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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

DECEMBER TERMS, 1858-1860, IN

21, 22, 23, 24 Howard,

WITH OTHERS,

BOOK 16,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

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HON. ROGER BROOKS TANEY.

ASSOCIATE JUSTICES,

HON. JOHN MCLEAN,
HON. JAMES M. WAYNE,
HON. JOHN CATRON,
HON. PETER V. DANIEL,
HON. SAMUEL NELSON,
HON. ROBERT C. GRIER,
HON. JOHN A. CAMPBELL,
HON. NATHAN CLIFFORD.

ATTORNEY GENERAL,

HON. JEREMIAH S. BLACK,
to December 26, 1860; after that

HON. EDWIN M. STANTON,
to March 6, 1861; after that

HON. E. BATES.

CLERK,

WILLIAM THOMAS CARROLL, ESQ.

REPORTER,

BENJAMIN C. HOWARD, ESQ.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS IT STOOD DURING THE TERMS OF 1858–9–60, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

Names of Justices, and whence appointed.	By whom Appointed.	Circuits, 1842–1862.	Commissioned.	Sworn in.	Termination.
Chief Justice. ROGER BROOKS TANEY, Maryland.	President Jackson.	Fourth. Delaware, Maryland and Virginia.	1836. (Mar. 15.)	1836. (Mar. 28.)	Died. 1864. (Oct. 12.)
Associates. JOHN McLEAN, Ohio.	President Jackson.	Seventh. Ohio, Indiana, Illinois and Michigan.	1829. (Mar. 7.)	1830. (Jan. 11.)	Died. 1861. (April 4.)
JAMES M. WAYNE, Georgia.	President Jackson.	Sixth. North Carolina, South Carolina and Georgia.	1835. (Jan. 9.)	1835. (Jan. 14.)	Died. 1867. (July 5.)
JOHN CATRON, Tennessee.	President Van Buren.	Eighth. Kentucky, Tennessee and Missouri.	1837. (Mar. 8.)	1838. (Jan. 10.)	Died. 1865. (May 30.)
PETER V. DANIEL, Virginia.	President Van Buren.	Ninth. Arkansas and Mississippi.	1841. (Mar. 3.)	1842. (Jan. 10.)	Died. 1860. (May 31.)
SAMUEL NELSON, New York.	President Tyler.	Second. Vermont, Connecticut and New York.	1845. (Feb. 14.)	1845. (Mar. 3.)	Resigned. 1872. (Dec. 1.)
ROBERT C. GRIER, Pennsylvania.	President Polk.	Third. New Jersey and Pennsylvania.	1846. (Aug. 4.)	1846. (Dec. 7.)	Resigned. 1870. (Jan. 31.)
JOHN A. CAMPBELL, Alabama.	President Pierce.	Fifth. Alabama and Louisiana.	1853. (Mar. 22.)	1853. (Dec. 6.)	Resigned. 1861. (May 1.)
NATHAN CLIFFORD, Maine.	President Buchanan.	First. Massachusetts, New Hampshire and Rhode Island.	1858. (Jan. 12.)	1858. (Jan. 21.)	Died. 1881. (July 25.)

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AT

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1858.

1*] *THE CLAIMANTS AND OWNERS OF THE STEAMER LOUISIANA, *Appts.*,
v.
ISAAC FISHER *et al.*

(See S. C. 21 How. 1-7.)

Collision between steamer and schooner—the former held in fault.

A schooner in Chesapeake bay was making a southwest course, and was close-hauled upon the wind. She was run into by a steamer and sunk. She did not vary her course after the steamer came in sight. The steamer was first directed to the westward, and afterwards to the eastward, and then stopped and backed; and these contrary movements were the result of the doubts of her officers as to the position or course of the schooner. If the order to ease the engines, or to stop, had been given in the first instance, the probability is that the catastrophe would have been avoided. Steamer held in fault.

The schooner was not responsible for failing to carry a light. The night was moonlight; though the light was occasionally obscured, but not to a degree that rendered the navigation of the bay dangerous, if care, skill and vigilance had been employed upon the different vessels.

(Mr. Justice Wayne did not sit in this case.)

Argued Dec. 13, 1858. Decided Dec. 28, 1858.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed in the district court of the United States for the district of Maryland, by the appellees, to recover damages resulting from the loss of the schooner George D. Fisher, and certain goods and money, by a collision.

The district court entered a decree in favor of the libelants for $3,100.

The circuit court having affirmed this decree, on appeal, the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **William Schley**, for appellants:

The following propositions are urged on the part of the appellants:

1. The omission of the schooner to display a light, under all the circumstances, was actual neglect and a culpable fault.

Act of 1838, ch. 191, § 10 (5 Stat. at L. 306); act of 1849, ch. 105, § 5 (9 Stat. at L. 382); also 14 and 15 Victoria, cap. 79, § 26; *The Londonderry*, 4 No. Cas. Supp. 46; 5 Eng. Adm.; *The Iron Duke*, 2 Wm. Rob. 383; 9 Eng. Adm. 382; *The Delaware* v. *The Osprey*, 2 Wall. Jr. 268; *Rogers* v. *The St. Charles*, 19 How. 109; *Ure* v. *Coffman*, 19 How. 63; *Ward* v. *Armstrong*, 14 Ill. 285; *Simpson* v. *Hand*, 6 Whart. 324; *Carsley* v. *White*, 21 Pick. 254; *The Aliwal*, 25 Eng. L. & Eq. 604; *Williams* v. *Chapman*, 4 No. Cas. 590-592; *New York & Va. Steamship Co.* v. *Calderwood*, 19 How. 246.

2. Even if the schooner was not bound to display a light, as an act of legal duty, and even if the omission to do so was not, in fact, any want of care; yet it was no fault of the steamer, if the persons who were on the lookout on board of the steamer were physically unable, from the absence of a light, to discern the schooner, in due time to have made the necessary dispositions to avoid a collision. The rule should then apply, that in a case of misfortune, without fault on either side, the suffering party is without redress.

Peck v. *Sanderson*, 17 How. 178; *Steinback* v. *Rae*, 14 How. 532.

3. At all events, even if the steamer is blamable for having maintained too high a rate of speed, still the schooner was in fault in having improperly changed her course, as shown by the proof; and in this view the loss should have been divided.

The Catharine v. *Dickinson*, 17 How. 177; *Rogers* v. *The St. Charles*, 19 How. 108.

Messrs. **William Price** and **S. T. Wallis**, for appellees:

1. Herbert N. Fenton, though a part owner and libelant, was a competent witness for the libelants as to the facts of the collision itself, touching which only he was examined.

The Catharine of Dover, 2 Hagg. 145; *The Pitt*, 2 Hagg. 149, *n.*; *The Sarah Barnardina*, 2 Hagg. 151, *n.*; 3 Greenl. Ev. § 412; *The Boston*, 1 Sumn. 343.

2. The steamer had no sufficient lookout, whose whole business was to act as such according to the established law of this court. Pearson was in the actual discharge of his duty as master, and Marshall was employed at the time as pilot.

St. John v. *Payne*, 10 How. 585; *The Genesee Chief* v. *Fitzhugh*, 12 How. 462; *The New York* v. *Rea*, 18 How. 225; *Ward* v. *The Ogdensburgh*, 5 McLean, 622.

NOTE.—*Rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 41 L. ed. U. S. 1053.

3. As matter of law, there was no obligation on the part of the schooner to carry a light, or to display one on such a night; and as matter of fact, the question of her having been without a light is not a practical one in this case.

The testimony of the master and mate of The Roanoke, it will be argued, are of conclusive weight for the appellees, they not only being indifferent witnesses, but having been at the time and previously, engaged in following the course of The Fisher as a guide of their own, so that they, of necessity, were forced to know the course she was pursuing, and did, in fact, know, from actually seeing her, the distance at which she was visible.

St. John v. *Payne*, 10 How. 586; *The Panther*, 24 Eng. L. & Eq. 585-587; *Walsh* v. *Rogers*, 13 How. 283; *Newton* v. *Stebbins*, 10 How. 606; *Ure* v. *Coffman*, 19 How. 62, 63; *Morrison* v. *Nav. Co.* 20 Eng. L. & Eq. 457, 458.

4. It is clear from Captain Pearson's testimony in regard to the noise of the rudder chains, that Marshall starboarded his helm, before he knew, on his own showing, whether the schooner was at anchor or in motion. This overt act, in addition to his failure to slacken the steamer's speed, seems to place the responsibility of the appellants beyond question.

The Londonderry, 4 No. Cas. Supp. 37, 38; *Ward* v. *The Ogdensburgh*, 5 McLean, 622; *Newton* v. *Stebbins*, 10 How. 606; *The Perth*, 3 Hagg. 417; *The Oregon* v. *Rocca*, 18 How. 572; *Rogers* v. *The St. Charles*, 19 How. 108; *Peck* v. *Sanderson*, 17 How. 180, 2.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellees instituted their suit in the district court of the United States for the district of Maryland, sitting in admiralty, against the steamer Louisiana, in a cause of collision, arising between the steamer and the schooner George D. Fisher, in the Chesapeake bay, in December, 1855, in which the latter was run into and sunk, and became a total loss.

The libelants charge, that before and at the time of the collision the schooner was bound on a voyage from Philadelphia to Norfolk, through the Chesapeake bay, and was properly manned and equipped for that voyage, and care- *4] fully navigated. *That the steamer was seen from the schooner, shortly after ten o'clock P. M., about 8 or 10 miles distant, steering up the bay, the schooner making about four knots an hour, in a southwest course, against the wind, which was blowing about south by east. That when the steamer was within a half mile or a mile distant, she appeared to be hauling to the westward, with the apparent intention of crossing the schooner's bows, but shortly afterwards seemed to be again hauling to the eastward, as if to drop under the schooner's stern. That this last movement was made too late, the distance between the two vessels being too inconsiderable to allow it to be of any avail. That the moon was shining, and the schooner might have been seen at a considerable distance. That the course of the steamer was between north-northeast and northeast.

The claimants in their answer admit the fact of the collision and the consequent loss of the schooner, and that it was a moonlight night; but say that it was cloudy in the western part of the horizon, and in consequence of heavy banks of snow clouds in that quarter, it was impossible to see vessels coming in that direction without lights, at any considerable distance; and a steamer, therefore, coming up the bay, could not make such regulations as to speed and course as to avoid collisions, that would have been practicable and proper under other and more favorable circumstances. They allege that the schooner did not carry a light and was the only vessel seen without one, and in consequence of this deficiency and the character of the night, the schooner was not visible, and could not be seen until the two vessels were within the short distance of three or four hundred yards.

In reference to the fact of the collision, they answer, that when the schooner was first seen from the steamer, the schooner was to the eastward, and proper action was had on board the steamer to direct her course to the westward; but when the course of the schooner in that direction was ascertained, the course of the steamer was changed, and the boat was stopped and backed; but from the proximity of the vessels at this time, it was impossible by any effort to avoid the collision. The steamer was running at the rate of 15 miles an hour before *this time. The district court pronounced [*5 a decree of condemnation, which was affirmed in the circuit court, on appeal.

The evidence convinces the court that the schooner might have been distinctly seen from the steamer at a greater distance than a half mile.

It is shown that another vessel was sailing in the wake of the schooner, and was guided in her course by her, and that the schooner was distinctly visible to those who were on board that vessel at a greater distance.

It also satisfactorily appears that the schooner was in fact discovered by the lookout on board the steamer when the vessels were several hundred yards apart, and that, by careful management of the steamer, the collision might then have been avoided.

The captain of The Louisiana says: "That after passing the Rappahannock lightboat I saw a black object; it appeared to be heading about south-southwest down the bay; it was about two points or two points and a half to the east of us. I could not tell at that moment whether it was a vessel at anchor or under way, but directly discovered it was a vessel under way, and she kept right hard off to the westward. This vessel had no lights. I think the distance was from 200 yards to 250. As soon as I saw her jib, I called to Mr. Marshall (pilot) to stop and back." Cross-examined, he says: "From the time I first saw the vessel until the time of the collision was, I should suppose, two minutes, more or less. The vessel changed her course, and kept off hard to the westward. I saw her jib, which enabled me to judge that it was a vessel under way. The change took place immediately after I first saw the object. When I first saw it, it looked like a cloud. I could not tell if it was a vessel at anchor or under way. When I saw the jib, I first knew it was a vessel under way."

Notwithstanding the uncertainty in the mind

of this officer the vessel under his command continued on in her voyage with unabated speed. No order was given to arrest her progress till a collision with the schooner had become inevitable. This was a grave error, and 6*] was followed by disastrous consequences,* for which the owners must render indemnity. In the case of *The Birkenhead*, 3 W. Rob. 75, the steamer was directed upon the supposition that a sailing vessel under way was at anchor, and proper precautions were taken under that hypothesis. The circumstances were such as might have occasioned a mistake. But the judge of the admiralty, with the advice of the Trinity Masters, condemned the steamer to compensate for the collision, saying "that she should not have prosecuted her voyage in any uncertainty, but should have eased or reversed her engines until the fact was ascertained."

The case of *The James Watt*, 2 W. Rob. 271 is similar in its circumstances to the one under consideration. The master testified that, when he discovered the sailing vessel, he ported his helm without stopping to ascertain her course. "In my apprehension," said the judge, "the master of The James Watt would have acted, under the circumstances, with greater prudence and caution, if, upon first discovering the sailing vessel, instead of porting his helm, he had continued his course at slacked speed, by easing his engines till he was able to discover the course the sailing vessel was stearing, and then acting according to circumstances. If he had pursued this course, it is apparent from the evidence, that, in the short space of about a minute after the sail was reported, he would have discovered her course, and could have adopted the measures that might altogether have prevented the collision."

The evidence shows that The George D. Fisher was making a southwest course, and was close-hauled upon the wind. That she did not vary her course after the steamer came in sight. That the steamer was first directed to the westward, and afterwards to the easward, and then stopped and backed, and that these contrary movements were the result of the doubts of her officers as to the position or course of the schooner. If the order to ease the engines, or to stop, had been given in the first instance, the probability is that the catastrophe would have been avoided.

The decisions of this court have settled that this was the duty of the steamer under such circumstances. *Peck* v. *Sanderson*, 17 How. 178. 7*] It is contended on the part of the *appellees that the schooner is responsible for failing to carry a light. In the case of *The Osmanli*, 7 Notes of Cases, 507, the learned judge of the admiralty says: "That no question has been more mooted and left more unsettled than this—whether it is the duty of a sailing vessel at night to show a light. Beyond all doubt, it has been determined there is no such general obligation; at the same time, there have been occasions on which, for the sake of avoiding a misfortune, which was in all human probability likely to occur, it became the duty of a vessel to show a light." In the present case, we have not been able to discover any fact that imposed the obligation upon the schooner to do so. The night was moonlight; and though the light was occasionally obscured, the evidence does not show that it was so, to a degree that rendered the navigation of the bay at all dangerous, if care, skill, and vigilance had been employed upon the different vessels.

The court is of opinion that the schooner was discerned from the steamer in sufficient time, and that the latter might have avoided the collision by the exercise of proper care.

Decree affirmed.

Mr. Justice **Daniel** dissented for want of constitutional power, in courts of the United States, in admiralty.

EDMUND RICE, *Plff. in Err.*,
v.
THE MINNESOTA AND NORTHWESTERN RAILROAD COMPANY.

(See S. C. 21 How. 82-85.)

Where cause was dismissed at former term for defect in return, motion to re-instate refused —final decision—writ of error functus officio.

Where a writ of error was returnable last term, and it appearing that there was no final judgment, the case was then dismissed for want of jurisdiction. A further transcript is now presented, which contains a final judgment.

Held, that the motion to annul the judgment of the last term, and reinstate the case, cannot be granted.

It was judicially acted on and decided, by this court. And when the term closed, that decision was final, so far as concerned the authority and jurisdiction of this court under that writ.

The writ of error was *functus officio;* and if the parties desire to bring the record of the case again before this court, it must be done by another writ of error.

Argued Dec. 17, 1858. Decided Dec. 28, 1858.

IN ERROR to the Supreme Court of the Territory of Minnesota.

On the motion of *Mr.* **Reverdy Johnson**, of counsel for the defendant in error, to revoke the mandate and annul the judgment of dismissal entered in his case, etc.

The case is stated by the court.

No counsel appeared for plaintiff in error.

Mr. **Reverdy Johnson** for defendant in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case was brought up, by a writ of error, directed to the judges of the supreme court of the territory of Minnesota, the writ being returnable to the last term of this court. The *case was docketed and called for trial [*84 according to the rules of the court; but upon inspection of the transcript, it appeared that there was no final judgment in the court below, and the case was, therefore, dismissed for want of jurisdiction.

At a subsequent day in that term, a motion was made by the plaintiff in error for a certiorari, upon affidavits filed, suggesting that there had been a final judgment in the territorial court, although it had not been correctly entered on the record. But the court

were of opinion that the affidavits were not sufficient to support the motion, and refused the certiorari.

A motion has been made at the present term to annul the order of dismissal made at the last term, and to place the suit on the calendar in the same order in which it would have stood if it had not been dismissed, but continued over to the present term. And in support of this motion, a transcript from the territorial court has again been presented; and this transcript contains a final judgment of the supreme court of the territory. It is certified by the clerk of the district court of the United States, to whose custody the record and proceedings in this case have been transferred pursuant to an act of Congress; and this transcript, among other things, certifies that an amended order of the supreme court of the territory, reversing the judgment of the inferior territorial court, and ordering a judgment for defendants, and an amended judgment of the said court to the same effect was on file in his office, transferred with the other proceedings in the case from the supreme territorial court.

But we think the motion to annul the judgment of the last term, and reinstate the case, cannot be granted. The suit is a common-law action for a trespass on real property, and the judgment of the court below can be brought here for revision by writ of error only. That writ was issued by the plaintiff in error, returnable to the last term of this court; and it brought the transcript before us at that term. It was judicially acted on, and decided by this court. And when the term closed, that decision was final, so far as concerned the authority and jurisdiction of this court under that writ. The writ was *functus officio;* and if the parties desire to bring 85*] the record of *the case again before this court, it must be done by another writ of error. The former writ is not returnable to the present term, and cannot, therefore, according to the principles which govern this common-law writ, bring the record before us.

The case of *The Palmyra*, 12 Wheat. 1, has been referred to, where a motion similar to the present was granted by the court. And if that had been a case at common law, we might have felt ourselves bound to follow it, as establishing the law of this court. But it was a case in admiralty, where the power and jurisdiction of an appellate court is much wider upon appeal, than in a case at common law. For, in an admiralty case, you may in this court amend the pleadings, and take new evidence, so as in effect to make it a different case from that decided by the court below. And the court might well, therefore, deal with the judgment and appeal of the inferior tribunal in the same spirit. But the powers which an appellate court may lawfully exercise in an admiralty proceeding, are altogether inadmissible in a common-law suit.

The case in 3 Pet. 431 relates to cases and questions of a different character from the one before us. In that case the judgment of the court at the preceding term was amended. But the amendment was made to correct a clerical error in this court, and make the judgment conform to that which the court intended to pronounce. But this is not a motion to amend, but to reverse and annul the judgment of the last term, which was passed upon full consideration, with the case regularly and legally before us, as brought up by the writ of error.

We refer to these two cases because they have been relied on in support of the motion. But, in the judgment of the court, they stand on very different principles; and the motion, for the reasons above stated, must be overruled.

JAMES KELSEY and Thomas P. Hotchkiss, *Plffs. in Err.*,
v.
ROBERT FORSYTH.

(See S. C. 21 How. 85-88.)

Guild v. *Frontin and Suydam* v. *Williamson affirmed—agreement cannot authorize mode of review—state laws cannot authorize United States court to depart from rules prescribed by Congress.*

This case is the same in principle as that of Guild v. Frontin, 59 U. S., p. 290, affirmed in Suydan v. Williamson, 61 U. S., p. 978.

The agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode than that which the law prescribes.

Nor can the laws of a state, regulating the proceedings of its own courts, authorize a district or circuit court sitting in the state to depart from the modes of proceedings and rules prescribed by the act of Congress.

(Mr. Justice Wayne did not sit in this case.)

Submitted Dec. 24, 1858. Decided Dec. 28, 1858.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment brought in the court below, by the defendant in error, to recover a part of Peoria French claim No. 7; the same that was before this court in the case of *Bryan* v. *Forsyth*, 60 U. S. (19 How.) 334.

On the final trial below, the case was submitted to the court without a jury, and the court found for the plaintiff. Thereupon the defendants sued out this writ of error.

A further statement of the case appears in opinion of the court.

Mr. **C. Ballance**, for appellants:

The errors assigned are:

1. The court erred in refusing to dismiss the cause for want of a bond for costs, before the commencement of this suit.

2. It was error to try the cause without a jury.

3. It was error to refuse a new trial at common law.

4. The court attached unjust and unreasonable conditions to the order setting aside the first judgment.

5. The court erred in refusing to grant a new

NOTE.—*Jurisdiction of Federal courts, not given by consent.* See note to Gov. of Georgia v. African Slaves, 7 L. ed. U. S. 73.

trial, *nunc pro tunc*, upon the agreement and disclaimer tendered by defendants below.

6. The court erred in receiving improper evidence.

7. The court erred in ruling out proper evidence offered by defendants below.

All the above errors, I submit, are well assigned, and either of them is sufficient to reverse the judgment of the court below; but I deem it unnecessary to discuss those various points, or introduce authorities to sustain them, because the facts of the case show clearly that, according to the doctrine established in the case of *Bryan* v. *Forsyth*, 19 How. 334, the plaintiff was completely barred by the Illinois statute of limitations, and because, also, the case was tried by the court without a jury, which, according to the decision in *Graham* v. *Bayne*, 18 How. 60, was error.

Mr. **Archibald Williams** for defendant in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the northern district of Illinois.

An action of ejectment brought by the defendants in error against the plaintiff, for a certain parcel of land described in the declaration, and upon the trial the verdict and judgment were for the plaintiff; a motion was afterwards made to set aside the judgment and for a new trial; and the judgment was, accordingly, set aside and a new trial granted upon the terms mentioned in the transcript. In the proceedings upon this new trial, the parties agreed to waive a trial by jury, and that both matters of law and of fact should be submitted to the decision of the court. The case was proceeded in according to this agreement, and the court, as the record states, found the issue in favor of the plaintiff (Forsyth), and entered judgment accordingly; and to this decision, and to all the rulings and decisions of the court in the previous stages of the cause, the defendants (Kelsey and Hotchkiss) excepted and sued out a writ of error to bring the case before this court.

It will be seen from this statement, that in a 88*] common-law *action of ejectment the case was submitted to the court upon the evidence, without the intervention of a jury, leaving it to the court to decide the fact, as well as the law, upon the evidence and admissions before it. The case, therefore, is the same in principle with that of *Guild et al.* v. *Frontin*, 18 How. 135. And the doctrine in that case was reaffirmed in *Suydam* v. *Williamson*, 20 How. 428, and the grounds upon which it rests fully set forth. It is unnecessary to repeat here what was stated in these two decisions. It is sufficient to say that the agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a state, regulating the proceedings of its own courts, authorize a district or circuit court sitting in the state, to depart from the modes of proceeding and rules prescribed by the acts of Congress.

The judgment of the Circuit Court must, therefore, be affirmed.

THE COMMONWEALTH OF PENNSYLVANIA, *Plff. in Err.*,
v.
WILLIAM RAVENEL, Executor of Eliza Kohne, Deceased.

(See S. C. 21 How. 103-112.)

Domicil—question of law and fact—acts and declarations, when proof of.

The question of domicil is one of mixed law and fact.

It is for the court to instruct the jury what constitutes a domicil, and for the jury to apply the law governing it, to the facts as found by them.

The mere speaking of a place as a home, without any act showing an intention to return to it, would amount to nothing.

But if acts and the language concur, and are continued for many years, they are conclusive of the fact.

(Mr. Justice Wayne did not sit in this case.)

Argued Dec. 14, 1858. Decided Dec. 28, 1858.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This action was brought in the court below, by the plaintiff in error, against the defendant in error, executor of the late Mrs. Kohne, to recover the sum of $5,820.32, called a collateral inheritance tax, assessed upon the estate of the testatrix.

Mr. Kohne, the husband of Mrs. Eliza Kohne, died in Philadelphia on the 26th of May, 1839, and was buried there. At the time of his death, he owned valuable real and personal estate in Philadelphia city and county, and also in Charleston, S. C. Among the Philadelphia property was a large and elegant mansion house in Chestnut street. Mr. Kohne, at the time of his death, also owned a mansion in Charleston, S. C., in which he and his wife resided during the winter. Both mansions were furnished with servants, furniture, plate, etc. Mr. Kohne also owned, at the time of his death, a valuable country seat, with 30 acres of land attached, close to the city of Philadelphia, in Turner's lane, and now within the corporate limits of that city, which was purchased by him in 1807, about the time of his marriage, and during his lifetime was sometimes occupied by Mr. and Mrs. Kohne, and by Mrs. K., after his death.

Mr. Kohne devised his real estate, wherever situate, to his wife for life (with some exceptions in Charleston, S. C.). Her life interest extended to the mansions referred to in Philadelphia and Charleston, and to the Turner's lane property in Philadelphia.

She did not visit Charleston the winter after her husband's death, but spent a part of it in Savannah. After that winter, however, she resumed the routine which had existed some years prior to her husband's death; that is, of spending from May to October in Philadelphia, and from November to May in Charleston.

Mrs. Kohne continued to reside alternately in Charleston and Philadelphia, according to the season of the year, until April 30, 1850, when she left Charleston and came to Philadelphia, where she remained until her death, March 16, 1852, at the advanced age of eighty-five years and upwards. She was born in Charleston, and

NOTE.—*Domicil, how determined*—see note, 13 L. R. A. 161.

was married there to Mr. Kohne, then a domiciled merchant of that city.

The trial below resulted in a verdict and judgment in favor of the defendant; whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Samuel Hood** and **R. K. Scott**, for plaintiff in error:

For the purpose of this argument, the exceptions to the charge of the court may be stated in this form,—*viz.*, (1) That the court charged the jury as to part only of the evidence, *viz.*, that of the defendant; (2) that the court charged the jury as to facts of which there was no evidence; (3) that, in effect, the court took from the jury the sole material fact in the cause, *viz.*, the domicil of Mrs. Eliza Kohne at the time of her death.

As to the first point, that the court charged the jury as to part only of the evidence, *viz.*, that of the defendant. The only question for the jury was whether Mrs. Eliza Kohne, at the time of her death, in March, 1852, was or was not domiciled in Pennsylvania. The charge of the court, after stating that, for the purposes of this case, the fact that Frederick Kohne, at the time of his death, was domiciled in Pennsylvania, is assumed, and that Mrs. Kohne's domicil was necessarily his, while the marriage existed,—adds that after his death she was free to choose her own domicil. The charge then recites the defendant's evidence as to Mrs. Kohne's domicil, but no reference whatever is made in the charge to the evidence adduced by the plaintiff, nor to any part of the defendant's testimony, favorable to the plaintiff, on the question of Mrs. Kohne's domicil.

In the case of *Smith* v. *Condry*, 1 How. 35, the S. C. of the U. S., Chief Justice Taney, in delivering the opinion of the court, reversed the circuit court of the District of Columbia, on the ground that the court instructed the jury on a part of the evidence only, leaving out of view other portions of it which the jury were bound to consider in forming their verdict. It should be left to the jury upon the whole evidence, where there is evidence of fault, to find whether it existed. In *Greenleaf* v. *Birth*, 9 Pet. 292, 298, 299, the decision of the circuit court of the District of Columbia was reversed on similar grounds.

As to the second point, that the court charged the jury as to the facts of which there was no evidence:

"The fact (says the charge) that she submitted to illegal exactions of tax gatherers here, rather than be annoyed with litigation, should not be suffered to weigh against the acts and declarations of twenty years of her life. Tax gatherers may impose on old ladies, but they cannot change their domicil for them against their will; nor is it any reason for an illegal exaction against the estate of the deceased, that the tax gatherers of Pennsylvania have heretofore wronged her with impunity."

Here is the assumption of facts without any evidence on which to base them.

In *Bradley* v. *Grosh*, 8 Pa. 49, it was held error to submit a fact or question to the jury, of which there is no evidence.

See, also, *Stine* v. *Sherk*, 1 W. & S. 195; *Irwin* v. *Shoemaker*, 8 W. & S. 76; *Jones* v. *Wood*, 16 Pa. 25, 42; *Snyder* v. *Wilt*, 15 Pa. 59; *Roach* v. *Hulings*, 16 Pet. 319.

As to the third point, that in effect the court took from the jury the sole material fact in the cause, *viz.*, the domicil of Mrs. Eliza Kohne at the time of her death.

See *Georgia* v. *Brailsford*, 3 Dall. 4; *Newbold* v. *Wright*, 4 Rawle, 195; *Brownfield* v. *Brownfield*, 12 Pa. 136; *Baker* v. *Lewis*, 4 Rawle, 356; *Sampson* v. *Sampson*, 4 S. & R. 329; *Tracy* v. *Swartwout*, 10 Pet. 96.

Mr. **B. Gerhard**, for defendant in error:

Domicil is always a mixed question of law and fact, and where a court charges a jury upon such a point, a discussion of the testimony must be intimately intermixed with the discussion of the law. In the present case, His Honor, who tried the cause, told the jury at the commencement of his charge, that it was "for the jury to apply the principles of law laid down by the court to the facts as found by them," and again, that "the court had no right to dictate to them on the facts which they were bound to find on their own responsibility." His Honor next proceeded to assume, as against the defendant, the fact of Mr. Kohne's domicil at the time of his death, and then indicating to the jury what facts they must find, if they gave a verdict for the plaintiff, he declared that as a matter of law, if the jury believed certain uncontradicted testimony, their verdict should be for the defendant; concluding by the expression of a hope previously entertained that the plaintiff would have abandoned the claim, after hearing the evidence for the defendant, as the contest must be fruitless, if the jury believed that testimony. Now, in all this there seems to me to have been a scrupulous care observed by the judge, in a case where there was no conflict of testimony, to avoid even the appearance of a formal interference with the constitutional province of the jury.

Domicil "is the conclusion of law on an extended view of facts and circumstances."

Rush, President, J., *Guier* v. *O'Daniel*, 1 Binn. 349, note a, cited in Phillim. Dom. App. XI., p. 209. *Bempde* v. *Johnstone; Graham* v. *Johnstone*, 3 Ves. 201.

"The question of domicil prima facie is much more a question of fact than of law."

Domicil is defined in *Guier* v. *O'Daniel*, 1 Binn. 349, as "a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time." This definition Judge Grier, in his charge to the jury in *White* v. *Brown*, 1 Wall. Jr. 262, says, "combines, it is probable, accuracy with brevity, beyond any other." He also says "that no one word is more nearly synonymous with the word 'domicil,' than our word 'home.'" Phillimore, in his Treatise on the Law of Domicil, p. 25, reduces the kinds of domicil to three: 1. The Domicil of Origin or Birth. 2. The Domicil by Operation of Law. 3. The Domicil of Choice, where one is abandoned and another acquired. One of these three kinds each person must have.

Phillim. p. 21; *Crawford* v. *Wilson*, 4 Barb. 504; *Bartlett* v. *New York*, 5 Sandf. 44; *Abington* v. *N. Bridgewater*, 23 Pick. 178; *Rue High, Appellant*, 2 Doug. (Mich.) 523.

A person may acquire a second place of residence, and occupy it alternately with the first. This makes no change in his domicil.

Bartlett v. *New York*, 5 Sand. 44; Phillim. Dom. 112, citing the case of *Munroe* v. *Munroe*, 7 C. & F. 842.

"The having a house and an establishment in London is perfectly consistent with a domicil in Scotland." This fact existed in *Somerville* v. *Somerville*, 5 Ves. 750, and in *Warrender* v. *Warrender*, 9 Bligh, N. R. 102, 103; see, also, *Harvard College* v. *Gore*, 5 Pick. 370.

The question in the present case is one of the third kind of domicil,—that of choice. "Every person *sui juris* is at liberty to choose his domicil, and to change it according to his inclination." Phillim. 98.

The question is not whether the facts connected with Mrs. Kohne's residence in Philadelphia for a portion of the year, and dying there, if viewed apart from the rest of the evidence, would constitute Philadelphia her domicil; but whether her whole course of life will support her expressed intention of making Charleston her domicil. In *Thorndike* v. *The City of Boston*, 1 Met. 246, Ch. J., Shaw say: "It may often occur that the evidence of facts tending to establish the domicil in one place, would be entirely conclusive, were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fix it, beyond question, in another."

It will be remembered that Mrs. Kohne's domicil of origin was in Charleston, and fewer circumstances are requisite to show that the domicil of origin has reverted, than that a new domicil has been acquired.

Phillim. Dom. 104; *White* v. *Brown*, 1 Wall. Jr. 265; charge of Grier, Justice.

"Where a party has two residences at different seasons of the year, that will be esteemed his domicil which he himself selects, or describes or deems to be his home."

Hairston v. *Hairston*, 27 Miss. 704; Story Confl. of Laws, § 47; *Shelton* v. *Tiffin*, 6 How. 163; *Ennis* v. *Smith*, 14 How. 400.

The fact of Mrs. Kohne's dying in Philadelphia affords no presumption whatever of her domicil being in that city.

Harvard College v. *Gore*, 5 Pick. 375.

The judge below did not take from the jury the consideration of the question as to Mrs. Kohne's domicil at the time of her death; but, on the contrary, treated it, as it clearly is, as a mixed question of law and fact; and carefully and scrupulously, though the facts were undisputed, instructed the jury that they must pass upon the evidence of those facts, but if they believed it, that it established Mrs. Kohne's domicil, at the time of her death, to have been Charleston.

In conclusion, it is submitted that the decisions fully sustain the views of the defendant in error.

The court may give their opinion on matters of fact to the jury, being careful to distinguish between such opinions and those on matters of law; the former being entitled to such influence only as the jury may think proper, the latter being conclusive.

Games v. *Stiles*, 14 Pet. 322; *Tracy* v. *Swartwout*, 10 Pet. 80.

"A case will not be reversed on account of an expression of opinion by the court, as to which of certain witnesses are most entitled to credit."

Porter v. *Seiler*, 23 Pa. 424.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the eastern district of Pennsylvania.

The action was brought by the state of Pennsylvania against the defendant, executor of the late Mrs. Kohne, to recover the sum of $5,820.23, called a collateral inheritance tax, assessed upon the personal estate of the testatrix. By the law of Pennsylvania, where the property of the deceased passes to his or her collateral heirs, or to strangers, either by the law concerning intestate estates, or by will, it is made subject to a specific taxation for the benefit of the state. This tax is 5 per centum on the clear value of the estate. *Brightly* v. *Purdon*, p. 138; act 22d April, 1846, § 14. And according to the construction of these acts imposing the tax, it is held, if a decedent be domiciled in the state at the time of his or her death, stocks of other states, or of corporations of other states, and debts due in other states, in the hands of the executors or administrators are liable to this tax. *Short, Estate of*, 4 Harr. (16 Pa.) 63; *Halroyd* v. *Humphrey*, 18 How. 69.

But if the domicil of the deceased be not in Pennsylvania, then the estate is not subject to the tax.

Mrs. Kohne died in the city of Philadelphia in March, 1852, and the question in the court below was, whether or not she was domiciled in Pennsylvania at the time of her death, or in the state of South Carolina. The jury, under the charge of the court, found a verdict for the defendant.

The case is before us on four exceptions taken to the charge of the court.

The first three it is not material to notice further than to say, that the first two are founded upon a misapprehension of the instructions given to the jury; and the third is not maintainable, as the instruction in the connection in which it is found is unobjectionable.

The fourth exception is, that the court, in the charge, took the fact of domicil from the jury.

*This exception, we think, is founded [*110 in a misapprehension of the instructions given. The court, after stating to the jury that the question of domicil was one of mixed law and fact, observed, that it was for the court to instruct them what constituted a domicil, and for the jury to apply the principles of law governing it to the facts as found by them; that the jury had no right to disregard the law as laid down by the court, and the court had no right to dictate to them as respected the facts, which they must find on their own responsibility. The court then stated to the jury the principles of law applicable to the question of domicil, to which no exception has been taken. Also, that as it had been admitted Mr. Kohne, the husband, who died in Philadelphia in 1829, had his domicil in Pennsylvania at the time of his death, the domicil of the wife must be taken

as in that state at the time, and submitted the question whether or not she had since changed it to the state of South Carolina; and then, after referring to the leading facts given in evidence, and relied on to establish a change of domicil, observed, that if the jury believed this evidence, the domicil of Mrs. Kohne was in South Carolina.

The court further says that the mere speaking of a place as a home, without any act showing an intention to return to it, would amount to nothing. But if acts and the language concur, as proved by the witnesses in the case, it would be a denial to the deceased of the right to choose her own domicil, not to allow her acts and declarations, continued for many years, to be conclusive of the fact.

We perceive nothing in the instructions of the court, or in the view of the case as presented to the jury, by which the question of domicil, so far as it depended upon the facts, was taken from the jury. The evidence was very strong in support of a change of domicil by Mrs. Kohne after the death of her husband, and, if believed by the jury, it was not too much to say, as matter of law, that they should find for the defendant.

The judgment of the court below is affirmed.

Mr. Justice **Daniel**, dissenting:

I cannot concur in the opinion of the court in this case.

111*] *Had I been acting as a juror upon the trial of this cause, it is more than probable that the conclusion formed by the jury, upon the evidence disclosed by the record, is identical with that at which I should have arrived. And, further, had it been within the legitimate province of the court, in the attitude of the case before it, to declare what ought to be the deductions from facts either established in evidence, or presumed or supposed by the court to have been established, or even from facts admitted by the parties on the trial, then exception to the charge of the court in this case could not properly be taken. The objection to the charge, and a fatal objection to my mind, arises from the principle that the court had no authority to pass upon or to give any opinion in relation to facts, either established by testimony or admitted or presumed, as to what those facts amounted to, or as to the correctness or absurdity of any deduction which the jury might draw from them. The power of the court was limited absolutely to the legality or relevancy of the testimony. The weight or effect of the testimony, or the deductions to be drawn from it, were peculiarly and exclusively within the province of the jury; and the court had no power to inform them, or intimate that evidence, either exhibited in reality or presumed, should be construed in any particular way, or to say to them *a priori* that an interpretation different from that of the court, as to the weight of evidence, would be absurd. Should the conclusion of the jury upon the weight of evidence be never so absurd, still it is the peculiar province of the jury to weigh that evidence, and to draw their own independent inferences from it; and the only legitimate corrective is to be found in the award of a new trial, or by a case agreed, or a demurrer to evidence. If the court can *a priori* direct the jury what the evidence, either made out in proof or hypothetically stated, really amounts to, the trial by jury becomes a cumbersome formality, and had as well, nay, had better be dispensed with, inasmuch as in the solemn administration of justice there should be as little that is useless, burdensome, or pretended, as possible. To show the character of that portion of the charge of the court regarded as exceptionable, it is here inserted, as follows, *viz.:*

"'If the jury find, that after his death [***112** (the death of the husband) she (Mrs. Kohne) returned to her former domicil in Charleston, took possession of the house and servants devised to her, lived in that house six or seven months of every year, calling it her home, spending only a few weeks in the spring and fall in her house here, and the remainder of the summer at watering places; coming north in the summer for the sake of her health, always intending to return to her house in Charleston; that she was hindered returning the last time from sickness; if she consulted counsel how she might void giving any pretense to the tax gatherers of Pennsylvania to treat her as domiciled here; if she carefully denied at all times her citizenship in Philadelphia, even to erasing it from printed lists of her chruch donations, as the assertion of a falsehood; if she refused to have some of her furniture removed here, for fear such a fact would be seized upon, after her death, for the purpose of asserting her domicil here; if she called herself, in her will, 'of Charleston;' if, when absent from that place, she always spoke of returning to it as her home, and did return to it as such, till hindered by sickness—if the jury believed this evidence of defendant's witnesses, testimony which has not been contradicted or denied, it would be absurd to say her domicil was not where she asserted it to be, to wit, in the city of Charleston."

Regarding this portion of the charge as tending to confound the powers of the court and the jury, I think that the judgment of the circuit court should be reversed, and the case remanded for a new trial.

BENJAMIN FORD, *Plff. in Err.*,
v.
JOHN S. and HERMAN WILLIAMS.

(See S. C. 21 How. 287-290.)

Principal, not liable for agent's dealings on his own credit—when liable, if agency is undisclosed—liable, though not named in contract—may show agent was acting for him—this proof does not contradict the writing—but agent cannot thus contradict the writing.

NOTE.—*Right and liability of undisclosed principal on contract of agent, made in agent's name. Rule as to negotiable instruments.*

The principal is ordinarily entitled to the same remedies against third persons in respect to acts and contracts of an agent as if they were made or done with him personally. Story, Agency, § 420; Brewster v. Saul, 8 La. 296; 2 Stark. 443; Taintor v. Prendergast, 3 Hill, 72; Bassett v. Lederer, 1 Hun, 274, 3 T. & C. 671; Ilsley v. Merriam, 7 Cush. 242; Barry v. Page, 10 Gray, 398; Small v. Atwood, 1 Younge, 407, 452; Paley, Ag. 323.

The rule is the same though at the time of entering into the contract, the principal is unknown to the party contracting and is undisclosed by the

If a party prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal.

But when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein.

Notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him.

This proof does not contradict the writing; it only explains the transaction.

But the agent who binds himself will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal.

(Mr. Justice Wayne did not sit in this case.)

Argued Dec. 15, 1858. Decided Dec. 28, 1858.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action of assumpsit brought in the court below, by the plaintiff in error, to recover damages on a certain contract signed by the defendants.

The only question to be reviewed is, whether assuming the contract in question to have been made for the benefit of the plaintiff, without any disclosure to the defendants as to his interest, he can maintain a suit in his own name.

Messrs. **George William Brown** and **F. W. Brune, Jr.,** for plaintiff in error:

The plaintiff in error will contend that the action was properly brought by him in his own name, and that the decision of the circuit court should be reversed; and in support of this proposition, he relies upon the following authorities:

N. J. Steam Nav. Co. v. *Merchants' Bank*, 6 How. 381; *Salmon Mfg. Co.* v. *Goddard*, 14 How. 455; Story, Agency, § 161; *Sims* v. *Bond*, 5 B. & Ad. 393; *Higgins* v. *Senior*, 8 Mees & W. 834; *Beckham* v. *Drake*, 9 Mees. & W. 78; 11 Mees. & W. 315; *Bank* v. *Lyman*, 20 Vt. 673; *Williams* v. *Bacon*, 2 Gray, 387; *Bateman* v. *Phillips*, 15 East. 272; *Elkins* v. *B. & M. R. Co.* 19 N. H. 342; *Huntington* v. *Knox*, 7 Cush. 374.

Mr. **J. Nelson,** for defendants in error:

The sole question to be reviewed is, whether, assuming the contract to have been made for the benefit of the plaintiff without any disclosure, to the defendants, of his interest, he was competent to maintain a suit in his own name.

That the court below committed no error in holding that he could not, the defendant in error will endeavor to maintain by reference to the following authorities:

U. S. v. *Parmele*, 1 Payne, 252; *Newcomb* v. *Clark*, 1 Denn. 227; *West Boylston Mfg. Co.* v. Searle, 15 Pick. 225; 1 Pars. Cont. 48, note; 2 Bouvier's Inst. 30.

Mr. Justice **Grier** delivered the opinion of the court:

The single question presented for our decision in this case is whether the principal can maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal.

It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally

agent and the party deals with the agent supposing him to be the sole principal. See authorities last cited and Williams v. Winchester, 19 Mart. 22; Leverick v. Meigs, 1 Cow. 645, 663-665; Hicks v. Whitmore, 12 Wend. 548; Walter v. Ross, 2 Wash. 283; Grojan v. Wade, 2 Stark, 443; Graham v. Duckwall, 8 Bush. 12; Foster v. Smith, 2 Coldw. 744; Woodruff v. McGehee, 30 Ga. 158; Culver v. Bigelow, 43 Vt. 249.

While the principal is entitled to the advantages or benefits to be derived from contracts made on his behalf by his agent, he also takes all the burdens and disadvantages connected with the contract. And if the contract of the agent was obtained by his fraud, misrepresentation, or warranty, the principal will be affected by the consequences, and the other party may interpose any defense that would be available if the principal had done precisely what was done by his agent. Elwell v. Chamberlain, 31 N. Y. 611; Veazie v. Williams, 49 U. S. (8 How.) 134, 157.

If the name of the principal is not disclosed, and the agent enters into the contract as though made for himself, the principal, if he assumes the right to enforce the contract, must take it subject to all the equities which could be enforced against the agent. Taintor v. Prendergast, 3 Hill, 72; Leeds v. Marine Ins. Co. 19 U. S. (6 Wheat.) 565; Gibson v. Winter, 5 B. & Ad. 96; Traub v. Milliken, 57 Me 63; George v. Clagett, 7 Term, 359; 3 Bos. & P. 490; 2 Caines, 296; Coates v. Lewes, 1 Camp. 444; Gibson v. Winter, 5 Barn. & Ad. 96.

When the agent contracts for carriage of goods without disclosing principal, latter may recover if goods are lost. 12 Minn. 412.

If the agent is the only known or supposed principal the person dealing with him will be entitled to the same right of set-off as if the agent were the true and only principal. Coates v. Lewes, 1 Camp. 444; Stracey v. Deey, 7 Term, 361, n.; Carr v. Hinchliff, 4 Barn. & Cress. 547; Taylor v. Kymer, 3 Barn. & Ad. 320; Baring v. Corrie, 2 Barn. & Ad. 137; Gibson v. Winter, 5 Barn. & Ad. 96; Young v. White, Beav. 506.

Whatever may have been the form of the contract, unless under seal, and even in that case, if it has been ratified by the plaintiff, the plaintiff may show even by oral evidence that a party who executed it, although apparently as the principal, did so as the agent of plaintiff; and upon such evidence the plaintiff may recover notwithstanding the statute of frauds applies to the contract and requires it to be in writing. Briggs v. Partridge, 64 N. Y. 357; Hubbert v. Borden, 6 Whart. 79; Nash v. Tourne, 72 U. S. (5 Wall.) 703; Salmon Falls, &c Co. v. Goddard, 55 U. S. (14 How.) 446; Eastern R. R. Co. v. Benedict, 5 Gray, 561; Alexander v. Moore, 19 Mo. 143; Benj. on S., §§ 210, 219, n.

A principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed he was acting for himself; and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. Higgins v. Senior, 8 M. & W. 834; Trueman v. Loder, 11 A. & E. 594; Dykers v. Townsend, 24 N. Y. 61; Coleman v. First Nat. Bk. of Elmira, 53 N. Y. 393; Huntington v. Knox, 7 Cush. 371; Eastern R. R. Co. v. Benedict, 5 Gray, 566; Hubbert v. Borden, 6 Whart. 91; Browning v. Provincial Ins. Co. 5 L. R. (P. C.) 263; Calder v. Dobell, 6 L. R. (C. P.) 486; Story on Agency, §§ 148, 160.

Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. Barker v. Mech's Ins. Co. 3 Wend. 94; Pents v. Stanton, 10 Wend. 271; DeWitt v. Walton, 9 N. Y. 571; Stackpole v. Arnold, 11 Mass. 27; Peckham v. Drake, 9 M. & W. 79; Eastern R. Co. v. Benedict, 5 Gray, 566.

on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and nothwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. "Such evidence (says Baron Parke) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal." See *Higgins* v. *Senior*, 8 Mees. & W. 843.

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the states, but by this 290*] court. *See *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 381, *et cas. ib. cit.*

The judgment of the court below, is therefore, reversed, and a venire de novo awarded.

THE COVINGTON DRAWBRIDGE COMPANY, and Richard M. Nebeker, *Appts.*,

v.

ALEXANDER O. SHEPHERD *et al.*

(See S. C. 21 How. 112-126.)

Court may appoint receiver of tolls and incomes of a bridge, to pay judgments against bridge company, after sale on execution.

Writs of fi. fa. were levied on the Covington bridge and the marshal sold the rents and profits of the same for the term of one year, but the keeper of the bridge refused to surrender possession. Those interested filed their bill, praying that the court should appoint a receiver to take possession, and receive the tolls and incomes of the bridge, and apply them to discharge the judgments.

Held, that the court below had power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls, and pay them into court, to discharge such judgments.

The bill alleges that "the Covington Drawbridge Company, of Covington, is a corporation and citizen of the state of Indiana:" held, that the averment of citizenship was sufficient.

Submitted, Dec. 14, 1858. Decided Dec. 29, 1858.

APPEAL from the Circuit Court of the United States for the District of Indiana. The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **O. H. Smith**, for appellants:

1. The averment in the bill of citizenship is not sufficient to give jurisdiction to the court, especially as the averment in the declarations at law upon which the bill is founded and the equity claimed, do not give jurisdiction to the court.

The averment in the declarations as to citizenship of the defendants, is as follows:

The plaintiffs, citizens of Ohio, complain against the "Covington Drawbridge Company, citizens of the state of Indiana."

This averment of citizenship of the corporation is insufficient to bring the case within the jurisdiction of the court, as decided by this court in the case of *The La Fayette Ins. Co.* v. *French*, 18 How. 404.

2. The judgment of law being rendered by the same court between the same parties, and the court having no jurisdiction owing to the defect of citizenship as shown by the declarations, should not have been admitted in evidence in support of the bill between these parties, who were bound to take notice of the defect of jurisdiction, however the law may be if offered collaterally between other parties.

3. The remedy at law is ample, and a court of chancery will not take jurisdiction.

Coe v. *Turner*, 5 Conn. 86; *Wiswall* v. *Hall*, 3 Paige, 313; *Rees* v. *Parish*, 1 McCord, Ch. 59; *Bird* v. *Holabard*, 2 Root, 35; *Wolcott* v. *Sullivan*, 6 Paige, 117; *Baker* v. *Biddle*, Bald. 394.

4. But as the further question may arise, and be deemed by the court important to be decided, although I cannot so consider it in this case, where the property levied upon is amply sufficient; that is, whether the franchise can be levied upon with the bridge, and the whole property appraised and sold upon the execution at law. I maintain the affirmative of this question, which, I admit, is one of much importance to the credit of corporation securities, as well as to the rights of their creditors. The question is, substantially, whether the general execution laws of the state of Indiana shall be applied in all cases between debtor and creditor, on judgments at law, including corporations, new cases as they arise, as well as old; or shall an exception, not in the law, exempting from execution certain property of corporations, be made by the court.

All corporations are said to have a franchise, but the ordinary rights of corporations are not parts of the eminent domain. The privilege to have a common name, and common seal, a perpetual succession, and by such common name to sue, to contract, to hold real estate, and to sell the same, or to make by-laws for the government of the members. These privileges are no part of the eminent domain, but only extensions to individuals collectively, of rights appertaining of common right to each.

Mr. Justice Woodbury, in 6 How. 539, 540, *West River Bridge* v. *Dix*, says: "The laws of the land are virtually a part and condition of the grant itself, as much as if inserted in it *totidem verbis*."

Towne v. *Smith*, 1 Wood. & M. 134; 1 How. 319; 2 How. 608, 617; 3 Story, Const. 1377, 8.

It is on this principle that the exercise of the eminent domain over franchises has been sustained; otherwise such exercise would be a breach of the contract implied in grant of the franchise, and a violation of the Constitution of the United States.

West River Bridge Co. v. *Dix*, 6 How. 507; *Enfield Toll Br. Co.* v. *Hart & N. H. R.* 17 Conn. 40, 2 Amer. R. R. Cases, 69; S. C., 95; *Beekman* v. *Sar. & Schen. R. Co.* 3 Paige, 45.

In *Providence Bank* v. *Billings*, 4 Pet. 514, it

is said by Ch. J. Marshall: "The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privilege which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist." In other words, corporations, unless expressly exempted, are subject to all the burdens imposed by the laws of the land on individuals. The rule is not to be confined to cases within the eminent domain, or to the taxing powers. It applies to all cases, to which, in the opinion of the legislative power, its application is necessary for the public good. A franchise may or may not be a portion of the eminent domain. But a franchise is property: "We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred than other property. A franchise is property and nothing more. It is incorporeal property, and it is so defined by Blackstone, 2 Com., ch. 3, p. 20."

West River Bridge Co. v. *Dix*, 6 How. 534; see the opinion of Justice Woodbury, same case, 541, 542.

As property, a franchise may be divided, leased, mortgaged, sold (Gunning on Tolls, 106, 110; 6 Barn. & Co. 703, 5, 875; 3 Maule & S. 247; 1 Comp. & J. 57); and it is property by grant, taken subject to the general laws of the land in force at the time of the grant, at least.

The question now arises: "Is a franchise subject to execution at law by the laws of Indiana?" The property, rights, credits, and effects of the defendants, are subject to execution. 2 Rev. Stat. of 1852, §§ 134, 433. There is only one exception, and that does not exempt a corporation debtor or its franchise. By § 438, a debt can be levied upon and sold only when "given up by the defendant;" but no property, either corporeal or individual, is exempted, except a limited amount of personal property in favor of families; and such has at all times been substantially the law of the state of Indiana. Franchises are not personal property, and of course could not be sold in England by a fi. fa. as goods and chattels. But undoubtedly the rents and profits of ferries, and markets, and mills, and the rents and profits of other real estate, have always been subject to seizure in England.

In Indiana, if on a judgment against the owner of a ferry, you sell the land, the ferry right will pass to the purchaser, with the land, as it is appendant thereto and cannot exist without it. But in Indiana there must be an appraisement of the property, and that assessment will be of the real estate and the right to exercise the franchise, on the rents and profits being first valued, and first sold, as the franchise held by an individual in a mill, or ferry, is subject to sale with the property, and descends to heirs. Why do not the same principles apply to a toll bridge held by a corporation, where the legal tolls are fixed by law, as in this case? The decision of the court in the case of *The West River Bridge*, 6 How. 533, is referred to as directly in point.

If it were shown that corporations in Indiana are exempt from the execution laws of the state, and as such protected in their property from levy and sale, and that consequently they form an exception to the general laws that govern other debtors, relieving them from the payment of other debts, there would be an end of the question; but as such is not the case, it is submitted that their property, including the franchise, is subject to appraisement and sale, as was done in the case at law, and therefore the appellees have no equity on that ground alone, and the decree of the circuit court should have dismissed the bill at the cost of the complainants below.

I maintain, further, that the appellants, being the execution defendants at law, are the only party that can raise the question, whether this property can be sold at law; and as they insist that it shall be sold, it does not lie within the appellees, the execution plaintiffs, to say that the property in question was not subject to be sold at law.

Mr. **R. W. Thompson**, for appellee:

As the company is alleged to have been incorporated in Indiana, to be a citizen of Indiana, and to have built the bridge authorized by the charter in that state, and exercised their corporate powers there, and one of the corporators is expressly alleged to be a citizen of that state, it is equivalent to an allegation that all the corporators are citizens of the state within the decisions of this court.

Letson's Case, 2 How. 497; *Marshall's Case*, 16 How. 314; *La Fayette Ins. Co.* v. *French*, 18 How. 404.

It also appears that the appellant supposes that advantage may be taken of the supposed defective averment of citizenship of the defendants, in the declaration against them, upon which the judgments were taken.

Upon this point the counsel cited:

Union Ins. Co. v. *Osgood*, 1 Duer, 707; *Woolf* v. *City Steamboat Company*, 7 M. G. & S. 103; *Freeman* v. *Machias, Etc., Co.* 38 Me. 343; *People* v. *Ravinswood, Etc., Co.* 20 Barb. 518; *Harris' Case*, 4 Blackf. 267; *Richardson's Case*, 5 Blackf. 146; *Ex parte Watkins*, 3 Pet. 207.

The fourth assignment of errors, that the court erred in overruling the demurrer to the original bill, in effect raised for the consideration of the court the whole question in the case, —*viz.*: Has the court of chancery jurisdiction to appoint a receiver of the rents and profits of a corporation defendant which is insolvent, or has no available real estate except that which is derived from the use of its franchise? That the court has such power, and that it has at all times been exercised for the advancement of justice, the repeated decisions of the courts will show.

The case of *Fripp* v. *The Chard Railroad Company*, 21 Eng. L. & Eq. 53, is an authority for all we ask here.

It appears from the bill in this case, and is not denied, that all the possible ways or means which the complainants have of making their debt or judgments, is out of the defendants' bridge. That is all the property the defendants have. They say, "There is the bridge, take it." If it was clear that the plaintiff could regard the bridge as real estate, and sell it under the Indiana Execution Laws, by exposing the rents and profits to sale, and that the purchaser could enjoy those rents and profits upon the purchase,

or if the purchaser of the bridge could keep it up, and receive the tolls, then the plaintiffs might have an adequate remedy at law. The difficulties are referred to and set out in the amended petition and complaint.

The complaints say that the bridge is valueless, except in connection with the franchise—the right to take tolls. Nebeker answers, that he is advised and believes that the franchise cannot be sold or exercised by third persons, except by consent of the corporation.

The circuit court of Indiana has adopted the statute of that state, requiring the appraisement of property upon execution sale. If the property is real estate, the rents and profits have to be appraised as well as the fee; and the fee cannot be offered as long as the rents and profits are sufficient, at two thirds their appraised value, to pay the debt. If the bridge is personal property, then two thirds of $70,000 would have to be paid for the bridge, which the purchaser could not lawfully maintain one hour, over or upon that public highway—the Wabash river. So that the court can see that this bridge company has brought the complainants to a "dead-lock," and they have no other adequate remedy but a receiver.

The grant in this case being to three persons, if they sell out their bridge, or it is sold out by execution, the bridge becomes the property of a private individual, and the charter of the defendants is forfeited, and the existence of the company will be, by the act, terminated.

In the matter of Highway, 2 N. J. 293; see, also, *Macon & Western Railway* v. *Parker*, 9 Ga. 377; *State* v. *Rives*, 5 Ired. 297; *Ammant* v. *New Alexandria Turnpike Company*, 13 S. & R. 210.

The decree of the court, in appointing the receiver, was of the most favorable character to the defendants. It provided for conforming, in every respect, with the charter of the defendants; and by it, the complainants were constrained to wait for their pay until it was earned in tolls at the bridge.

Mr. Justice **Catron** delivered the opinion of the court:

In December, 1854, Shepherd and others recovered a judgment against the Covington Drawbridge Company, for upwards of $6,000. At the same time, Davidson recovered a judgment against the same company for upwards of $1,000.

The corporation was created by an act of the legislature of Indiana, and built a drawbridge over the Wabash river, in that state, pursuant to its charter; was sued for a tort in the circuit court of the United States for Indiana district, where the recoveries were had. Executions at law were regularly issued, and at March term, 1855, of that court, were returned by the marshal, "nothing found." Alias writs of fi. fa. were taken out and levied on the bridge as real estate, and in November, 1855, the marshal proceeded to sell the rents and profits of the same on Davidson's judgment for the term of one year, at the sum of $4,666.62, Davidson, the execution creditor, becoming the purchaser. The agent of Shepherd and others instructed the marshal not to sell the bridge on their judgment, and he returned the special facts. Davidson demanded possession of the bridge from the corporation, so that he might obtain the tolls, but the keeper of the bridge, and a principal owner of the stock, refused to surrender possession. In May, 1856, Shepherd, and those interested in the large judgment jointly with Davidson, filed their bill in equity in the circuit court of the United States for the district of Indiana, against the Bridge Company and Richard M. Nebeker, as keeper, agent, and manager of the bridge; praying that the court should appoint a suitable receiver to take possession of the same, and receive the tolls and income, and apply them to discharge the judgments at law, after defraying expenses. The court made the decree prayed for, from which the bridge company appealed to this court.

The first objection made to the decree is, that it does not appear by the bill that the defendant is properly described as *incorporated by the state of Indiana. The bill alleges that "the Covington Drawbridge Company, of Covington, is a corporation and citizen of the state of Indiana;" and it is also insisted that the judgments at law are void, because jurisdiction was not given to the United States courts by the averment of citizenship in either of the declarations. The judgment at law, in *Shepherd's Case*, was brought before this court at the last term, when it was held that the averment of citizenship, here objected to, was sufficient. 20 How. 227. That decision is conclusive of the two foregoing exceptions. [*123

The consideration, whether by a creditor's bill corporate property and franchises can be subjected to pay the debts of the corporation, by taking possession and administering its affairs, and drawing to the court its revenues, is a question of great importance and some difficulty. In advance of this question, it is insisted here that there exists in Indiana an adequate remedy at law; that Davidson's judgment is satisfied by the levy and sale of the tolls of the bridge; and Davidson having obtained a remedy by fi. fa., Shepherd may do the same. To ascertain whether Davidson obtained satisfaction by the marshal's sale, we must inquire what property was sold, and what title to it acquired, that could be made available by possession and the receipts of tolls.

The Covington Drawbridge Company was duly incorporated to build a bridge across the Wabash river where it was navigable for steamboats, and not subject to be bridged by an individual assuming to exercise a mere private right. The corporation had conferred on it a public right of partially obstructing the river, which is a common highway, and which obstruction would have been a nuisance, if done without public authority. This special privilege, conferred on the corporation by the sovereign power, of obstructing the navigation, did not belong to the country generally by common right, and is therefore a franchise; and second, the authority of taking tolls from those who crossed the river on the bridge was also a franchise, and freedom to do that which could not be lawfully done by one without public authority. This franchise could only be conferred by the legislature directly, or indirectly *through public agents and tribunals, in pursuance of a statute. The bridge is part [*124

of a road, and an easement, like the road; and the privilege of making the bridge, and taking tolls for the use of the same, is a franchise in which the public have an interest; the corporation, as owner of the franchise, is liable to answer in damages if it refuses to transport individuals on being paid or tendered the usual fare; the law secured the tolls as a recompense for the duty imposed to provide and maintain facilities for accomodating the public. Whether the timbers and materials of this bridge could be sold at auction by the marshal, by virtue of a fieri facias in his hands, as was held could be done by the laws of North Carolina in the case of *The State* v. *Rives*, 5 N. C. 297, we are not called on to decide in this case, as here the annual tolls were sold, and not the bridge itself.

By the laws of Indiana, lands and tenements cannot be sold under executions until the rents and profits thereof for a term not exceeding seven years shall have been first offered for sale at public auction; and if that term, or a less one, will not satisfy the execution, then the debtor's interest of estate in the land may be sold, provided it brings two thirds of its appraised value. The tolls, under the idea that they were rents and profits of the bridge, were sold for one year, according to the forms of this law. The tolls of the bridge being a franchise, and sole right in the corporation, and the bridge a mere easement, the corporation not owning the fee in the land at either bank of the river, or under the water, it is difficult to say how an execution could attach to either the franchise or the structure of the bridge as real or personal property. This is a question that this court may well leave to the tribunals of Indiana to decide on their own laws, should it become necessary. One thing, however, is plainly manifest, that the remedy at law of these execution creditors is exceedingly embarrassed, and we do not see how they can obtain satisfaction of their judgments from this corporation (owning no corporate property but this bridge), unless equity can afford relief.

By the laws of Indiana, stocks in a corpora-
125*] tion may be sold *by virtue of an execution against the owner of the stocks, which the sheriff may transfer to the purchaser; but this law does not help these complainants; they did not proceed against the stocks; their judgment at law did not affect individual property, but corporate property. The question whether a railroad company's property, including the franchises, can be subjected to the debts of the corporation by a decree in equity, is treated very fully by Redfield on Railways, ch. 32, § 2, p. 571; there the substance of the decisions affecting the doctrine is given in cases where there were liens by mortgage. The subject was well examined by the supreme court of Georgia in the case of *The Macon & Western Railroad Company* v. *Parker*, 9 Ga. 378. The contest there involved claims of creditors. When speaking of the necessity of equity exercising jurisdiction, the court says "that the whole history of equity jurisprudence does not present a case which made the interposition of its powers not only highly expedient, but so indispensably necessary in adjusting the rights of creditors to an insolvent estate as this did." The road was sold according to the decree; but, to settle the difficulty as to the sale of a franchise without the consent of the power granting it, upon application, an act was passed by the legislature, creating the purchaser and his associates a body corporate, with the powers and privileges of the old company. In England, the practice is to order a receiver to be appointed to manage the corporate property, take the proceeds of the franchises, and apply them to pay the creditors filing the bill.

Blanchard v. *Cawthorn*, 4 Simons, 566; *Tripp* v. *The Chard Railway Company*, 21 E. L. & E. 53.

All that we are called on to decide in this case is that the court below had power to cause possession to be taken of the bridge; to appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgments at law; and our opinion is, that the power to do so exists, and that it was properly exercised.

It is, therefore, ordered that the decree below be affirmed; and the Circuit Court is directed to proceed to execute its decree.

*Mr. Justice **Daniel** dissented for [*126
want of jurisdiction of the courts of the United States over corporations.

Marshall v. *B. & O. R. Co.* 16 How. 314.

THE PROPELLER NIAGARA, her Engine, Etc., Ansel R. Cobb, *et al.*, *Claimants and Appts.*,

v.

JOSEPH H. CORDES;

AND

THE PROPELLER NIAGARA, her Engine, Etc., Ansel R. Cobb, *et al.*, *Claimants and Appts.*,

v.

LESTER SEXTON, Lorin Sexton, George Sexton, and Edmund Bottes.

(See S. C. 21 How. 7-35.)

Carrier by water, liable for loss—the exceptions in accident—liable for all possible care—for every loss which could have been prevented by foresight, skill and prudence—burden of proof on carrier to show excepted peril—losses arising from dangers of navigation, what are—first cause—master's duty to seek shelter from storm—negligence in saving goods—when cannot abandon ship or cargo.

Carrier by water is liable in all events, and for any loss, however sustained, unless it happen from the act of God, or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading.

When he is unable to carry the goods forward to their place of destination, from causes over which he has no control, as by the stranding of the vessel, he is still bound to take all possible care of the goods.

He is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence.

Where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility.

NOTE.—*Loss by perils of the sea*—see note, 19 C. C. A. 465.

Losses arising from the dangers of navigation are such as happen in spite of human exertions, and which cannot be prevented by human skill and prudence.

When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law results from the first cause.

It depends upon the proof whether the act of the master, in seeking shelter in the harbor, was reasonably necessary, and if it was, then he is not in fault on that account.

A master has a right, and oftentimes it is his duty, to seek shelter from a storm; and although the circumstances here tend strongly to prove that he misjudged, still they are not of that decisive character which incline the court to make the decision turn upon that ground; and the same remarks also apply to his acts and endeavors to anchor the steamer after he entered the harbor.

Master was guilty of gross negligence for not having made any effort himself, or requested the aid of others, either to get the steamer off when stranded, or to remove and store the goods.

A master cannot abandon his ship and cargo upon any grounds, when it is practicable for human exertions, skill, and prudence to save them from the impending peril.

Argued Dec. 9, 1858. *Decided Jan. 4, 1859.*

APPEALS from the District Court of the United States for the District of Massachusetts.

The libels in these cases were filed in the court below, by the appellees, to recover on contracts of affreightment for damages to certain goods.

The court below entered decrees in favor of libelants, for $3,763.76, with $105.64 costs, and $4,964.30, with $447.76 costs, respectively. From these decrees the defendants took appeals to this court.

A further statement appears in the opinion of the court.

Mr. **S. G. Haven,** for the appellants:

After a review of evidence and an argument on the disputed questions of fact, the counsel proceeded:

After The Niagara was stranded and filled with water by the dangers of navigation, and disabled from proceeding on her voyage, the appellants were only responsible for the ultimate delivery of the goods, and for reasonable care in preserving the goods from the effects of storms, of bad air, of leakage, and of embezzlement.

Story, Bailm. §§ 490, 512; *Norway Plains Co.* v. *B. & M. R.* 1 Gray, 263, 270, and cases cited.

The principle on which the extraordinary responsibility of common carriers is founded, does not require that that responsibility should extend to the time occupied in transportion. That principle is the danger of robbery or embezzlement, by collusion or fraud on the part of the carrier.

Parsons v. *Hardy*, 14 Wend. 215.

The principle mentioned does not extend beyond delivery of the goods. It does not reach the condition in which they are delivered. The freezing of canals excuses delay; but during the delay, the carrier must not be guilty of negligence in taking care of articles detained.

Bowman v. *Teall*, 23 Wend. 306; *Wibert* v. *N. Y. & E. R. Co.* 12 N. Y. 245; Ang. Carr. §§ 213, 289, 328.

After the stranding of The Niagara, the proper standard of diligence was, such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property similarly situated.

Smyrl v. *Niolon*, 2 Bail. 421; Ang. Carr. § 187, p. 187; 3 Kent's Com. 224; 16 Johns. 348; *Lawrence* v. *Minturn*, 58 U. S. (17 How.) 100-109.

In cases of necessity or calamity during the voyage, the master is by law created an agent from necessity, for the benefit of all concerned: and what he fairly and reasonably does under such circumstances in the exercise of his sound discretion, binds all parties in interest.

Abb. 446-455; 1 Story, C. C. 342; 2 Kent's Com. 212; *Everett* v. *Saltus*, 15 Wend. 474; 5 Johns. 262; 3 Rob. 240; 1 Salk. Com. Case. 34; *Miston* v. *Lord*, 1 Blatchf. 354; *Douglas* v. *Moody*, 9 Mass. 550; Smith Mer. Law, 292, note, and cases cited; *Searle* v. *Scovell*, 4 Johns. Ch. 218.

The carrier may excuse delay of delivery, by accident or misfortune.

Bowman v. *Teall*, 23 Wend. 306; *Forward* v. *Pittard*, 1 T. R. 27; *McHenry* v. *Phila. W. & B. R. Co.* 4 Harr. Del. 448; Story, Bailm. §§ 490-509, 512.

Accident or misfortune will excuse the carrier, unless he have expressly contracted to deliver the goods within a limited time.

Harmony v. *Bingham*, 12 N. Y. 99; *Wibert* v. *N. Y. & E. R. Co.* 12 N. Y. 245; *Parsons* v. *Hardy*, 14 Wend. 215.

Messrs. **Alfred Russell** and **R. H. Gillet,** for appellees:

The fact of damage fastens responsibility on the vessel, and raises a legal presumption to be rebutted by the carrier, that the injury arose from negligence.

Clark v. *Barnwell*, 12 How. 272; *Rich* v. *Lambert*, 12 How. 347; *The Martha*, Olcott, 143; *King* v. *Shepherd*, 3 Story, 355; *Bernadon* v. *Nolte*, 7 Mart. 283; *Price* v. *Ship Uriel*, 10 La. Ann. 413; Story, Bailm. § 509; 1 Conkl. Adm. 205.

Neither of the triple defenses of the answer is established by the proofs. The damages did not arise either from being driven into the harbor or forced upon the shore, or the unavoidable detention of the goods in a leaking vessel.

Muddle v. *Stride*, 9 C. & P. 380.

But if the weight of evidence were measurably doubtful, this court, when an appellant has taken no new testimony on appeal according to his privilege, and as in *Rich* v. *Lampert*, 12 How. 374, will be disinclined to reverse the decree below, on a balancing of testimony.

Tronson v. *Dent*, 36 Eng. L. & Eq. 41; *Stuart* v. *Lloyd*, 4 Eng. L. & Eq. 1; *The Sibyl*, 4 Wheat. 98; *Hobart* v. *Drogan*, 10 Pet. 119; *Spear* v. *Place*, 11 How. 528; *Pigs of Copper*, 1 Story, 322; *Cushman* v. *Ryan*, 1 Story, 97; 1 Wall. Jr. 344.

It is abundantly manifest from the evidence that the storm did not compel the propeller to put into port.

There was a want of ordinary prudence in adopting no precautionary measures before entering the harbor, after the decision to enter had been made, to prevent the accident which did occur.

The master was guilty of want of ordinary care of the interest of the shippers, in deserting the vessel after she was stranded, in making no efforts to remove the libelant's goods from the place of stowage, either ashore or to some part

of the vessel where they would have escaped damage by water.

A peril of the sea, imposing such duty upon him, will not be regarded as the proximate cause of such damage, if he was delinquent in this regard.

Chouteaux v. *Leech*, 18 Pa. 233; *Bowman* v. *Teall*, 23 Wend. 306; *King* v. *Shepherd*, 3 Story, 349; *The Barque Gentlemen*, Olcott, 118; *Bird* v. *Cromwell*, 1 Mo. 81; *Harrington* v. *Lyles*, 2 N. & McC. 88; *Harris* v. *Rand*, 4 N. H. 259; *S. B. Co.* v. *Bason*, Harper, 262; Marv. Wreck, 21; Fland. Mar. Law, 155; Abb. Ship. 454 (N. I.); see, also, *Shipton* v. *Thornton*, 9 Ad. & E. 314; *Tronson* v. *Dent*, 36 Eng. L. & Eq. 41; *Hugg* v. *Ins. Co.* 7 How. 595; *Saltus* v. *Ins. Co.* 12 Johns. 107; *Bryant* v. *Ins. Co.* 6 Pick. 131; 1 Arn. Ins. 187; *Hobart* v. *Drogan*, 10 Pet. 108; *Cheviot* v. *Brooks*, 1 Johns. 367.

In cases of careless and cowardly abandonment, the law will presume that well-directed efforts would have been successful.

Davis v. *Garrett*, 6 Bing. 716; 19 Eng. C. L. 714; *Williams* v. *Grant*, 1 Conn. 492; Fland. Ship. 199, 261, 269, 303, n. 1.

If the master and mates had remained, it is evident they might have taken out the perishable articles, and thus have prevented them from having essentially damaged themselves, or at least from damaging the dry goods of Sexton. There is good reason to believe that the houses on shore, and the means of erecting more, might have been used to afford safe storage.

The advice of the best-informed men would make no difference. It must be clear to the court that the master's conduct was proper.

Tronson v. *Dent*, 36 Eng. L. & Eq. 41; *Lawrence* v. *Minturn*, 58 U. S. (17 How.) 110; Marv. Wreck, 20, 21.

3d. There was a deviation. This, of itself, renders the vessel chargeable, because it appears that the master was inexperienced and unskillful in his business, and the evidence shows that his putting into Presque Isle was not necessitated by an unavoidable and overruling force, but was a voluntary and unexcused departure.

1 Arn. Ins. 404, 409; *Byrne* v. *Ins. Co.* 7 Mart. N. S. 128.

4th point. Omitted.

14*] *Mr. Justice **Clifford** delivered the opinion of the court:

These are appeals in admiralty from the district court of the United States for the district of Wisconsin.

Libels were filed in these cases at a special term of the district court of the United States, begun and held at the city of Milwaukee, on the first Monday of November, 1855. They are drawn in the usual form of libels *in rem*, and respectively allege a breach of contract of affreightment. Both suits grow out of contracts for the transportation of goods by the steam propeller Niagara, on her last trip during the season of 1854, from the port of Buffalo, in the state of New York, to Chicago, in the state of Illinois. They were argued together in this court, and it was conceded at the argument, by the counsel on both sides, that they depended substantially upon the same state of facts. All the testimony respecting the liability of the steamer was first taken and filed in the case last named, and was subsequently admitted and read in evidence at the hearing in the other suit, under a stipulation of the parties, and the pleadings are substantially the same in both cases. On the part of the libelants, it is alleged, among other things, to the effect that on or about the 28th day of November, 1854, the libelants caused certain goods, particularly described in the respective libels, to be shipped in good order and condition on board the propeller Niagara, to be transported from Buffalo to Milwaukee, in the state of Wisconsin, and that the master, Hugh Mallon, received the goods on board, and in consideration of certain freight to be paid in that behalf by the respective libelants, undertook and promised to convey the goods from the port of shipment to the port of destination, and there to deliver the goods (the dangers of navigation, fire, and collision, only excepted), in like good order and condition to the libelants or their respective agents.

And they further allege that the steamer shortly thereafter departed on her voyage, but that the master, not regarding his duty, nor his promise and undertaking, did not so convey the goods, although no danger of navigation, fire, or collision prevented him from so doing, and that the goods, or a large portion of them, through the mere carelessness, negligence, and *improper conduct of the master, his mar- [*15 iners or servants, became wetted, heated, or stained, and greatly damaged, or wholly lost to the libelants. Answers in the usual form of pleading were duly filed in each case on the 24th day of May, 1855, admitting the jurisdiction of the court and setting up substantially the same grounds of defense. They are alike in all their material allegations, so far, at least, as respects the questions discussed at the bar, and all the matters involved in the judgment of the court. In both cases the answers admit the contract to transport the goods, as per bill of lading, the dangers of navigation, fire, and collision excepted, and that certain packages, under each of the contracts, were accordingly shipped on board the steamer for that trip, leaving it to the libelants in each case to make such proof of the kind, quantity, and value of the goods, as they might be advised was material, and aver that the steamer, when she departed on the voyage, on the 29th day of November, 1854, was tight, stanch, seaworthy, and well manned, and that her entire cargo was well, safely, and securely stowed. And the respondents, denying every allegation in the libels, of carelessness, negligence, and improper conduct, on the part of the master and his mariners, aver the fact to be that they were vigilant, competent, and skillful in the premises, and did what was their duty to do under the circumstances in which they were placed. They admit, also, that a part of the cargo was damaged, but allege and insist that the damage was occasioned by a danger of navigation within the exception of the bill of lading, for which they are not, and bought not, in any manner, to be held responsible. And they further allege that the steamer was, by stress of weather, compelled to make the harbor of Presque Isle, and by the snow and the force of the storm and wind, which was very se-

vere, the steamer dragged her anchor, went ashore, and was dashed upon the beach, from which cause, and the necessary detention of the goods on board, the damage, whatever it is, occurred; and that in the month of May, 1855, which was as soon thereafter as it was possible to repair the steamer and for her to proceed on her voyage, the goods, or so much of them as belonged to the respective libelants, 16*] were *transported to Milwaukee, and there delivered to them, and were by them respectively received, with a full knowledge of the damage, if any, and of its cause, and with an agreement not only to share the damage, but that the goods should be charged with and pay their proportion of a general average of the losses thus occasioned; and the respondents claim that the libelants in each case are liable "for a large amount of the average and damage" to the steamer, which they aver to be the sum of $2,000.

This statement from the libels and answers embraces the substance of the pleadings in both cases, so far as respects the several matters discussed at the bar, and the real merits of the controversy. Testimony was taken on both sides in the court below, and after a full hearing a decree in each case was entered for the libelants, and the respondents appealed to this court. No additional testimony has been taken since the appeal, and it seems to be conceded that the rights of the parties depend chiefly upon certain questions of fact to be determined from the evidence, which is conflicting, and in some particulars very contradictory. That remark, however, applies more particularly to that part of the testimony which relates to the conduct of the master after the steamer was stranded, and the means at his command to secure and preserve the goods from damage. Many of the facts and circumstances connected with the voyage, as well as those attending the disaster, are involved in much less difficulty, and some of those most material to be ascertained are satisfactorily proved, without any contradiction whatever. On the one side, no question is made that the goods were regularly shipped at Buffalo on the 28th day of November, 1854; and on the other, it is admitted that in the contract of shipment the dangers of navigation, fire, and collision were duly excepted in the usual form of such an exception in bills of lading. All of the goods were shipped in good order and condition, and were to be delivered at Milwaukee, as alleged by the libelants. They consisted in the one case of groceries, and in the other of dry goods; and it is conceded that they were carefully and properly stowed. On the day following the shipment, 17*] The Niagara *left Buffalo, and proceeded on her intended voyage. She was a steam propeller, of four hundred and fifty tons burthen, and at the time of her departure was a good, tight, stanch vessel, every way suitable for the navigation in which she was engaged, and was well furnished with ground tackle, including two anchors and two chains. One of her anchors weighed fourteen hundred pounds, with an inch and an eighth chain of sixty fathoms, and the other weighed seven hundred pounds, with a chain of the usual size and length. Her whole company consisted of twenty-two men, constituting a full complement of officers and crew for the voyage in a steamer of that description. Having proceeded on the usual route for that voyage, she arrived in Lake Huron on the second day of December, at four o'clock in the morning, in perfect safety, and crossed Saginaw bay in the afternoon of the same day. About eight o'clock in the evening of that day, it commenced snowing, with a light wind, which by twelve o'clock at night freshened to a gale, and the storm continued without any abatement, blowing a heavy gale from a northeasterly direction, or east-northeast, till the day after the steamer was stranded.

After crossing Saginaw bay, nowever, she continued on her regular course, and made Thunder bay light at one o'clock, and proceeding onward on her voyage, arrived off Presque Isle, and made the light at that place at four o'clock in the morning, without having suffered any damage or met with any difficulty, except that the master testifies that she rolled heavily, and that for a half or three quarters of an hour before he made the light, he had to keep her off her course two points, to ease her in the sea. Her course from Thunder bay had been north-northwest for a short time, then west by north and then northwest; and the mate of the steamer testifies, that when they first saw Presque Isle light, the steamer was a mile or two east of the light, and was in the usual course. At that time she was in no want either of wood or water, and it does not appear that she was in any worse condition to proceed on the voyage, unless prevented by the storm, than at the moment when she left the place of her departure. Her cargo was a general assortment of merchandise, consisting of teas, sugars, coffee, fish, *liquors, molasses, crates of [*18 crockery, bales of sheeting, boxes of dry goods, and various other articles specified in the record. All of the liquors, molasses, and some of the boxes were stowed on the ground tier in the lower hold. Heavy goods were placed at the bottom, and light goods on top, and the hold was full, and battened down. Most of the light goods, such as boxes of merchandise, teas, sugar in barrels, and bales of sheeting were on deck, and there were some willow wagons on the hurricane deck. None of her deck load had been washed away or injured, and it does not appear that it had been in any manner displaced or thrown into disorder by the rolling of the vessel.

These considerations tend strongly to show that there could not have been any urgent necessity to change the course of the steamer on account of the violence of the storm or the motion of the vessel; and, consequently, affect the credit of the master, and corroborate the statement of the mate, that, at the time the light was discovered, the steamer was pursuing her usual route. Both the master and the mate were on deck when they made the light, and the master gave the order to run into Presque Isle. In entering the harbor, they steered west-southwest, and then doubled inside of a small shoal round to the southeast, in order to get to the pier. What purpose was to be accomplished by getting to the pier, it is not easy to perceive as the mate testifies that they knew that the sea was so heavy that the steamer could not lie at

the dock. They, however, came round to the southeast, and so near to the pier that the mate says he could see the snow on the beach, and then let go the large anchor, and the wind immediately caught the steamer on the larboard bow, and she commenced dragging the anchor. When they found that the steamer dragged, and that there was danger that she would go ashore, instead of casting the other anchor, their first endeavor was to get rid of the one already cast, in order, if possible, to work her off, and make another effort to get up to the dock; and finding that they could not heave the chain with the windlass, their next effort was to slip it; and while they were endeavoring to unshackle the chain the steamer struck, and went on to 19*] the beach stern first, and *immediately swung round broadside to the shore. No attempt was made to let go the small anchor, although it was hanging at the bow, and the mate admits that the steamer dragged more than a quarter of a mile before she struck. They presently tried the pumps, and it was found that she did not leak. Shortly after, she commenced pounding, and it was then ascertained that she was making water freely, when they started the engine pump, but it choked with sand, and they were obliged to desist. At the place where the steamer lay the water was seven or eight feet deep, and she filled to the level of the water outside in two or three hours, so that the water in the hold was four or five feet deep above the top of the keelson. It was about five o'clock in the morning of the 3d of December, 1854, that the steamer went on to the beach, and the master and all hands remained on board till ten o'clock in the forenoon, when he and the mate went on shore for the purpose, as he testifies, of ascertaining whether there were any facilities for storing the goods, and whether it would be possible to unload the steamer, and get her off. When he got on shore, he found the steamer Plymouth, bound down the lake, lying there, fastened at the dock, she having touched at Presque Isle for wood, four or five hours before the arrival of The Niagara, and remaining there on account of the storm. Having made certain inquiries of the residents, and consulted with the master of The Plymouth, he came to the conclusion that it was the safest way to leave the goods on board, as more of them, in his judgment, would be protected in that mode than by removing them on shore; and on the morning of the 6th of December, the master, other officers, and all the crew of The Niagara, except three, took passage in The Plymouth, leaving the watchman, wheelsman and porter in charge of the steamer, with the hatches fastened down, and the goods in the condition in which they were when the steamer was stranded. During the night of the 4th of December, the storm subsided; but the following day was very cold, so that the steamers were frozen in, and persons walked on the ice from the pier to the place where The Niagara lay, which was more than a half mile. It moderated, however, during 20*] the night, and on *the following morning the ice went out of the harbor, and two other steamers, The Republic and Kentucky, came in before The Plymouth left, and the former took the place of The Plymouth at the dock after she started on her voyage down the lake. Several witnesses testify—and among the number the master of The Plymouth—that the 6th of December, the day he left, was a fine day, although, he says there was so much ice about his boat where she lay at the dock, that he had to cut her out in the morning before he started.

One of the witnesses for the libelants, who resides at Presque Isle, testifies, that after The Plymouth left, it was clear, and made ice, but did not blow, and that not long after there was a thaw, which continued till the 13th of January, and that after the thaw there were two or three weeks of very nice weather. Navigation, however, closed in a few days after The Plymouth left, and The Niagara remained on the beach, where she was stranded, until the mate, who is now the master of The Niagara, returned to Presque Isle, on the 27th day of April, 1855. When he returned, he found her where he left her, in charge of the watchman. He immediately pumped her out with a steam pump, according to his account, and lightened her off with a steamboat, and, after she was lightened, got the steamboat to take her up to the dock, where he removed the residue of the goods, and then took her to Detroit and had her repaired. After she was repaired, he returned to Presque Isle, in the month of May, 1855, and conveyed the goods, or so much of them as had not been destroyed, to the place of destination. Some of the goods were in good condition or were slightly injured, while others were greatly damaged or wholly worthless. Those stowed below had remained entirely without ventilation from December to March, and then the hatch at midships only had been opened. They were heated, discolored, and stained, and one of the witnesses testifies that sugar, coffee, and dried fruit were all soaked together, and that the water pumped up was dark, exhibiting the appearance of the soakings of coffee and codfish, and that the goods had the offensive smell of dead water. They were taken out about the first of May, so that those stowed in the *lower hold, not [*21 more than four or five feet above the keelson, had been submerged in bilge water for nearly five months, and some of those above the water had been moistened by the dampness and become moldy. Damages to the amount of $3,763.76 were allowed by the district judge, in the case first named, and in the other, $4,964.30, and it is not pretended in the argument that the respective amounts were either extravagant or unreasonable. It is not upon any such ground that the appellants seek to reverse the respective decrees in the court below. They deny that they are liable at all for any amount, and set up the first exception in the contract of shipment or bill of lading, and their counsel insist upon the following propositions:

I. That the damage to the goods resulting from the stranding of the steamer was wholly occasioned by the dangers of navigation, the risk of which was not taken by the master or owners of the steamer.

II. That after The Niagara was stranded and filled with water, and disabled from proceeding on her voyage, the appellants were responsible only for the ultimate delivery of the goods, and for reasonable care in preserving

them from the effect of storms, bad air, leakage and embezzlement.

III. That the master, after the steamer was stranded, and the goods wetted, became and was the agent of the shippers of the goods as well as of the owners of the vessel, and as such, under the circumstances of this case, is responsible only for the due and proper care and diligence, and that it cannot be successfully contended, from the evidence, that such care and diligence were not exercised.

These propositions, whether taken separately or collectively, necessarily involve mixed questions of law and fact, which in a case like the present must be determined by the court, acting instead of a jury to find the facts, and as a court to determine the law. Such propositions, therefore, must be considered in connection with all the legal evidence exhibited in the record, and their accuracy must be tested by 22*] the true state of *the facts as found by the court from the evidence, and by the rules of law applicable to that state of the case. According to the admitted or undisputed facts of the case, The Niagara was enrolled and licensed for the coasting trade, and was employed by the owners in transporting goods, under contracts for freight, upon navigable waters between ports and places in different states; and at the time of the disaster she had a full cargo of merchandise, of various descriptions, on board, consigned to merchants or parties residing either at her port of destination or at Milwaukee, and other intermediate ports or places along the course of her voyage. She was a general ship, laden with goods to be transported for hire; and the goods in question having been received and taken charge of, as goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, the question of liability in this case must be determined by the rules of law applicable to carriers of goods upon such inland waters. A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. In all cases where there is no special agreement to the contrary, he is entitled to demand the price of carriage before he receives the goods; and if not paid, he may refuse to receive them; but if he take charge of them for transportation, the nonpayment of the price of carriage in advance will not discharge, affect or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed. When he receives the goods, it is his duty to take all possible care of them in their passage, make due transport and safe and right delivery of them at the time agreed upon; or, in the absence of any stipulation in that behalf, within a reasonable time. Common carriers are usually described as of two kinds, namely, carriers by land and carriers by water. At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods intrusted to his care 23*] safely, and is liable for all *losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods.

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and stanch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence. He must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage; unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable, as well as the master and owners. A clean bill of lading, in general, imports, unless the contrary appear on its face, that the goods are to be safely and properly secured under deck. Fland. on Ship., § 192.

In the case of a parol shipment, the master is allowed to show a local custom to carry the goods on deck in a particular trade. *It [*24 must, however, be a custom so generally known and recognized, that a fair presumption arises that the parties in entering into the contract agreed that their rights and duties should be regulated by it. Having received the goods for transportation, in the absence of any stipulation as to the period of sailing, the master must commence the voyage within a reasonable time, without delay, and as soon as the wind, weather, and tide, will permit. After having set sail, he must proceed on the voyage, in the direct, shortest, and usual route, to the port of delivery, without unnecessary deviation, unless there is an express contract as to the course to be pursued; and where the vessel is destined for several ports and places, the master should proceed to them in the order in which they are usually visited, or that designed by the contract, or, in certain cases, by the advertisement relating to the particular voyage. A deviation from the direct route may be excus-

able if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates, or for the purpose of obtaining necessary supplies of water or provisions, or, in the case of a steamer, to obtain necessary supplies of wood or coal for the prosecution of the voyage, or for the purpose of assisting another vessel in distress.

As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by some cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertion of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, it becomes his duty, under such circumstances, to procure it and transport the goods to their place of destination, and in that event he is entitled to charge the goods with the increased freight arising from the hire of the ves- [*25] sel so procured. That rule, however, *is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time. In that state of the case, he may, if he deems it best, retain the goods until the repairs are made, and forward them in his own vessel; and upon the same principle, and for the same end, if he have no means to tranship the goods, it is his duty to repair his own vessel, when capable of being repaired, provided it can be done within a reasonable time, and he has the means at his command; and if not, and the means cannot be obtained from the owner, or upon the security of the ship, he may sell a part, or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be enabled to resume the voyage and carry the goods, or the residue, as the case may be, to the place of destination; and he is not entitled to recover for freight if he refuses to transship the goods, unless he repairs his own vessel within a reasonable time, and carries them on to the place of delivery. Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and they cannot be modified or relaxed except by the interposition of the legislative power of the Constitution. Time and experience have shown their value and demonstrated their utility and justice, and they ought not and cannot be changed by the judiciary. Some new and important provisions have been introduced into the law of carriers by water, by the act of the 3d of March, 1851, entitled "An Act to Limit the Liability of Ship Owners." Owners of ships under that act are not held liable for loss or damage to the cargo by reason of fire happening to or on board the vessel, unless the fire was caused by the design or neglect of such owner, except in cases where there is a special contract between the owner and the shipper, whereby the former assumes that risk. They are declared not liable as carriers for precious metals, precious stones, or jewels, or for the bills of any bank or public body, unless at the time of their lading a note in writing of their true character and value be given to the owner or his agent, and the same be entered on the bill of lading; and in no case, where that act applies, will the owner be liable for the articles therein enumerated beyond the amount *so notified and en- [*26] tered. It contains other provisions also of very great practical importance, and among the number the following: that for embezzlement, loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of the owner, his liability shall in no case exceed the amount or value of his interest in the vessel and the freight then pending. No part of the act, however, applies to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.

A question may arise whether the lakes bordering on a foreign jurisdiction are or are not excluded from the operation of the act under the term inland navigation; but it is not necessary at the present time to determine or consider that question, as the first exception in the contract of shipment is the only one set up in this case, and there is no pretense that there has been any transfer of the steamer under the 4th section of the act for the benefit of the libelants.

Carriers by water are liable at common law, and independently of any statutory provision, for losses arising from the acts or negligence of others to the same extent and upon the same principles as carriers by land—that is to say they are in the nature of insurers, and are liable, as before remarked, in all events and for any loss, however sustained, unless it happen from the act of God, or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading. Duties remain to be performed by the owner, or the master as the agent of the owner, after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those, too, of a very important character, arising immediately out of his original undertaking to carry the goods safely, to their place of destination. His obligation to take all possible care of the goods still continues, and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck, and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the seacoast in certain seasons *of the year, as well as on the lakes, and [*27] it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight,

skill and prudence. An effort was made by able counsel, in *King* v. *Shepherd*, 3 Story, C. C. 358, to maintain the proposition, assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine, and held that his obligations, liabilities, and duties, as a common carrier, still continued, and that he was bound to show that no human diligence, skill, or care, could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract, as universally understood in courts of justice. Admit the proposition, and it is no longer true that where there is no provision in the contract of affreightment varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods intrusted to his care, except by proving that it was the result of some natural and inevitable necessity superior to all human agency, or of a force exerted by a public enemy. Kent, Chief Justice, said in *Elliott* v. *Russell*, 10 Johns. 7, decided in 1813, that it has long been settled that a common carrier warrants the delivery of the goods in all but the excepted cases of the act of God and public enemies, and there is no distinction between a carrier by land and a carrier by water; and the same learned judge also held that the character, duty, and responsibility of a carrier continues to attach to a master as long as he has charge 28*] of the goods. A master, *says a learned commentator, should always bear in mind that it is his duty to convey the cargo to its place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty is an act for which both he and his owners may be made responsible. His duties as carrier are not ended until the goods are delivered at their place of destination, or are returned to the possession of the shipper, or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law. *King* v. *Shepherd*, 3 Story, C. C. 349; Abb. Ship. 8th ed. Perk. 478. These authorities are sufficient, it is believed, to demonstrate the proposition, that where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril, in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in this case. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel; and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged. All the evidence, however, in this case, shows the fact to be otherwise; that the goods did not perish at the time the steamer was stranded; and the damage having since occurred, the rule of law to be ascertained is the one applicable in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do under like circumstances. In great dangers great care is the ordinary care of prudent men, and in great emergencies prudent men employ their best exertions; so that the difference in the rule contended for, and the one here laid down, is much less than at first appears. Nevertheless there is a difference, and in a question of so much *practical [*29 importance it is necessary to adhere strictly to the correct rule. Losses arising from the dangers of navigation within the meaning of the exception set up in this case are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertions, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage, in judgment of law, results from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences the excepted peril may be regarded as continuing its operation. Such, it is believed, is the nature of the contract between a carrier and shipper, so far as it becomes necessary to examine it in the cases under consideration. Carriers may be answerable for the goods, although no actual blame is imputed to them; and after the damage is established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they are exempted in the contract of shipment or bill of lading.

Clark v. *Barnwell*, 12 How. 272; *Rich* v. *Lambert*, 12 How. 347; Chitt. on Carriers, 242; Story on Bail. §§ 528, 529; 3 Kent's Com. 213; 1 Smith Lead. Cases, 313; *Chouteaux* v. *Leech*, 18 Pa. 233; Fland. Ship. § 257; Marvin on Wr. & Salv. 21; Parsons' Mer. L. 348; Smith's Mer. L. 3d ed. 386.

Applying these principles of law in the consideration of the case, we will proceed to a brief review of the evidence, in connection with that already given, bearing upon the questions of fact presented for decision. It has already appeared that the seamer made the light at Presque Isle on the 3d day of December, 1854, at four o'clock in the morning. At that time she was on the usual course, and was heading northwest. She had met with no difficulty up to that time, and was tight, stanch, and strong, and in no want either of wood or water. Her master says, however, that he found it would be a great risk to haul her off to get round the point, doubtless referring to his previous statement that he had kept her off her course to ease her in the sea. She was then sailing northwest, and her course up to the straits would have been, as the witnesses *say, either west- [*30 northwest, or northwest by west half west, and there is no difference of opinion among them that the course was direct and the wind was a fair wind for steamers; and one witness says that in a conversation with the mate, while he was at Presque Isle, he heard him say that they need not have entered the harbor. All or nearly all the witnesses agree that there is no difficulty in entering that harbor in the daytime,

and that the anchorage, though rather limited in space, is safe and quite good just northwesterly of the end of the pier and out towards the lighthouse, and that the harbor affords a good shelter to vessels in a storm, except when the wind is blowing from a northeasterly direction or east-northeast, and then that its course is directly into the harbor, which fact must have been well known to the master and mate at the time they decided to make the attempt. Many of the witnesses say that it is more difficult to go in during the night, and several testify positively that it is dangerous, and some of the more experienced navigators say they would not risk the attempt in a dark night. One witness, the master of The Plymouth, called by the respondents, testified that the steamer did not come right in; that she broached to so near the mouth of the harbor, that she was detained at least a quarter of an hour. She, however, succeeded in entering the harbor, and cast her anchor as before stated. Four experienced navigators testify to the effect that she should have kept on her course; that it was not proper to enter the harbor. On the other side, one witness says, that whether it was good seamanship or not would depend upon the position of the vessel; and that if she was near in, he thinks it was prudent, and that he should have entered. Another says that if he had considered either vessel or cargo in danger, he should have gone in by all means; and the mate says that they concluded that it was better to go in. One witness, called by the libelants, says he heard the mate say, after the disaster, that it was unnecessary.

These are the principal facts bearing upon the question whether the master exercised a sound judgment and discretion in entering the harbor. Most of the facts in evidence respecting the acts of the master after he entered the 31*] harbor, as they *appear to the court, have already been stated, and need not be repeated. Experts were called and examined upon the question whether the master evinced proper skill and judgment in the attempt he made to anchor, and on that point three or four witnesses, who are experienced navigators, were called and examined by the libelants. They testify to the effect that a master of a steamer about to enter a harbor under the circumstances of this case ought to have both anchors ready, so that if one will not hold the vessel, he can cast the other; and they express the opinion that such precautionary steps are no more than ordinary prudence; and one of them says that it is customary to let go the small anchor first, and if that will not hold, then to let go the large anchor. On the other side, the mate of the steamer testifies that they had not time to let go the small anchor; and another witness expresses the opinion, that if the large anchor and the engine would not hold, then there was nothing that could be done; and the master of The Plymouth says that he knows of nothing else that could have been done, except to cast the anchor.

Numerous witnesses were examined on the question whether it was practicable to have removed the goods and stored them; and whether, if it had been done it would have afforded any better protection to the goods. On this point the testimony of the witnesses is very conflicting. All that can be done is to state the principal facts, as they appear to the court.

Nineteen men were residing at Presque Isle at the time of the disaster, mostly temporary residents, in the employment of Frederick Barnham, a witness for the respondents. There were four dwelling-houses there in which people lived, and two unoccupied, and there were two barns and a vacant shop; all or nearly all the dwellings were built of logs, and were rudely finished. Three of those dwellings were within a half mile of the place where the steamer lay which was within a quarter of a mile of a road extending round on the beach from the pier, where The Plymouth lay, with her officers and crew on board. Several days previously, the steamer Grand Turk had been wrecked, twelve miles distant from Presque Isle, and her officers and crew were there, consisting in all of *eight or nine [*32 men. There was a large scow in the harbor, in good order, anchored near the pier, and not in use, which several witnesses testify might have been obtained to lighten the steamer; and one witness testifies that the same scow was used by the mate in the spring following, to carry the goods from the steamer to the dock, before she was taken off by the tug. Nine pumps, such as are used on board vessels, and brought up to use on the other disabled steamer, were lying on the beach, within a half mile. All the witnesses agree that the master of The Niagara never applied to any one of them for any assistance, either in respect to the goods or the steamer; and the mate admits that they had made up their minds to leave, the evening of the day after the disaster. Some of the witnesses offered assistance, and it was declined. Courtwright testifies that he heard a conversation between the master and the mate, in presence of fifteen or twenty persons, in reference to taking out the cargo of the steamer. The mate said to the master that they could get the goods out of the steamer, and get her alongside of the dock; to which the master replied, that it was too late in the season to do anything with her; that he was bound to go home; that he would not stop there for the steamer and all that was in her. Other declarations of the master, equally expressive of his determination to return home, are also in evidence; and being a part of the *res gestæ*, are clearly admissible to explain the motives of the master, in connection with his acts. Many witnesses on the side of the respondents express the opinion that the goods could not have been removed; and an equal or greater number called by the libelants express a contrary opinion, and suggest various modes by which it might have been accomplished in a very short time. Such opinions, however, cannot have much weight in determining the question. One important fact is clearly proved, namely: that the ice went out of the harbor the night before The Plymouth left, and it was mild weather after that, for the most part, till near the middle of January, 1855.

Our conclusions upon these several questions may be briefly stated. In respect to the one first presented, it is proper to remark that it depends upon the proof whether the act of the *master, in seeking shelter in the harbor, [*33 was reasonably necessary; and if it was, then he is not in fault on that account. None of

the circumstances exhibit such clear and decisive indications as would justify the conclusion that he did not think at the time that it was the most expedient course to be pursued. That he was without much experience as a master of a steamer of this description, does not seem to be denied; and it is equally clear that he had a strong preference for a sailing vessel, as is made evident by his own remarks, as well as in another fact proved in the case, that he has resumed his more favorite employment upon the water, for which, perhaps, he is better qualified than for the one in which he was then engaged. He says, in effect, that he found it would be dangerous to proceed on the voyage, and the mate says they concluded that it would be better to go into Presque Isle; and on their own opinions thus expressed, and the proofs as to the violence of the storm, his vindication mainly rests. Strong doubts are entertained whether he acted wisely in departing from the course of the voyage, and yet the evidence is not so full and clear in the case as to induce the court to place the decision upon that ground. Whatever dangers there were in entering the harbor, he succeeded in surmounting, and he cannot be held responsible for any accident which did not happen. Masters have a right, and oftentimes it is their duty, to seek shelter from a storm; and the fact that it would have been better to have kept on the course, may be more apparent now than it could have been to any one at the time. Something must be deferred to the judgment and discretion of the master on such occasions, so that although the circumstances tend strongly to prove that he misjudged, or was wanting in that fearless, prudent energy which he ought to have displayed, still they are not of that decisive character which incline the court to make the decision turn upon that ground; and the same remarks also apply to his acts, and endeavors to anchor the steamer after he entered the harbor. Knowing, as he did, that the wind was blowing directly into the harbor, it is difficult to see why it was that he brought the steamer round to the position in the wind, so as to ex-
34*] pose her to the danger which finally *overcame his efforts to accomplish the purpose for which he says he sought the harbor. He knew the course of the wind and the difficulties of the undertaking, before he entered; and ought to have been prepared to encounter them with the best precautions in his power to make. When he found that the anchor dragged, a great majority of the witnesses say he ought to have let go the other. His own description of what took place on the deck of the steamer after she entered the harbor, as well as that given by the mate, evinces an indecision and want of energy quite unsuited to the emergency in which he was placed, and tends strongly to show that he was wanting in the proper qualities of a skillful and well instructed master. These considerations create strong doubts in the mind of the court, whether the respondents are faultless in this particular, and yet the court is disinclined to place the decision entirely on that ground, as several witnesses, of some nautical skill, have testified that they are unable to see that anything more could have been done.

On the remaining ground of complaints against the master, we are all of the opinion that he was guilty of gross negligence. His steamer lay within ten or fifteen rods of the beach, and within a little more than a half mile of the settlement, the number of whose residents was temporarily augmented by the presence of the officers and crew of the steamer Plymouth and those of The Grand Turk; and yet all he did, so far as appears, to secure or recover the large amount of property he had on board, was to go on shore, consult with one or more of the residents, advise with the master of The Plymouth, and then came to the conclusion that nothing could be done, and that it was best to leave the goods on board, under the charge of three of his crew. He remained, however, for two or three days, until the storm had subsided and the weather had moderated; and after two other steamers had arrived in the harbor, he took passage on The Plymouth, and returned home, without having made any effort himself, or requested the aid of others, either to get off the steamer, or to remove and store the goods. We are satisfied from the evidence that the goods might have been removed between the time he left and the middle of January; *and we are not satisfied that it could not [*35 have been done or successfully commenced during the time he remained in Presque Isle. A removal of a part would have enabled him to protect the residue on board; and there is no sufficient ground from the evidence to conclude that he would have encountered any serious difficulty in finding places enough for storing to have enabled him to remove from the steamer all of that class of goods exposed to damage, and store them on shore. At that time the goods had not received any considerable injury, and most of them, in all probability, none whatever. Prompt attention would have saved the property and protected the shipper from loss. It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, when it is practicable for human exertions, skill and prudence, to save them from the impending peril.

This view of the evidence renders it unnecessary to consider the other grounds of defense set up by the respondents.

The decrees, therefore, of the District Court in the respective cases are affirmed, with costs, in each case for the libelants.

THOMAS LEGGETT, JR., *et al.*, *Appts.*,
v.
BENJAMIN G. HUMPHREYS.

(See S. C. 21 How. 66-80.)

Surety in sheriff's bond, discharged by payment in other suits, of amount of bond—where courts of law refuse relief, resort may be had to equity—plea puis darrein continuance—surety not liable beyond penalty of bond—substitution of, to securities—subsequent indemnity does not restore liability.

NOTE.—*Sureties on official and other bonds; and for debts, liabilities.* See note to U. S. v. Giles, 3 L. ed. U. S. 708, and note to P. M. Gen. v. Early, 6 L. ed. U. S. 577; *Rights and liabilities of sureties.* See note to Hall v. Smith, 12 L. ed. U. S. 66.

That a surety in a sheriff's bond had been compelled to pay the whole amount of his bond in other suits, before present defendants obtained their judgment against him, but after the institution of their suit, is a good defense to the action, if pleaded *puis darrein continuance.*

Where the complainant tendered his plea at the proper time, and was refused the benefit of it, and was guilty of no laches, he is entitled to relief by bill in equity.

Sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings.

The liability of a surety cannot be extended by implication.

A surety who pays the debt of his principal, will be substituted in the place of the creditor to all the liens held by him to secure the payment of his debt; and the creditor is bound to preserve them unimpaired.

The liability of a surety is limited by the penalty of his bond.

A subsequent indemnity by his principal will not restore his liability when once discharged.

An open and honest effort of a principal to protect his surety against casualties incident to a responsibility about to be assumed for him, cannot be obnoxious to objection.

Argued Dec. 16, 1858. Decided Jan. 4, 1859.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The bill in this case was filed in the court below, by the appellee, for an injunction against the enforcement of a certain judgment.

The circuit court decreed a perpetual injunction, according to the prayer of the bill; whereupon the defendants appealed to this court.

The case is very fully stated by the court.

Messrs. **R. Johnson** and **J. H. Bradley,** for the appellants:

Two questions arise in this case.

1. Can the aid of a court of equity be had, to stay proceedings at law, upon any facts of which the party might have availed himself in that suit?

2. Can the aid of a court of equity be had to protect a surety from payment of the penalty of an official bond, on the ground that he has once paid the full amount, when before payment by the surety, the principal had placed in his hands money or property exceeding the amount of the penalty?

On the part of the appellants, we will endeavor to maintain the negative of both of these propositions.

1. We assume that Humphreys was duly served with process, and employed counsel throughout the original cause. In that cause he "failed to make a proper defense at law through negligence, and equity will not aid him."

20 How. 161.

2. It appears by the record that the property of Humphreys was levied on Aug. 1 and Sept. 12, 1840; was all sold in large parcels on Sept. 1, 1840, to David G. Humphreys; the money for this was paid Sept. 23. It also appears that the assignment to secure Humphreys was made by Bland in March, 1840. It is fair to presume from the face of this deed, that it embraced a large portion of Bland's estate.

He admits that prior to the said executions, his principal had placed in his hands the very property which would have been primarily liable for these debts. Yet it does not show that he made any effort to avail himself of that security, or give any satisfactory account of it, and suffered his own property to be levied on and sold, under circumstances of great suspicion.

Under such circumstances, equity will not relieve him from the consequences of his own actions.

9 How. 312.

Messrs. **George E. Badger** and **J. M. Carlisle,** for the appellees:

The right of Humphreys, upon the facts set forth in his bill, to the relief he obtained in the court below, was established by the judgment of this court when this cause was here upon the demurrer to the bill.

9 How. 297.

The appellee is here seeking to obtain in equity the benefit of a legal defense of which he has been deprived at law, not by his own oversight or misfortune, but by the rejection of his defense in consequence of the mistaken construction of the mandate.

The intention of the conveyance is declared to be, that the appellee "should be saved and kept harmless and indemnified against all loss and damages." Or if he "should have anything to pay by reason of said obligations," that he "should be secured in the means of remuneration." The answer shows also that he received an assignment of certain choses in action from Bland for his further idemnity in the premises. And from the answer and an account exhibited therewith, it appears that after the application of all the conveyed and assigned effects, Bland is still his debtor to an amount exceeding the judgment at law. All the items charged to Bland in the account exhibited with the appellees' answer, are properly chargeable to him.

A principal is bound fully to indemnify his surety against all loss resulting from his suretyship, including therein all reasonable expenses to which he may have been put.

Heyden v. *Cabot,* 17 Mass. 172.

A surety as such is deemed a creditor in equity, and both at law and in equity, an assignment for his indemnity is valid, though the liability be future and contingent.

Williams v. *Washington,* 1 Dev. Eq. 137; *Stevens* v. *Bell,* 6 Mass. 339; *Hendricks* v. *Robinson,* 2 Johns. Ch. 283, 306; *Halsey* v. *Fairbanks,* 4 Mass. 207; *Miller* v. *Howry,* 3 Penr. & W. 374.

As to the money placed in the hands of the appellee in the creditors' suit, it is submitted that it cannot be considered here for any purpose.

1. For the reason already given as to a supposed surplus of the assigned effects.

2. Because it has not been applied, nor is he at liberty to apply it, for his indemnity.

3. Because he holds it subject to a chancellor's decree, and has given bonds to replace it when directed. It should be added, that if an interest account be stated between Bland and the appellant, as to the funds assigned by the former and charges of the latter, there will result a balance in favor of the appellant, of many thousand dollars beyond everything which he has received.

Mr. Justice **Daniel** delivered the opinion of the court:

The controversy between these parties, although in its progress it has been much com-

plicated and involved, yet, as to the principle by which its true character is defined, and by which its decision should be controlled, is simple enough. That principle is the extent of the pecuniary responsibility sustained by the surety in an official bond for the conduct of his principal.

To a correct comprehension of the position of the parties to this cause, some length of detail as to the facts and pleadings it contains, is necessary.

The appellee, together with one Grissom, having in the year 1837 bound himself in the penalty of $15,000, as surety, to the official bond of Richard J. Bland, sheriff of Claiborne county, in the state of Mississippi, a suit was instituted in the name of the governor of the state upon that bond, for the use of the appellants, in the circuit court of the United States for the southern district of Mississippi, charging a breach of the condition of that bond by Bland, in having released from jail one McNider, against whom the appellants had recovered a judgment in the circuit court aforesaid, and whom, after being charged in execution in that 70*] court, the marshal had committed *to the custody of Bland, the sheriff. Under certain provisions of the statutes of Mississippi, it was pleaded in defense to this action, that McNider being insolvent and unable to pay his prison fees, the appellants, who were nonresidents, had failed to pay those fees, or, as required by the law of the state, to give security for their payment, or to appoint an agent within the county on whom demand for the prison fees could be made; and that, in consequence of such failure, McNider had, by a regular judicial order, been discharged from jail as an insolvent debtor. Upon a demurrer to the plaintiff's replications to these pleas, the circuit court gave judgment with costs in favor of the sheriff and the appellee, Humphreys, the suit having been previously discontinued as to the other surety, Grissom. This judgment was upon a writ of error reversed by this court, and the cause was remanded to the circuit court with instructions (Bland, the sheriff, pending the cause here, having died) to enter a judgment against the appellee, as surety, for the sum of $3,910.78, besides the costs. *Vide McNutt* v. *Bland et al.* 2 How. 28. In the interval between the emanation of the writ of error and the reversal of the judgment of the circuit court, two judgments were, on motion, obtained in the state court against the sheriff and Humphreys as his surety, by the Planters' Bank of Mississippi, one for the sum of $12,325.22, and the other for $2,674.-75, making an aggregate amount exceeding the penalty of the bond in which the appellee was surety; and the property of that surety was levied upon and sold under execution, and the proceeds applied in full satisfaction of the amount of the penalty. Upon the receipt in the circuit court of the mandate of this court, the appellee, as surety as aforesaid, moved the circuit court for leave to plead *puis darrein continuance*, the judgments, levy, and satisfaction above mentioned, in fulfilment of his bond and of his liability for the sheriff; but the circuit court refused leave to plead these facts in discharge or satisfaction of the penalty, and, in literal obedience to the mandate of this court, rendered judgment against the appellee, as surety for the sum hereinbefore mentioned. The appellee, Humphreys, then exhibited his bill on the equity side of the circuit court, alleging the aforegoing *facts, and averring, more- [*71 over, that no notice or process of any kind had ever been served upon him in the suit of *McNutt* v. *Bland et al.*, but that the return of the officer of service as to the appellee was absolutely false. Upon these allegations, an injunction to the judgment at law was granted by the circuit court, but subsequently, upon a demurrer to the bill by the appellants, the injunction was dissolved and the bill dismissed. From this decree of dismission an appeal was taken to this court, who, after a hearing, expressed the following conclusions,—*viz.*,

"In the case before us, the surety had been compelled to pay the whole amount of his bond by process from the state courts before the present defendants obtained their judgment against him, but after the institution of their suit. This would have been a good defense to the action, if pleaded *puis darrein continuance*. The complainant tendered his plea at the proper time, and was refused the benefit of it, not because it was adjudged insufficient as a defense, but because the court considered they had no discretion to allow it. The mandate from this court was probably made without reference to the possible consequences which might flow from it. At all events, it operated unjustly by precluding the plaintiff from an opportunity of making a just and legal defense to the action. The payment was made whilst the cause was pending here. The party was guilty of no laches, but lost the benefit of his defense by an accident over which he had no control. He is, therefore, in the same condition as if the defense had arisen after judgment; which would entitle him to relief *audita querela*, or bill in equity. We are, therefore, of the opinion that the complainant was entitled to the relief prayed for in the bill, and that the decree of the court below should be reversed."

The cause was thereupon remanded to the circuit court for further proceedings to be had therein, in conformity with the above opinion. *Vide* 9 How. 313, 314, *Humphreys* v. *Leggett et al.* On the filing of the mandate in this latter case, the defendants (the present appellants) being ruled by the circuit court to answer the bill for the injunction, admit by their answer the recovery of their judgment against Humphreys as *surety for Bland. They ac- [*72 knowledge their belief of the judgments in the state court against the sheriff and his surety, and the levy under those judgments, and the return of satisfaction upon the executions by the proper officer, but allege that the judgments were fraudulently suffered in order to defeat the appellants; that no money was paid under the pretended sale, and that the property was retained by Humphreys. In an amended answer, filed by leave of the court, the appellants allege that Bland, the sheriff, had transferred the judgments in the state court, for $10,524, to Humphreys, who, under that assignment, had received the sum of $18,000; that he had not discharged the penalty of the sheriff's bond, and from various sources had received funds exceeding all his liabilities arising therefrom. Subsequently, *viz.*; in 1851, the appellants, by a cross-bill against the appellee, charged that

Bland, to indemnify the appellee as surety in the bond of 1837, had assigned certain debts and other subjects of property, real and personal, to an amount more than equal to the penalty of that bond; that among these subjects were the fee bills due to Bland, as sheriff, to a large amount, and also the judgments set forth in the original bill as having been recovered in the state courts; and that these judgments had been discharged by Humphreys by notes purchased by him at the depreciation of fifty cents in the dollar. To this cross-bill a demurrer was interposed by Humphreys, but, upon being ruled by the court to answer, he admitted that in March, 1840, Bland conveyed, in a deed of that date, to Volney Stamps, the property mentioned in that deed, in trust to indemnify the appellee as surety in the official bond of Bland, of November, 1837, and to indemnify the same appellee and one Flowers, as sureties for Bland on his official bond of 1839, and to save them harmless against all loss and damage, and all money paid, or charge or expense to be incurred, in consequence of being sureties in the said official bonds. He admits that so much of the property as could be found has been sold by the trustee, and that from the proceeds of sale, after deducting the expenses of sale, respondent has received three fourths, amounting to $3,825, and the said Flowers one fourth, amounting to $1,275, which make the whole amount 73*] that has *been realized from the trust fund. He admits that in 1840, for his further indemnity, Bland assigned him all the fees then due to the former as Sheriff of Claiborne county, but alleges that from this source there has been received an aggregate amount of only $3,288.17, as shown by the statements of the persons employed in the collection of those fees, filed as exhibits with the answer. The respondent further admits, that after the recovery by the Planters' Bank of the $12,325.22 against said Bland and respondent, which recovery was founded on an original judgment of the said bank against P. Hoopes, J. H. Moore, and John M. Carpenter, the said Bland claiming to be the owner of that judgment, did assign all his rights and interests therein to respondent, for his indemnity, as he had to pay the penalty of the bond.

The respondent claims the benefit of that judgment, but alleges that he has collected nothing under it from either Hoopes or Moore, each of whom became insolvent prior to 1840, and still continued insolvent. That the judgment of the Planters' Bank against Campbell Pierson and Moore, for $3,702.66, had always been unproductive and worthless, and that nothing had been or would be received therefrom, by reason of the insolvency of the defendants in that judgment. That in a suit pending in the superior court of chancery of the state of Mississippi, upon a creditor's bill, the respondent has exhibited the former judgment of the Planters' Bank for $10,855.93, as a claim against the estate of H. Carpenter & Co., and the commissioner has reported it as a valid claim for that amount, with interest thereon from November 1, 1840. That this report having been excepted to, and remaining still a subject of contest, the court of chancery had in the meantime, out of the funds of the estate, ordered the payment to the appellee of the amount of the said judgment or claim for $10,855.93, with interest, amounting in the whole to $18,852.75, upon his entering into bond with security to refund that amount in the event that it should be disallowed by the court. With this answer, denying his having been indemnified, were exhibited as parts thereof, the deed of trust from Bland, the amount of fees collected under the assignment from Bland, and *a statement of the account between [*74 Bland and Humphreys. With the original bill of Humphreys were exhibited also the bonds in which he was bound as surety, the records of the judgments on motion against the sheriff and Humphreys; and by the deposition of Maury, the attorney for the Planters' Bank, was proved the satisfaction of those judgments by sales of the property of Humphreys under execution. At the May term of the circuit court, in the year 1856, this cause having been submitted to the court upon the original bill, the answer and replication, and the exhibits and proofs, and upon the cross-bill and the answer thereto, and upon the exhibits therewith, the following decree was then made: "It is ordered, adjudged, and decreed, that the injunction heretofore granted in this cause be made perpetual, and that the defendants, Leggett, Smith, and Lawrence, and their agents and attorneys, be, and they are hereby forever enjoined and restrained from taking out any execution upon a certain judgment rendered on the law side of this court, on the 14th day of May, 1845, in favor of Alexander McNutt, governor, suing for the use of Leggett, Smith, and Lawrence, against the said Humphreys, the complainant, for the sum of $6,355.33, being the judgment mentioned in the bill of complaint in this cause, and that they be forever enjoined and restrained from taking or adopting any step or proceeding to enforce the payment of the said judgment by the complainant Humphreys, or the collection thereof out of his estate. And it is further adjudged and decreed, that the said complainant do recover of the said defendants his costs of suit to be taxed." This decree having been brought by appeal before the court, its legality and justice are now the subjects for our examination.

With reference to the defense essayed by the defendant in the suit of *McNutt* v. *Bland*, after the filing of the mandate of this court in that cause, the opinion of this court in the case of *Humphreys* v. *Leggett et al.* would seem to be conclusive, both as to the period at which the defense was proffered, and the legitimacy and sufficiency of the defense, if substantiated by proof. The facts tendered in defense coming into existence after the issues previously made up, were not on that *account less essen- [*75 tially connected with the character of the controversy, nor could the defendant for that reason have been justly deprived of their influence upon that controversy. He appears to have sought to avail himself of the earliest and only opportunity for alleging them by plea *puis darrein continuance*. In support of his right so to plead, it would be adding nothing to the clearly expressed opinion of this court in the 9th of Howard, to refer to cases collated in elementary treatises on pleading.

In judging of the character or sufficiency of the defense alleged for the exemption of the appellee, there should be taken as a guide the

rule, which is perhaps without an exception, that sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings. Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations. This rule is thus forcibly put by Chancellor Kent in the 3d Commentaries, p. 124, where he says: "When the contract of a guarantor or surety is duly ascertained and understood by a fair and liberal construction of the instrument, the principle is well settled, that the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication." It will be seen that, to a certain extent, even the creditor whose claim the surety has under the terms of his obligation been compelled to satisfy, may be required to co-operate in effecting the indemnity of the latter. Thus it is said, on the same page of the work just quoted, that "the claim against a surety is *strictissimi juris;* and it is a well-settled principle, that a surety who pays the debt of his principal, will in a clear case in equity be substituted in the place of the creditor to all the liens held by him to secure the payment of his debt; and the creditor is bound to preserve them unimpaired when he intends to look to the surety." For this doctrine are cited numerous English and American authorities.

In the case of *Graves* v. *McCall*, 1 Wash. Rep. 364, it is said by the court of appeals of Virginia, "that a court of equity will not charge a surety farther than he is bound at law; but if a surety bound at law cannot be 76*] charged there for *the want of the instrument of which the creditor is deprived by accident or fraud, a court of equity will restore the paper to its legal force."

In the case of *The United States* v. *White*, 1 Wash. C. C. 417, it is ruled by Washington, Justice, "that a surety can never be bound beyond the scope of his engagement, and therefore a surety for the faithful service of B as clerk to C, who afterwards enters into partnership with D, is not liable for unfaithful conduct to C and D." The same law has been explicitly and repeatedly ruled by this court, as will be seen in the cases of *Miller* v. *Stewart*, 9 Wheat. 680; of *McGill* v. *The Bank of the United States*, 12 Wheat. 511; and *The United States* v. *Boyd*, 15 Pet. 187.

The principle which limits the liability of the surety by the penalty of his bond, inheres intrinsically in the character of his engagement. He does not undertake to perform the acts or duties stipulated by his principal, and would not be permitted to control their performance; and could not, where his principal was a public officer, legally assume the functions of that principal. The undertaking of the surety is essentially a pledge to make good the misfeasance or nonfeasance of his principal to an amount coextensive with the penalty of his bond. In addition to this interpretation, resulting from the character of the obligation of the surety, the statute of Mississippi, which necessarily enters into and controls all contracts made under its authority, expressly limits the responsibility of a surety in a sheriff's bond to the amount of the penalty of that bond. *Vide* Hut. Miss. Co. p. 441, art. 3, § 1. Indeed, it has scarcely been contested in argument in this case, that the extent of the surety's liability upon the sheriff's bond was measured by the amount of the penalty. The great effort of counsel has been to show in this case that satisfaction of the penalty of the bond has not been honestly made, but has been fraudulently evaded.

1st. By the provisions of the deed of trust for the indemnity of the appellee, and in the application of the property thereby conveyed, and by the subsequent assignment of fees to a large amount, exceeding together in value the judgments of the Planters' Bank against the sheriff and his surety.

*2d. By the sale of the property of the [*77 appellee under the executions in behalf of the Planters' Bank at a sacrifice greatly below its value.

The force of those positions will now be considered.

Whilst it may be conceded that a fraudulent combination between the officer and his surety for the purpose of shielding the property of both or either from just responsibility, and in contemplation of delinquency in the former, would have the effect of vitiating any compact or instrument made with such a design, it is undeniable that an open and honest effort of a principal to protect his surety against casualties incident to a responsibility about to be assumed for him, cannot be obnoxious to objection; and it is equally clear, that the simple fact of the existence of such an effort, unattended by any known *indicium* of fraud, and unassailed by plain or probable direct proofs, can warrant no just impeachment of such an effort, which may be praiseworthy and just with reference to its object, and calculated to promote the performance of services to the public which otherwise could not be undertaken. The practice of providing such an indemnity for sureties is known to be usual and frequent, and it would be difficult to imagine an objection, either legal or moral, to its application to the extent to which the surety had been made answerable upon his bond. The right of a debtor in the first instance, to apply his payments wherever his funds are not specifically bound, is universally admitted. The judgment of the circuit court in the case of *McNutt* v. *Bland*, having been against the plaintiff, and the deed by Bland for the indemnity of the appellee having been executed for a bona fide consideration pending the proceedings on the writ of error to the circuit court, and no final judgment of that court having been entered to this day there was no specific lien on the property of Bland which prevented its appropriation in exoneration of his surety, or which forbade any payments or assignments by him in discharge of his liability. A strong illustration of this position may be seen in the case of *The United States* v. *Cochran*, decided by Marshall, Chief Justice, and reported in the 2d vol. of Brockenbrough's Reports, p. 274. It is one of that class in which priority is *claimed for the [*78 United States in instances of insolvency of their debtors. It is thus stated by the judge:

"Robert Cochran, collector at the port of Wilmington, N. C., being very largely indebted to the United States, made a deed of his property for their benefit. Previous to the execution of this deed, he deposited $10,000, the amount

of the bond executed to the United States for the faithful performance of his duty, in a trunk which was placed in the bank, and absconded. From Baltimore he addressed a letter to his sureties, requesting the trunk to be taken out, and the money to be applied to their exoneration. The money was received at the Treasury, and the bond given up. It being afterwards discovered that this was the money of the collector, and not of the sureties, this suit is brought to compel the sureties to pay the amount of the bond, considering the money received as constituting no equitable discharge as to them. . . . The act of Congress does not transfer the property itself to the United States, but subjects it to their debts in the first instance. The assignee holds it as the debtor would hold it, liable to the claim of the United States, and if he converts it to his own use, or puts it out of the reach of the United States, he is undoubtedly responsible for its value. . . . But the power of the debtor to apply his payments is coextensive with that of the creditor. This principle has, it is believed, never been denied. If it be correct, then the power of Mr. Cochran to apply this sum of money in discharge of the bond, and in exoneration of the sureties to it, is coextensive with that of the United States to make the same application of it. If, then, Mr. Cochran had, without any assignment of his property, paid this money into the Treasury, with a direction that it should be applied to the bond, he would have exercised a right which the law gives to every debtor. . . . Does the transfer of this money to the sureties change the law of the case? We think not. It has been very properly argued that the act of Congress gives to the debt due to the United States priority over debts due to individuals; but not to one part of the debt due to the United States, over any other part of it; nor does it vest the property absolutely in the United States, though it 79*] *gives them the right to pursue it for the purpose of appropriating it in payment. It would seem to follow, that the right to apply payments whilst the money is in the hands of the debtors, is not affected by the act of congress, but remains as it would stand independent of that act. If, then, the sureties had declared to the Treasury Department that the money was received from Mr. Cochran, to be paid in discharge of their bond, and had tendered it in payment thereof, we think the tender would have been valid, and might have been pleaded in a suit on the bond."

This was a case where there was a legal priority in the creditor, where there existed a quasi lien, or a restriction upon the power of the debtor to dispose of his property, so as to exempt it or its value from the claim of the creditor. In the case under consideration, no such restriction existed; no lien by judgment or other specific claim, upon the property conveyed in trust to Stamps; and no evidence having been adduced, of a fraudulent purpose in making that conveyance, no valid objection is perceived to an application of the proceeds of that conveyance towards the indemnity of the surety; and these proceeds, together with the amount of the sheriff's fee bills collected, it is shown by the testimony, are far short of the penalty of the bond discharged by the surety.

The right to any surplus which, upon a settlement between the appellee and Bland or his representatives, may remain in the hands of the former, we regard as not involved in nor pertinent to this controversy, which relates regularly and exclusively to the question whether the appellee, as the surety for Bland, has fulfilled the exigency of his bond by a satisfaction of the penalty.

In answer to the objection which has been urged, and founded on the alleged sacrifice of the property of the appellee in the sale under the judgments of the Planters' Bank, it may be remarked, that the relevancy or force of such an objection is not perceived. The questions here are these, and these only—*viz.*, whether the penalty of the bond executed by the appellee has been satisfied, or whether there remains still a portion of that penalty of which the appellants can claim the benefit: *The judgments in favor of the [*80 bank, the levy upon the property of the appellee, the sale and satisfaction to the full amount of the penalty, are facts all established of record. Whatever sacrifice of the property of the appellee by these undoubted proceedings may have been produced, is his loss, and his only, and can in no wise affect the validity of his release by the fulfillment of his obligation.

The decree of the Circuit Court is, therefore, affirmed, with costs.

EDWARD M. LIVERMORE and David Sexton, *Appts.*,
v.
THOMAS A. JENCKES, Alexander Farnum, Samuel Harris, and Stephen Waterman.

(See 21 S. C. How. 126-146.)

Rhode Island assignment, when legal.

In Rhode Island an assignment is not voidable, as tending to hinder, delay, and defraud creditors; because there is a reservation in it to the assignor of the dividends of such creditors as should refuse to become parties to it, and to release their demands in consideration of the dividends they might receive.

It would have been had the the assignment been made in New York, by persons residing there.

But the assignment was made in Rhode Island, by a person, and to persons, residing there, and is in every particular just such an one as, by the laws of that state, merchants and others in failing circumstances, residing there, are allowed to make in favor of creditors, wherever the property of the assignor may be.

The complainants never acquired any lien upon the property in New York, so as to subject it legally or equitably to their demand.

Submitted Dec. 17, 1858. Decided Jan. 4, 1859.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The bill in this case was filed in the court below, by the appellants, as judgment creditors of the respondents, Harris & Waterman, to

NOTE.—*Assignment with preferences, when valid, when not*—see notes, 5 L. ed. U. S. 552; 37 L. ed. U. S. 368.

avoid an assignment made by Waterman to respondents, Jenckes and Farnum, in trust for the payment of the creditors of said Harris & Waterman, and Waterman individually. The assignor and assignees were citizens of Rhode Island, where the assignment was made. The circuit court, having found that the property, situated in the state of New York, covered by the assignment, had been converted into money and the proceeds transferred to Rhode Island prior to the filing of the bill in this case, that the complainants had no lien on said property, and that there was no fraud in making said assignment, entered a decree dismissing the bill, with costs.

From this decree the complainants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **C. L. Monell,** for appellants:

1. The circuit court erred in not deciding that the assignment from Waterman to Jenckes and Farnum was fraudulent and void as affecting the complainants below, and the other creditors of Waterman residing within the state of New York at the time of the assignment, so far at least as the assignment affected the estate of the assignor within the state of New York at the time of the execution and delivery.

Waterman, being insolvent, and holding property in the state of New York, assigned to J. & F., giving certain preferences, and directing the residue to be paid to such of his creditors at large as should release their demand within six months, reserving to himself the dividends of such creditors as should refuse to release.

Such an assignment is adjudged fraudulent as to the creditors, by the laws of the state of New York. As to the property situated within the state of New York and the claims of resident creditors, the laws of the state of New York are paramount, and do not yield to the laws of the domicil of the debtor.

The states have not seen fit to lodge in Congress power to harmonize the conflict of their internal systems. Such a power, if lodged in the Federal Government, would necessarily involve the right to carry the laws and systems of polity prevailing in one state, within the territorial limits of another.

Story's Confl. Laws, § 18.

The language used by Mr. Justice Grier in *Caskie* v. *Webster*, 2 Wall. Jr. 131, would, on a cursory examination, appear to imply that it was a part of the duty of the Federal courts to apply to controversies of this character a sort of modified *jus gentium*, adapted to harmonize with the objects and purposes of the union of the states. A careful examination of that case will show that such was not his intent.

The court must give the same judgment which the courts of the state of New York would have been bound to give, had they adjudicated the case.

See remarks of Ch. J. Marshall in *Elmendorf* v. *Taylor*, 10 Wheat. 159.

By the laws of the state of New York, an insolvent's assignment containing the clause requiring creditors to release or forfeit their dividends, and directing them to be paid in that case to the assignor, is fraudulent as to creditors, and is void.

The Revised Statutes re-enact the statute of 13 Eliz., which is an affirmance of the common law.

2 R. S. 137, § 1; *Meeker* v. *Wilson*, 1 Gall. 419.

The question of the invalidity of such a reservation was finally settled in the state of New York by the decision in *Grover* v. *Wakeman*, 11 Wend. 187, in the court for the correction of errors.

Goodrich v. *Downs*, 6 Hill, 438; see, also, *Hyslop* v. *Clarke*, 14 Johns. 458; *Austin* v. *Bell*, 20 Johns. 442; *Seaving* v. *Brinkerhoff*, 5 Johns. Ch. 329; *Murray* v. *Riggs*, 15 Johns. 571.

The assignment being of a nature forbidden by the laws of New York, according to the acknowledged principles governing the jurisprudence of that state, it cannot be asserted there as affecting property within that state, and as against a creditor of the assignor there resident.

In *Leroy* v. *Crowningshield*, 2 Mass. 157, Judge Story says that "personal contracts are to have the same validity, interpretation, and obligatory force in every other country, which they have in the country where they are made or are to be executed." "An exception is, that no nation is bound to enforce or hold valid any contract which is injurious to its own rights and those of its own citizens, or which offend public morals or violate the public faith."

The same doctrine was held by Judge Washington in *Ogden* v. *Saunders*, 12 Wheat. 259.

In *The Watchman*, 1 Ware, 232. Ware, Dist. J., says: "No principle can be more incontrovertible than this: that every nation has the exclusive legislative and judicial authority within its own territorial limits."

No rule or notion of comity can require a state to permit to foreigners privileges denied to its own citizens. Per Judge Nelson, in *Frost* v. *Brisbin*, 19 Wend. 15.

Huberus says: "The effect of a contract entered into at any place, will be allowed according to the law of that place, in other countries, if no inconvenience will result therefrom to the citizens of that other country, with respect to the right which they demand."

See translation in note, 3 Dall. 370; *Oliver* v. *Townes*, 2 Mart. N. S. 93, 102; Story, Confl. Laws, § 390; see, also, *Hunter* v. *Potts*, 4 T. R. 192; *Potter* v. *Brown*, 5 East, 124.

The greatest diversity exists between the insolvent systems of the different states and foreign countries, all, however, recognized, in greater or less degree, the right of the state to assume the disposition of the estates of insolvents.

If the insolvent or bankrupt laws of a foreign country or state are not permitted to have any extra-territorial efficacy, for the reason that every state must determine for itself the best mode of administering the estates of insolvents, with how much more reason should we refuse to permit a citizen of a foreign state voluntarily to make such a disposition of his property in this state, at variance with our insolvent laws.

Le Chevalier v. *Lynch*, 1 Doug. 76; *Abraham* v. *Plestoro*, 3 Wend. 538, 551; *Harrison* v. *Sterry*, 5 Cranch, 298; *Ogden* v. *Saunders*, 12 Wheat. 213; 2 Kent's Com. 330, 331.

The cases on insolvency and administration, are similar in principle in this respect.

Harrison v. *Sterry*, 5 Cranch, 289.

In *Ingraham* v. *Geyer*, 13 Mass. 146, it was held that the assignment, though valid in Pennsylvania, was prejudicial to citizens of Massachusetts who were creditors of the insolvent, and therefore void, as far as debts due to the insolvent from citizens of Massachusetts were concerned. The principle upon which this case was decided, is more fully presented in *Blake* v. *Williams*, 6 Pick. 286, and is in strict accordance with the authorities above cited. Under the laws of Massachusetts, all insolvents' assignments were held void for want of consideration, except so far as creditors had actually become parties to them.

Nostrand v. *Atwood*, 19 Pick. 281; see, also, *Fall River Iron Works* v. *Croade*, 15 Pick. 11; *Means* v. *Hapgood*, 19 Pick. 105.

In Maine, in *Fox* v. *Adams*, 5 Greenl. 245, the court held all foreign assignments void as to the attaching creditors; but it appears to be doubtful whether the rule may not be there limited to the reasonable bounds contended for in the present case.

Pearson v. *Crosby*, 23 Me. 261; *The Watchman*, 1 Ware, 232.

In Connecticut, the doctrine contended for is fully established.

Atwood v. *Protection Ins. Co.* 14 Conn. 555; *Richmondville Man. Co.* v. *Prall*, 9 Conn. 487.

So in New Jersey.

Varnum v. *Camp*, 1 Greenl. 326.

And in Missouri.

Brown v. *Knox*, 6 Mo. 302.

In Pennsylvania, the precise point does not appear to be adjudicated, although there are floating *dicta* adverse to the principle contended for.

Speed v. *May*, 17 Pa. 91; see, also, *Law* v. *Mills*, 18 Pa. 185.

These cases are very brief, and evidently received little examination or careful consideration.

The counsel also referred to the case of *Cashie* v. *Webster*, 2 Wall. Jr. 131, decided by Judge Grier in the third circuit, and contended that it was not controlling. The courts of the United States must either recognize that the decisions of each state are final in all questions of state origin and jurisdiction, or they must harmonize the discord, by deciding independently of the state courts upon authority and principle.

Should the latter course be pursued, it remains for us to consider how the question of the validity of such assignment stands in that point of view. In *Albert* v. *Winn*, 7 Gill, 446, decided in the court of appeals of the state of Maryland, the court states the condition of the question upon the state authorities at that time.

See authorities cited in 1 Am. Lead. Cas. 69, 85; see, also, *Sanderson* v. *Bradford*, 10 N. H. 260; 19 Pick. 11, 281.

Massachusetts was improperly placed among the latter states; for in that state all assignments being held void, except so far as the creditors actually became parties to them, the question could arise.

Counsel also referred to the case of *Phippen* v. *Durham*, 8 Grat. 457, as supporting his view on principle.

Since the decision in *Albert* v. *Winn*, New Jersey has acceded to the states holding such assignments void.

Varnum v. *Camp*, 1 Green. 326.

Rhode Island should be added to the states sustaining the clause. At the present time, the states whose systems of jurisprudence forbid such clauses, are New York, Ohio, North Carolina, Mississippi, Missouri, Alabama, Connecticut, Illinois, Pennsylvania, New Hampshire, Maine, Maryland, and New Jersey.

On the other side stand Rhode Island and South Carolina, side by side.

See, also, the opinion of Marshall, Ch. J., in *Brashear* v. *West*, 7 Pet. 608; Judge Curtis in *Heydock* v. *Stanhope*, 1 Curt. 471; and remarks of Judge Nelson in *Cunningham* v. *Freeborn*, 11 Wend. 256.

The assignment, therefore, being void, the appellants are entitled to a decree against the assignees for the payment of their debt.

2. The assignment to J. & F. being void by the laws of the state of New York, the appellants were entitled to a decree in the court below, for an account of the property or the proceeds thereof, which came into the assignee's hands from the state of New York.

Had this case been carried to a decree in the New York courts, the appellants would have been entitled to an account against the assignees, as above stated.

Upon these points, the counsel referred to and discussed the following authorities:

Beck v. *Burdett*, 1 Paige, 308; N. Y. Rev. Stat. part III. ch. 1, tit. 2, § 58; *Hadden* v. *Spader*, 20 Johns. 553.

By the law of the state of New York, the assignment was void as to creditors. The test of that is, that a creditor may by a levy take the property out of the hands of the assignee; and the invalidity of the assignment is a bar to an action of trespass brought by the assignee.

Hyslop v. *Clarke*, 14 Johns. 458.

The cases of *Hone* v. *Henriques*, 13 Wend. 243, and *Mills* v. *Argall*, 6 Paige, 577, relied on by the respondent, are not in point.

The assigned estate, notwithstanding the fraudulent conveyance, remaining as against creditors the property of the insolvent, no act of the assignees could defeat the right of the creditors to have their estate applied to the payment of their debt.

Ames v. *Blunt*, 5 Paige, 22; *Hadden* v. *Spader*, 20 Johns. 553.

The pretended sale to Hill, Carpenter, & Co., far from being a protection to the assignees, was in itself an act of fraud directly aimed against the New York creditors.

The conveyance of the proceeds of this sale into the state of Rhode Island does not relieve the assignee from liability to the New York creditors.

If the act of Waterman in assigning was an illegal act, that of the assignees, in carrying the assets of the estate to Rhode Island, was equally illegal.

In the first place, the assigned effects were not, in fact, transferred to Rhode Island; but even if they had been so transferred, there are

two difficulties in making good the respondents' position.

It is not made to appear, that, under the laws of Rhode Island, any such equities have attached.

If they have attached, that is no ground of protection to the assignees in New York.

The assignees do not pretend to have transferred all the assigned effects to the state of Rhode Island.

As to the part remaining in New York, the appellants are clearly entitled to an account.

3. Even should the appellants fail to establish the invalidity of the assignment, yet they are entitled to an account of the amount in the hands of the assignees, arising from the lapsed dividends of non-releasing creditors. These dividends belong, by the terms of the assignment, to the assignees. As to this fund, we are clearly entitled to a decree of payment on account of our debt.

Edmeston v. *Lyde*, 1 Paige, 637.

Messrs. **Thomas A. Jenckes** and **Clarence A. Seward**, for appellees:

1. The assignment was valid *inter partes*, and the assignees legally acquired and legally translated to Rhode Island, the property covered by it.

1. The assignment was valid *lege loci*.

See point 4, 2 *b*.

2. It was also valid in the state of New York, until its invalidity had been judicially declared.

3. The action of the assignees in reducing the property to their possession and removing it prior to such judicial declaration, cannot be impeached.

Henriques v. *Hone*, 2 Edw. Ch. 120; *Mills* v. *Argall*, 6 Paige, 577; *Porter* v. *Williams*, 9 N. Y. 149, and cases there cited; *Averill* v. *Loucks*, 6 Barb. 477.

2. The appellants had not, at the time of filing their bill, acquired that lien upon the estate which is an indispensable prerequisite to the granting of the relief sought.

At that time the entire assigned estate, with the exception of a few worthless claims, was in possession of the assignees in Rhode Island. The assignees were Rhode Island creditors of the New York insolvents. These debts followed the persons of the creditors, and if collectible, were the property of the assignees in Rhode Island. But even if the debts had been collectible, or if the assignees had casually brought some portion of the assigned estate into New York prior to the filing of the bill, the appellants would not, by service of process upon the assignees, have acquired any lien upon the assigned estate. The period during which the lien could attach, ceased when the assignees took possession of the property transferred to Rhode Island, and there became vested with the title to it. Without such lien, the title of the assignees cannot be questioned.

The Watchman, 1 Ware, 241; *The U. S.* v. *The Bank of The U. S.* 8 Rob. La. 415; *Richardson* v. *Leavitt*, 1 La. Ann. 430.

3. The relief sought by the appellants cannot be granted consistently with the rights of other creditors of Waterman, who are not now before the court.

The Fall River Works v. *Croade*, 15 Pick. 11.

4. A conflict between the *lex fori* and the *lex loci* does not necessarily or properly arise. It is only in cases of rival claimants to property within the jurisdiction of the *lex fori*, that such a conflict can arise.

But if the question of the construction of the assignment is necessarily before the court, then, both upon principle and authority, it should sustain the assignment.

The question is one of law, and not of fact. By the Revised Statutes of the state of New York (2 R. S. 138, § 4) the question of fraud in an assignment is a question of fact, and as such is to be decided, first, upon the evidence, and second, by the language of the instrument.

The question of fraud in fact does not arise.

The bill is verified and calls for an answer under oath. The answers are fully responsive to all the charges of fraud alleged in the bill, and so far as they are responsive, are evidence for the defendants, to be taken as absolutely true because not disproved.

Hough v. *Richardson*, 3 Story, 692; *Langdon* v. *Goddard*, 2 Story, 267.

When the question to be decided arises upon the language of the assignment it becomes one of law rather than of fact. Its answer determines the legal construction or effect of the instrument.

Cunningham v. *Freeborn*, 3 Paige, 557; *Sheldon* v. *Dodge*, 4 Den. 217; *Goodrich* v. *Downs*, 6 Hill, 438.

The single question, then, presented for the consideration of the court is, Is this assignment upon its face valid or fraudulent, within the state of New York? It must be borne in mind:

1st. That the assignor and the assignees were neither citizens of, nor residents in, New York. They were citizens of Rhode Island and residents of Providence.

2d. That the assignment was not executed in New York, but was executed in Rhode Island, the domicil of the parties.

3d. That by the laws of Rhode Island it is valid.

4th. That it operated upon personal property only in the state of New York.

5th. That the personal property is not within the jurisdiction of the *lex fori*.

6th. That the parties proposing the question have no lien upon the property.

Personal property has no locality. It follows the law of the person. The law, therefore, can only reach his property through him.

Sill v. *Worswick*, 1 H. Bl., 690; *Pipon* v. *Pipon*, Amb. 25.

Hence it follows that a transfer of property by its owner, whether *inter vivos* or *post mortem* valid by the law of his domicil, will, if made before the law of another country has actually attached upon the property by a proceeding against its owner, be esteemed valid within every other jurisdiction where the property may be.

Story, Confl. L. §§ 380, 383, 384.

The law of the domicil regulates the succession to, and the distribution of, the personal property of the intestate.

Story, Confl. of L.; *Holmes* v. *Remsen*, 20 Johns. 267.

The assignment is valid in Rhode Island. This is proved by the answer of the assignees and by the decisions of the courts of that state.

Stewart v. *Spencer*, 1 Curt. 157; *Dockerry* v. *Dockerry*, 2 R. I. 547; *Heydock* v. *Stanhope*, 1 Curt. 471.

This court should interpret the assignment as it would be interpreted by the courts of Rhode Island, not only in compliance with authority, nor upon principles of comity only, but upon principles of justice. Contracts are to be interpreted by the *lex loci*, to which the parties had reference when the contract was made. The integrity of the instrument where, as here, there is no fraud in fact, is to be tried by the law of the place of its execution.

Brashear v. *West*, 7 Pet. 608; *Dundas* v. *Bowler*, 3 McLean, 397.

The rule is too well established to be now shaken or disturbed.

Speed v. *May*, 17 Pa. 91; *Adams* v. *Storey*, 1 Paine, 100; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Van Reimsdyk* v. *Kane*, 1 Gall. 371; *Leroy* v. *Crowinshield*, 2 Mas. 151.

The only remaining question is upon the interpretation of the instrument itself. By what law shall the assignment be interpreted? In England, effect is given to the claims of foreign assignees as against creditors resident there, and this, whether the assignment be voluntary or *in invitum*.

Locke, Attach. 36; *Sill* v. *Worswick*, 1 H. Bl. 690; Story, Confl. of L., §§ 408, 409.

The rule is not recognized to an equal extent in the United States. A distinction obtains here, between bankruptcy *in invitum* and a voluntary assignment. Any extraterritorial effect is almost universally denied to an assignment made compulsory under foreign bankrupt laws, while to an assignment voluntarily made *ex mero motu* by a failing debtor, effect is or is not given, as the authorities of each particular state may require. These authorities are of course numerous, and it is to be admitted, conflicting. Numerically they uphold the assignment. The rule sustaining the *lex domicilii*, and the assignment to which all the authorities refer, is thus stated by Story in his Conflict of Laws (§ 3): "It is therefore admitted, that a voluntary assignment by a party, made according to the law of his domicil, will pass the personal estate whatever may be its locality, abroad as well as at home." The distinction is also alluded to in the case of *The Watchman*, 1 Ware, 240, "The law separates that which is derived from the public power, from that which comes from the will of the party. Tried by this principle, if the assignment of the debtor in the present case is valid in Massachusetts, it is valid everywhere, and operated a transfer of his property wherever situated; for the transfer was made by the simple will of the owner, and not by virtue of the public power, as in the case of bankruptcy.

1st. The authorities supporting this rule are as follows:

Saunders v. *Williams*, 5 N. H. 213; *Sanderson* v. *Bradford*, 10 N. H. 260; *Frazier* v. *Fredericks*, 4 Zab. 162; *Means* v. *Hapgood*, 19 Pick. 105; *Fox* v. *Adams*, 5 Greenl. 245; *Atwood* v. *Protection Ins. Co.* 14 Conn. 555; *Holmes* v. *Remsen*, 4 Johns. Ch. 460; *The Same* v. *The Same*, 20 Johns. 266; *Abraham* v. *Plestoro*, 3 Wend. 566; *Johnson* v. *Hunt*, 23 Wend. 87; *Hooper* v. *Tuckerman*, 3 Sandf. 316; *Hoyt* v. *Thompson*, 5 N. Y. 353, decided in 1851; *Carnley* v. *Tuckerman*, N. Y. S. P. T. R. 1st Judic. Dist.; *Milne* v. *Moreton*, 6 Binn. 353; *Speed* v. *May*, 17 Pa. 91; *Mulliken* v. *Aughinbaugh*, 1 Penr. & W. 117; *Lowry* v. *Hall*, 2 W. & S. 131; *Law* v. *Mills*, 18 Pa. 186; *Greene* v. *Mowry*, 2 *Bailey*, 163; *West* v. *Tupper*, 1 Bailey, 193; *The U. S.* v. *The Bank of the U. S.* 8 Rob. La. 262, 413; *Richardson* v. *Leavitt*, 1 La. Ann. 430; *The Watchman*, 1 Ware, 232; *Dundas* v. *Bowler*, 3 McLean, 397; *Caskie* v. *Webster*, 2 Wall. Jr. 132; *Ogden* v. *Saunders*, 12 Wheat. 213; *Harrison* v. *Sterry*, 5 Cranch, 298; *Brashear* v. *West*, 7 Pet. 608; *The Bank of Augusta* v. *Earle*, 13 Pet. 519; *Black* v. *Zacharie*, 3 How. 483.

In no case have the claims of the assignees been disregarded, when the property covered by the assignment has become vested in them and they have transmitted it beyond the jurisdiction of the court whose aid is invoked by the attacking creditor, before he has acquired any lien upon it.

The English cases do not hold such an assignment void.

Jackson v. *Lomas*, 4 T. R. 166; *The King* v. *Watson*, 3 Price, 6.

There is no conflict in the decisions of the local courts of the several states as to the effect upon an assignment of a clause requiring a release.

In Massachusetts, New Hampshire (*Haven* v. *Richardson*, 5 N. H. 113, before the statute of that state), Pennsylvania, Virginia, South Carolina, Alabama, and Rhode Island, the assignment is held valid; and in New York, Ohio, Missouri, Connecticut, Maine, and Illinois, it is held to be void.

1 Am. Lead. Cas. 94, 95, and cases there cited.

In *Pearpoint* v. *Graham*, 4 Wash. C. C. 232, the assignment was upheld, and the decision in this case was followed by Judge Story in *Halsey* v. *Fairbanks*, 4 Mason, 206, and in the case of *Brashear* v. *West*, 7 Pet. 608, where the assignment excluded from the benefit of its provisions all creditors who should not, within ninety days, execute a release. The question of the construction of this assignment is not an open question, but is to be decided by reference to local law, and the court must follow the decision in *Brashear* v. *West*, and adopt the construction given by the courts of Rhode Island, and thus also the assignment must be sustained, and the decree below must be affirmed with costs.

Mr. Justice **Wayne** delivered the opinion of the court:

This bill was filed by the appellants in the circuit court of the United States for the southern district of New York, as judgment creditors of the respondents, Waterman & Samuel Harris, to avoid an assignment made by Waterman to the respondents, Jenckes & Farnum, in trust, for the payment of the creditors of Harris & Waterman, and of Waterman individually.

The appellants seek to avoid the assignment, on the ground that it was voidable, from its tending to hinder, delay, and defraud creditors; because there is a reservation in it to the assignee of the dividends of such creditors as should refuse to become parties to it, and to release their demands in consideration of the divi-

dends they might receive. It appears that a large amount of the property conveyed was in the state of New York; that the appellants resided there, and that they were then creditors of Harris & Waterman. The trusts in the deed were, first, to pay the expenses of the assignment; secondly, to pay the debts of several preferred creditors of Harris & Waterman, and of Waterman individually; and thirdly, to pay all the residue of the debts of Waterman individually, and as a member of the firm of Harris & Waterman. The assignment contained the following proviso: "Provided, that none of my said creditors named in the third class of this assignment shall be entitled to receive any dividend or benefit under the deed of assignment, unless they shall execute and deliver to my said assignee, within six months from the date hereof, a full release and discharge, under seal, of all their claims and demands against me, the assignor; but the dividends on the claims and demands of the creditors who shall not execute 145*] *such release shall be paid over to me, the said assignor, or to such person as I shall appoint."

It appears that Harris, the copartner of Waterman, had given to the latter a bill of sale of all their partnership property; that the firm was then dissolved; that Waterman had the possession of it, and that he afterwards made the deed of assignment to Jenckes & Farnum. Now, Jenckes & Farnum received and held the property under the assignment as well that which was in New York as all that was elsewhere. A part of the copartnership property was the Owasco lake mill, situated at Auburn, Cayuga county, state of New York, and it is admitted that it exceeded in value the debt due by Harris & Waterman to the complainants. As to that property, James Fitton was a copartner; but it appears that he joined with Harris & Waterman in dissolving the copartnership, and in authorizing Waterman to "settle up" its business, having on the same day agreed that Harris should convey to Waterman the bond and mortgage which he had given to Harris & Waterman, for the purchase money due by him for an undivided fourth part of the Owasco lake mill. Thus Waterman was made the sole owner of it. He supposed himself at that time to be solvent, and that he could carry on the business of the mill, and worked it for some time; but finding himself unable to do so, he conveyed it to Jenckes & Farnum, with all the other property of the late concern which had become his. with the intention that they should, as his assignees, make an equitable distribution of it among his creditors; and, in his answer to the bill of the complainants, he declares he did so without any fraudulent intent to hinder, delay, or defraud creditors. Waterman had been, was then, and was when he made the assignment, a citizen of the state of Rhode Island. The property assigned was in different states. Jenckes & Farnum accepted the trusts of the assignment. Waterman ceased to have any control over it, and, for aught that appears, the assignees have executed their trust unimpeachably. After the assignment was made, the complainants obtained, in the supreme court of New York, a judgment upon their demand against Harris & Waterman.

They have now brought their bill as judgment creditors *against Waterman and Jenckes [*146 & Farnum, the assignees, to avoid the assignment; alleging that they have a lien upon the property in New York or its proceeds, as creditors of Harris & Waterman, because Waterman's assignment to Jenckes & Farnum contained a reservation to the assignor, which, by the laws of New York, was fraudulent. And so it would have been, had the assignment been made in that state, by persons residing there. But the assignment was made in the state of Rhode Island, by a person and to persons residing there, and is in every particular just such a one as, by the laws of that state, merchants and others in failing circumstances, residing there, are allowed to make in favor of creditors within that state and those residing elsewhere, wherever the property of the assignor may be. We see no cause for thinking it was fraudulently made. The respondents deny it upon their oaths, as responsively to the charge made by the complainants as that can be done. The latter have not sustained their charge by any proof whatever. For that cause alone, if there was no other, we should concur with the circuit judge in the decree given by him in this case. And we also concur with him that the complainants never acquired nor ever had any lien upon the property in New York so as to subject it legally or equitably to their demand against Harris & Waterman either before or after it was carried into judgment in the supreme court of New York. Deeming the grounds stated decisive of this controversy, we abstain from a discussion of other points learnedly and ably argued by the counsel in the cause in their respective printed briefs. They were appropriate to the cause but we do not deem them necessary for the decision of it.

We direct the affirmance of the decree given in the court below.

DEAN RICHMOND, *Appt.*, *v.* THE CITY OF MILWAUKEE and Ferdinand KUEHN.

(See S. C. 21 How. 80-82.)

Appeals, how regulated—value in controversy must be over $2, 000, and be shown.

Appeals to this court, from circuit and district courts, are regulated by the act of 1803, ch. 40, where not otherwise specially provided for by act of Congress.

By that law no appeal will lie, unless the sum or value in controversy exceeds $2,000; and that fact must be shown to the court in order to give jurisdiction in the appeal.

Argued Dec. 10, 1858. Decided Jan. 10, 1859.

APPEAL from the District Court of the United States for the District of Wisconsin. The case is stated by the court.

Messrs. **Brown** and **Ogden** for appellant.

Mr. **J. R. Doolittle** for appellees.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This is an appeal from the district court of

the United States for the district of Wisconsin, exercising the powers of a circuit court.

It appears that a bill was filed in that court by the appellant, praying an injunction to prohibit the conveyance of certain lots in the city of Milwaukee, which had been sold for the payment of city taxes assessed upon it by the corporation.

81*] *The bill states that the city of Milwaukee is a corporation chartered by the state; that, under its charter and the Constitution and laws of the state, it is authorized to assess certain taxes for corporate purposes upon the lots and property in the city, and if the taxes are not paid according to law, to sell the lot upon which it is charged. The bill further sets forth, that the appellant was the owner of sundry lots in the city, which are particularly described by their respective numbers, and also the assessment imposed upon them, respectively, the manner and purposes for which it was imposed, and the proceedings of the corporate authorities under this assessment, and the sale of the lots to pay the amount claimed to be due.

And the bill then charges that the corporation exceeded its powers in imposing these taxes, and even if lawfully imposed, that the proceedings afterwards had, were not conformable to the law of the state, which points out particularly the steps to be taken before the lot assessed can be sold. The bill charges, that upon the grounds above stated, the sale of his lots was illegal and invalid, and prays an injunction to prevent a conveyance to the purchaser, as such a conveyance would be a cloud upon his title.

The bill alleges that the lots so sold are worth $500, and that the taxes imposed exceed their value as assessed on the books of the corporation, more than two hundred per cent.

The corporation and their treasurer answered, and admitted the sale of the lots, and aver that the city had a lawful right to impose the tax; that their proceedings to recover it were fully authorized by law, and that the sales were valid, and will entitle the purchasers to a conveyance unless the appellant shall within three years redeem them, in the manner and upon the terms provided for by the law of the state where lands or lots have been sold for the nonpayment of taxes.

Testimony was taken on both sides, which is set out in the transcript. But in the view which the court take of the case it is unnecessary to state it particularly, or to set out at large the various points in controversy between the parties upon the bill and answer because, upon the appellant's own showing, this court have no jurisdiction.

82*] *Appeals to this court from the circuit courts of the United States, and from district courts exercising the jurisdiction of circuit courts, are regulated by the act of 1803, ch. 40, where not otherwise specially provided for by act of Congress. There is no special provision in the act establishing the district court in Wisconsin which regulates appeals to this court, and consequently they are governed by the general law above referred to; and by that law no appeal will lie, unless the sum or value in controversy exceeds $2,000; and that fact must be shown to the court in order to give jurisdiction in the appeal.

Now, the matter in dispute in this case is the title to the lots which have been sold by the municipal authorities for the nonpayment of the taxes. The taxes assessed were charged upon the respective lots, and created no personal responsibility upon the owner; the lots alone being liable for the payment. And the only evidence or averment of their value is the statement of the complainant in his bill that they were worth more than $500 and his complaint that more than two hundred per cent upon their value as mentioned in the books of the corporation, was charged upon them by the assessment and the proceedings of the city authorities under it. There is nothing in the allegations of the parties, or in the evidence, to show that the value of the lots in question exceeded $2,000, nor anything from which it can be inferred.

The appeal must, therefore, be dismissed for want of jurisdiction in this court.

THE UNION INSURANCE COMPANY,
Plffs. in Err.,
v.
JOHN BLAIR HOGE.

(See S. C. 21 How. 35-66.)

Mutual insurance company, who is member of —cash premiums and premium notes are a common fund—payment of premiums prescribed by the company—state construction of charter, when decisive.

In a mutual insurance company, a person insured upon a cash premium, without any further liability, is a member.

In a mutual insurance company, the premiums paid by each member for insurance constitute a common fund; and the cash premiums as well represents the insured in such fund as the premium note.

In the absence of any prescribed mode of payment of premiums, the power to prescribe it by the company, is necessarily implied.

The construction of the New York insurance act of 1849, by the public officers of the state, that a charter is in accordance with it, should be regarded as decisive in a case of doubt.

Submitted Dec. 20, 1858. Decided Jan. 10, 1859.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

This suit was brought in the court below, by the defendant in error, on a certain policy of insurance to cover $2,500.

The company based its defense on the ground that the act of April 10, 1849, of the laws of New York, under which it was incorporated, authorized it to conduct its business on the plan of mutual insurance; that the receiving of a definite sum of money in lieu of a premium note for the policy of insurance in this case, was not warranted by the act of 1849; and that the policy is void, as made without authority and in violation of said statute. The plaintiff demurred. The court having sustained the demurrer and entered judgment in favor of the plaintiff the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **Henry Van Derlyn** for plaintiff in error:

The question to be decided by this court is: Is the policy of insurance issued by defendants for an advance cash premium paid to defendants, a valid policy as claimed by plaintiff; or is it invalid, because it was not founded on a premium note as claimed by defendants?

The circuit court of the United States for the northern district of New York have decided that the policy in question was a valid policy. This decision is deemed erroneous; and to reverse it this writ of error is brought.

1. The issuing of policies upon the plan of stock companies, and the receiving of a definite sum in lieu of a premium note, is not warranted by the act of 1849, and is in violation of its manifest spirit; and therefore the policy declared on is void being made without authority and in violation of the statute.

We say this for several reasons.

1. This is a mutual insurance company, formed to do business on the plan of mutual insurance and is so declared in the charter, in pursuance of the act of 1849, § 10.

See 2d sec. of the charter.

"Its business shall be conducted on the plan of mutual insurance." The company was organized without a dollar of cash capital and with $100,000 of premium notes (§§ 5 and 11), and was prohibited from commencing business without $100,000 of premium notes. The act has not a word or provision indicating the right to do business after the stock or cash plan; and a corporation can exercise no powers not expressly granted, or that are not necessary to carry into effect those that are granted.

See authorities cited under point 3, *post*.

And moreover, that statute expressly prohibited the commencing business on the stock plan, without $50,000 of cash capital.

2. The company being organized under the general act as a mutual company, and with a capital made up of premium notes by direction of the statute, the legislature, by the term "mutual insurance," used in the act, must be deemed to have adopted the term as it had become known in the legislation of the state, and as expressed in the Jefferson & Madison County Mutual Insurance Company charters.

Laws of 1836, pp. 42 and 89.

In 1849, when a general act was to be passed, it had become a settled feature in the mutual insurance companies that a premium note instead of a cash premium was essential to the idea of a mutual company; and that interpretation of the word "mutual," was clearly indicated by the requirement, in mutual companies, of a capital made up of premium or deposit notes instead of a cash capital, which was required in companies organized on the plan of stock companies, and in life insurance.

Act of 1849, p. 441, §§ 5, 6.

An additional reason to infer the intent of the legislature is found in the prevalence of this premium note principle in the other states.

Angell, 424, § 418.

In Indiana, Connecticut, Maine, Massachusetts, Vermont, Illinois, New Hampshire, Pennsylvania, and many others, the legislatures, at the time of the act of 1849, had adopted the premium note system, as we claim it to be. I infer this from the decisions of their courts, without an actual examination of the acts in the several states.

It is some evidence of the necessity of having legislative authority for issuing policies for a definite sum paid in cash in lieu of a premium note that a special enactment has been resorted to for that purpose, instead of coming in under the 14th section of the general act, which would have given the power, if it were possible, under the provisions of that statute.

Session Laws of N. Y. 1849, pp. 436, 184; Session Laws of N. Y. 1850, p. 337; Session Laws of N. Y. 1852, pp. 27, 399, 65; 3 Ohio, N. S. 348.

4. Another and to our minds a conclusive objection to the exercise of this power of receiving a definite sum in lieu of a premium note (without an express legislative sanction) is, that it destroys the principle of mutuality, which is the leading characteristic of mutual companies formed under the act of 1849, and confounds the operation of a company "organized to do business on the mutual plan," with that of those companies which are organized on the plan of stock companies, and which are in their nature and principle antagonistic to the mutual companies.

To illustrate this idea, suppose that an individual desires to make an insurance in a mutual company. He makes his application and receives a policy for $1,000, and executes a premium note for $100, and pays in addition 5 per cent of that sum in cash. If the company is prudently and successfully managed this 5 per cent will pay expenses and all ordinary losses. But he is liable to pay, if any exigency like a disastrous fire renders it necessary upon a just assessment the whole of his $100 note to satisfy the losses of any of his associates who have also given their premium notes; and all who have given premium notes share in this contribution, which constitutes the principle of mutuality. Now, let us suppose that he applies to, and is insured in a stock company; he gets his policy for $1,000 and pays for it 1 per cent—$10. He is entitled to the same indemnity in case of a loss, as he was in the mutual company; but when he pays his premium, he ceases to have any further interest in the successful operation of the company; he is the insured, but not the insurer. In the mutual company, he was not only the insured, but he was also one of the insurers, and suffered a loss by the loss of any one of his fellow-members. By the device in question, the makers of the premium notes are turned into a stock company, and become insurers to stock policy holders to a ruinous amount, without any liability on their part to contribute to any loss whatever.

Rhinehart v. *All. Mut. Ins. Co.* 1 Pa. 359; Angell, p. 424; *Bangs* v. *Gray*, 12 N. Y. 477-479; 7 W. & S. 349, 351.

After saying "that any person insured is a member of the company," Gibson, Ch. J. says: "and on no other plan could a mutual company be constituted; the object of the members being to share each other's losses for the general weal, and not to bear the risk of losses for a premium"—which is quite significant, when we remember that the stock companies bear the risk of losses for a premium.

See, also, *Mut. Benefit Ins. Co.* v. *Jarvis*, 22 Conn. 133, 145.

5. There is another consideration which serves to show that this practice of receiving a a definite sum in lieu of a premium note, is wholly unwarranted by the spirit of the act of 1849. A company might, in the course of two or three years, entirely change the charter of a mutual insurance company into that of a stock company, without having at the outset a dollar of cash capital, and in defiance of the prohibition in the 7th section, by which the company was forbidden to commence, that is, to do any business as a stock company, without a stock capital. Such is the absurdity into which our opponents are driven by their own hypothesis.

II. There is no force in the pretense that the definite sum which is to be taken in lieu of a premium note is really an equivalent for a premium note. This pretense is deceptive and fraudulent and so transparently absurd as to deceive no one.

It can never be an equivalent for a premium note, unless the sum is as large as that expressed in the premium note.

The premium note was intended to be so large as to meet all possible contingencies, and no one was expected to have to pay the whole of it, if the company was conducted prudently. How, then, was it expected that individuals would pay in cash any such sum?

There can be no mistake in the case of this company, because the directors who framed the by-laws have stated the definite sum to mean the ordinary stock rates in the fundamental laws for the practical operation of the company.

III. Conceding that the receiving a definite sum in lieu of a premium note was a practice not authorized by the statute of 1849, and in violation of its provisions, the insertion of such a power in the charter would not legalize such practice, especially as those who dealt with the company on the plan of stock insurance, had legal notice of the powers of the Mutual Company.

1. The act of 1849 is a public act of which all must take notice; and the act requires a copy of the charter to be filed in the office of the secretary of state and county of Montgomery, which is sufficient notice.

Dutchess Cotton Manuf. v. *Davis*, 14 Johns. 238, 245.

The name and by-laws of the company indicate that it was a mutual insurance company.

All who deal with a corporation are bound to know the powers of the corporation with which they deal or connect themselves.

4 McLean, 8; *Root* v. *Godard*, 3 McLean, 102, 276; *Mumma* v. *Potomac Co.* 8 Pet. 287.

Though not a technical estoppel, it is nevertheless notice.

2. The corporation was an artificial person with limited powers embracing only those expressed and such as are necessary to carry into effect the express powers.

1 R. S. of N. Y. 599, 600, §§ 1, 2, and 3; 2 Kent, 279, 299.

Their powers are to be strictly construed.

Ang. & Ames, Corp. 2d ed. 64-67, 192, 193, 200; Chit. Cont. 536, 539; *People* v. *Utica Ins. Co.* 15 Johns. 383; *Thomas* v. *Achilles*, 16 Barb. 494, 5; *N. Y. F. Ins. Co.* v. *Ely*, 2 Cow. 709, 699; *N. R. Ins. Co.* v. *Lawrence*, 3 Wend. 482; *Beatty* v. *M. Ins. Co.* 2 Johns. 109, 114; *L. & F. Ins. Co.* v. *M. F. Ins. Co.* 7 Wend. 31, 34; *Safford* v. *Wycoff*, 1 Hill, 11; 2 Hill, 249; Eng. L. & Eq. 7, 505; 16 Eng. L. & Eq. 180; 30 Eng. L. & Eq. 120.

3. The corporation not only had no power to issue stock policies by the act, but the doing of these acts were expressly prohibited by § 7 of the act, and were void for that reason.

Tracy v. *Talmage*, 14 N. Y. 179, Selden, J.:

"It has long been settled that contracts founded on an illegal consideration," " or prohibited by some positive statute, are void." "That a contract by a corporation which it has no legal power to make, is void and cannot be enforced, it would seem difficult to deny."

Page 204, Comstock, to the same effect in the note.

Mr. **Henry R. Mygatt,** for defendant in error:

The leading questions presented are:

1st. Was the cash policy of insurance on which this action was brought, *ultra vires?*

2d. Are the premium notes of the company capital stock, and as such liable to pay *pro rata* the losses and liabilities of the company?

I. The issuing of policies by this company for a cash advance premium, was not unlawful. It was not the exercise of a power not granted or forbidden by the act of April 10, 1849, but it was the exercise of a lawful, and necessary, and proper act.

II. This question was distinctly presented by the decision of the court of appeals of New York in the case of *White, Receiver*, against *Haight*, which case was decided at the last December term, and the judgment in favor of the receiver affirmed, on the ground that the note in that action formed part of the original capital of $100,000, and was collectible without any allegation of losses and without an assessment. That case is reported in 16 N. Y. 310, but only the opinion of Denio, Ch. J., is reported. Opinions were written by two others of the then members of the court of appeals, and this question is debated by said two of the members, to wit: Mr. Justice Brown and Mr. Justice Shankland. The following extract from the opinion of Mr. Justice Brown is in point:

"The 1st section of the act of 1849 is sufficiently broad and comprehensive in its terms to authorize the existence of companies with power to make insurance, both upon the mutual and stock principle. The 21st section, which provides for uniting a cash capital to any extent, as additional security to the members over and above their premium and stock shares, certainly favors that construction. . . . . The 8th section of the company's charter contains an express provision, that any person applying to the company for insurance, may "pay a cash premium in addition to a premium note, or a definite sum in money to be fixed by the corporation in full for insurance and in lieu of a premium note." All the policies to which the defendant's answer takes exception were issued under this provision. When he became a member he was cognizant of its existence and must be deemed to have assented that the contracts should be made and the policies issued in conformity with it. In executing this

part of their trust the directors represented him, and did no more than he assented they should do. The moneys received by them upon this class of risks have been applied to the uses of the corporation in the payment of losses, chargeable *pro rata* upon the premium notes, his own amongst the number. To that extent his note has been exonerated and he has been benefited. Upon the plainest principles of justice, he should not be allowed to set up acts of which he was cognizant, and to which he gave his assent, and of which he has taken the benefit, in evasion and repudiation of his contract."

The following is an extract from the opinion of Mr. Justice Shankland:

"It is now urged against the validity of this 8th clause of the charter, that the taking of cash premiums, in lieu of premium notes, is not in accordance with the mutual principles on which this company was authorized to be organized, because it might happen that the makers of the premium notes may have to pay more than those who pay cash premiums. To this it may be justly answered that the act nowhere declares what is mutuality, nor does it either expressly or impliedly require that premium notes shall be given by persons insured after the organization of the company. . . . It certainly cannot be alleged as a want of mutuality, that some members of the company have paid their premiums in cash instead of giving a note. It is rather beneficial than otherwise, because by the rules of this company, the cash premium must be exhausted before the notes can be assessed; and the answer admits it was so in this case.

Perfect equality and mutuality between the members of this company is impossible, nor is it contemplated by the statute. The different localities in which insured property is situated, the mode in which fires are kept, and the care of the owners, varies the risks infinitely; yet this diversity of risk is called mutual insurance. It is so in fact; for what parties agree shall be considered mutuality, the law will adjudge so. . . .

But the defendant became a member of this company, with full knowledge of the charter and by-laws thereof. That charter gave him an election to be insured for cash or on a premium note. He chose the latter mode, as most likely to cost less in the end. If he mistook in this respect he should not be heard to say there was not complete and perfect mutuality between the members of the company.

There have been several decisions in the supreme court of this state which concur in this construction of the statute; some of which are reported and none reported to the contrary that I am aware of.

21 Barb. S. C. 610.

In *Ohio Mut. Ins. Co.* v. *Marietta Woolen Fac.* 3 Ohio St. 348, the statute authorized the company to take cash premiums in lieu of premium notes, or to give premium notes, at the election of the insured; it was held that the company was nevertheless a mutual company, but that the cash premiums must be applied to losses occurring on policies concurrent in time with the note policies. So in 3d Gray, Mass. 210, it was held that a mutual insurance company, which took part cash for premiums and the balance in notes, could recover an assessment on the latter, although the proportion of cash received from the various members differed from each other, whereby inequality was produced, unless the defendant could show that he was injured thereby.

These authorities confirm the views I have above taken, that equality is not attainable, nor does its absence render these companies the less mutual insurance companies on that account.

It appears from said opinions, that said justices regarded the payment of an advance cash premium as the lawful and proper exercise of the powers granted by the statute and the charter, and as beneficial to the members; and that by the well known and continued course of business of the company, the policies issued therefor precluded the company from repudiating these contracts issued to those who parted with value upon the faith of, and in consideration of their interest in, the company.

2. This is not a mutual insurance company, with a stock branch engrafted on it. It is purely a mutual insurance company and as such has power to issue policies of insurance for a cash premium, or premium note, or both.

This company was formed under a general law, which was passed at the last session of the legislature, after an amendment of the charter of the Albany County Mutual Insurance Company. By its charter, like to the Albany Company, it expressly allows of the cash premium in the place of the premium note, or of both the cash premium and the premium note.

"The leading principle of mutual insurance companies is, that each person whose property is insured, becomes a corporator or a member of the company."

Angell, Fire and Life Insurance, 45 § 10; *Susquehanna Ins. Co.* v. *Perrine*, 7 W. & S. 348; *Liscom* v. *Boston Mut. Fire Ins. Co.* 9 Met. 205.

"A mutual insurance company, in its origin, was a body of persons each of whom was desirous of effecting an insurance, and he agreed with the rest of the members to contribute his premiums to a common fund, on the terms that he should be entitled to receive out of that fund."

Dodesdell, 22; Angell, Fire and Life Ins. 422, § 413.

"The whole body becomes reciprocally bound to make good the losses, and are literally mutual insurers." *Ib.*

Parsons says that there are "mutual companies in which everyone who is insured becomes, thereby, a member."

Pars. Merc. L. 489.

Reynolds, Life Assurance, p. 180, refers to the difficulty of collecting assessments on notes which are often of trifling amount, and are liable to be called on for frequent assessments; and then remarks: "to obviate these objections, another modification of the mutual system has been introduced by some companies, which is for the assured to pay the whole premium in cash."

"The giving of the premium note is not necessary to the consummation of the contract of insurance."

Blanchard v. *Waite*, 28 Me. 51.

This company was purely a mutual insurance company.

The case of *The Utica Insurance Co.* v. *Bristol*, decided at the general term in the 5th district of New York, in which case the opinion of the court is by Justices Allen and Pratt, was the case of a stock branch engrafted on a mutual insurance company.

Mutual insurance companies were formed in Ohio in 1844, with charters like the one in question.

In the *Ohio Mut. Ins. Co.* v. *Marietta Woolen Fac.* 3 Ohio St. 348, it was held that, in cases of losses on policies issued on cash premiums, the cash fund must be first exhausted to meet said losses, and then resort may be had to the premium notes.

In the case of *Tuckerman, Receiver*, v. *McLean*, in the superior court of New York, the defense in an action on a premium note was, that it was assessed to pay cash policy losses. By the court, Duer, Justice:

"This is clearly no defense. The company had the right by statute and their charter to receive cash premiums and issue policies on them, and the defendant's note has been greatly relieved by the practice. It was the best thing the company could do. These notes are the basis of the transactions of the company, and they must be paid when the cash is exhausted. The plaintiff is entitled to judgment."

This question was also decided at the general term of the supreme court of New York, in the 6th district, in the case of *White, Receiver*, v. *Haight*, 16 N. Y. 310, Justices Mason, Gray, and Balcom, concurring in the decision.

See, also, *Shaughnessy* v. *The Rensselaer Ins. Co.* 21 Barb. 610.

3. This company had power to issue policies of insurance for a cash premium.

The plaintiff in error's argument is that these cash policies engrafted a stock branch upon a mutual insurance company and that said cash policy should be repudiated as *ultra vires*.

Admit, for the argument, that the act of April 10, 1849, contains no express authority to the corporation to issue policies for a cash premium; it does not follow that the corporators are not answerable for losses arising from said policies in their corporate capacity. The company have received value for them in cash and it hardly comports with fair dealing that they should seek to exonerate themselves from a debt on this account, contracted by and through their accredited directors. It is not true that a corporation cannot bind the corporators beyond what is expressly authorized in the act of incorporation. There is power to make policies of insurance, and, if a series of such contracts based on a cash premium have been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted, unless it can be established that cash in hand is not as good as a premium note.

The court of appeals in New York says in *Conover* v. *The Mut. Ins. Co.* 1 N. Y. 292: "Incorporated companies whose business is necessarily conducted altogether by agents, should be required at their peril to see to it that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually, and as a part of their system of business, transcend those powers. How else are third persons to deal with them with any decree of safety?"

When a charter and act of incorporation and the statute are silent as to what contracts corporations may make as a general rule, it has power to make all such contracts as are necessary and usual in the course of business, as means to enable it to attain the object for which it was created.

Ang. & A. Corp. 2d Am. ed. 200, and cases.

The creation of a corporation for a specified purpose implies a power to use the necessary and usual means to effect that purpose; and though their charters were entirely silent on the subject, banks would necessarily be empowered to issue and discount promissory notes and bills of exchange, and insurance companies to make contracts of indemnity against losses by fire.

Ketchum v. *The City of Buffalo*, 21 Barb. 300; *Broughton* v. *Manch. Waterworks Co.* 3 B. & Ald. 11, 12; *Yarborough* v. *Bank of England*, 16 East, 6; *Murray* v. *E. Ind. Co.* 5 B. & Ald. 204; *Edie* v. *E. Ind. Co.* 2 Burr. 1216.

Corporations are liable even for torts and trespasses, but their charter does not authorize them.

Beach v. *Fulton Bank*, 7 Cow. 485; *Life & Fire Ins. Co.* v. *Mech. Fire Ins. Co.* 7 Wend. 31.

The case of *Stoney* v. *The Am. Life Ins. Co.* 11 Paige, 635, decides that the negotiable security of a corporation, which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, although such security was, in fact, issued for a purpose and at a place not authorized by the charter of the company, and in violation of the laws of the state where it was actually issued.

When corporations "confine themselves to the purposes and objects of their incorporation, they should not be deemed as transcending their authority, but should be regarded as acting within the scope of those implied incidental powers necessary to the full and advantageous development of those which are expressly given."

Mead v. *Keeler*, 24 Barb. 24; see, also, *Wright* v. *Scott*, in House of Lords, 24 Eng. L. & Eq.; *McIntyre* v. *Preston*, 5 Gilm. 48.

When by its charter a company is prohibited insuring on property to an amount exceeding two thirds of its value, yet if the company voluntarily insure to a greater amount without any fraud on the part of the insured, the policy is not thereby void. 31 Maine, 220.

By the 21st section of the act, the company may "unite a cash capital to any extent as an additional security for the members, over and above their premium and stock notes."

This word "premiums," as here used, establishes the right of this company to receive advance premiums for policies. The certificate of the comptroller is "that the company are in possession of the capital, premiums, or

engagements of insurance," as the case may be.

In *Hone et al. Receivers*, v. *Allen and Paxson*, reported in the note to *Brouwer* v. *Appleby*, 1 Sandf. S. C. 185, Jones, Ch. J., says: "The company purports to be a mutual insurance. Originally mutual insurance was, where all the insurers agreed to apportion all the losses among themselves ratably." The learned Chief Justice says further: "The system underwent various modifications. Notes were dispensed with, to rely on premiums only, or on insurances agreed for as soon as the company was ready to make them. In this respect the parties were left much to fix their own standard."

Art. 10 expressly allows this premium to be paid in a definite sum in money, in full for said insurance, and in lieu of a premium note.

The act incorporating the Schoharie Mutual Insurance Company allowed the making of contracts of insurance "for such term or terms of time and for such premium or consideration as may be agreed on."

Session Laws of New York, 1831, p. 280, § 2; see, also, Session Laws of New York, 1832, p. 129, § 2; Session Laws of New York, 1834, p. 182, § 2; Session Laws of New York, 1836, p. 315; Session Laws of New York, 1848, p. 66.

The real question here is whether this company, by its agent and the consent of its corporators, could carry on its business in any given mode, and act contrary to the general course of business of such corporation, so long as it proved profitable to the company, and when a disaster occurs, be allowed to shield themselves from liability by a resort to a more than literal construction of their charter powers, which they themselves had extended by a liberal construction of its terms.

It would seem that there could be but one answer; and such is the uniform current of the more recent decisions upon the subject.

Curtis v. *Leavitt*, 15 N. Y. 9, and authorities there cited; *E. Co. R. Co.* v. *Hawkes*, 35 Eng. L. & Eq. 8, and authorities there cited.

11. The premium notes of this company constitute its capital stock, and as such are liable to pay all the losses and liabilities thereof.

Brown v. *Crooke*, 4 N. Y. 51; *Van Buren* v. *Chenango Co. Mut. Ins. Co.* 12 Barb. 676.

It has been decided in Pennsylvania that the deposit or premium notes of a mutual insurance company are part of its capital.

Rhinehart v. *Allegheny Co. Mut. Ins. Co.* 1 Pa. 359, and the court of appeals of New York, in *Hyde* v. *Lynde*, 4 N. Y. 391, by Bronson, Ch. J.: "I agree with the supreme court, that the deposit or premium notes are to be regarded as capital, for the security of those who may deal with the company."

As these premium notes are a security for all who may deal with these companies, and as this company, as appears by the pleadings, has issued more policies for a cash advance premium than for premium notes, and has received $43,000 for said cash policies, and expended the same in payment of the general liabilities of said company, common justice and mutuality would seem to require that said premium notes be applied equally to pay all the just creditors of this company.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the northern district of New York.

The suit was brought against the defendants on a policy of insurance against fire, in the sum of $2,500, upon a paper mill, machinery, and stock of one R. K. Kounsler, of the state of Virginia, the property situate in that state. The defendants are incorporated under the laws of the state of New York, and the place of business at the village of Fort Plain, an interior town of that state. The policy and all interest under the same have been duly assigned to the plaintiff.

There is no question in the case upon the loss, or upon the preliminary proofs; the defense being placed exclusively upon a defect of authority in the defendants to issue the policy. The act of the legislature of New York, passed April 10, 1849, under which they were incorporated, provided, § 1, that any number of persons, not less than thirteen, might associate and form an incorporated company, among other things, to make insurance on dwellings, houses, [*61 etc., against loss or damage by fire; § 3, that these persons should file in the office of the secretary of the state a declaration, signed by them, expressing their intention to form a company for transacting the business of insurance, which declaration should comprise a copy of the charter proposed to be adopted by them, and requiring notice of their intention to be published in a newspaper a given number of weeks. Section 4 provides for opening books of subscription to the capital stock, and that in case the business of the company was to be conducted on the plan of mutual insurance, then to open books to receive propositions and enter into agreements in the manner afterwards specified; which in substance is, that the company shall not commence business until agreements shall have been entered into for insurance, the premiums on which shall amount to $100,000, and notes have been received in advance for the premiums on such risks, payable at the end of or within twelve months from date, which notes shall be considered a part of the capital stock, and shall be deemed valid, negotiable, and collectable, for the purpose of paying losses or otherwise. Section 11, that the charter of the company should be examined by the attorney general of the state, and if found in accordance with the requirements of the act, and not inconsistent with the Constitution or laws of the state, he should certify the same to the comptroller of the state; and thereupon the comptroller should institute an examination to ascertain if the company had received and had in its actual possession, the capital premiums, etc., to the full extent required by the act; and upon a certificate to this effect by the comptroller, filed in the office of the secretary of state, this officer should furnish the company with a certified copy of the charter and certificates, which, upon being filed in the office of the clerk of the county in which the company is located, shall be its authority to commence business and issue policies.

By § 10 it is made the duty of the corporators to declare in the charter the mode and manner in which the corporate powers conferred by the

general act are to be exercised; and by § 12 the corporators, trustees, or directors, as the case 32*] *may be, shall have power to make such by-laws, not inconsistent with the Constitution or laws of the state, as may be deemed necessary for the government of its officers and the conduct of its affairs.

By the 5th section of the charter formed under this general act, it is provided that the rights, powers, etc., conferred by law on the company, shall be vested in and exercised by a board of directors, to consist of thirteen persons, to be elected by persons holding the policies of insurance in the company or their proxies, and one vote shall be allowed on every one hundred dollars insured. The 8th section of the charter provides that the rates of insurance shall be fixed and regulated by the company; and premium notes therefor shall be received from the insured, and shall be paid at such time or times and in such sum or sums as the company shall from time to time require; and any person applying for insurance, so electing, may pay a cash premium, in addition to a premium note, or a definite sum in money, to be fixed by the company, in full of said insurance and in lieu of a premium note.

The policy in question was issued on the payment of a cash premium, under this 8th section of the charter, the insured paying a gross sum of $56.25 for the insurance of his paper mill and stock to the amount of $2,500 for one year.

The ground taken in the defense is that, according to the general act under which the defendants were organized, they were empowered to make contracts and issue policies of insurance to such persons only as became members of the company by giving premium notes; and that the 8th section of the charter, providing for the payment of the premium in cash, was without authority, and the policy, therefore, void.

It is stated in the plea upon which the question in the case is raised, that from the time the company began business (August, 1850) till June. 1853, when it became insolvent, over two thousand policies were issued, founded upon premium notes, and over two thousand five hundred founded upon cash premimus; and that the amount of $43,000 was received by the company for policies issued upon cash premiums.

63*] *The general act, conferring the power upon companies organized under it to make contracts of insurance against fire, and issue policies, provides for a certain amount of capital ($100,000), secured by premium notes upon engagements of insurance entered into by the companies, as a condition to the right of commencing the business of insurance. This capital, thus obtained, is essential to a complete organization under the act; for, without it, the corporation is forbidden to enter upon the business of insurance.

These preliminary engagements and the giving of premium notes were designed as an immediate security to persons who, confiding in the responsibility of the company, should make application for insurance on its going into operation.

The notes thus constituting capital are to be made payable at or within a year from their date; they may be made payable, therefore, within the terms of the act, on demand, or at any short period; and they are made negotiable and collectable for the payment of any losses which may accrue in the business of insurance or otherwise. And it has been held in the court of appeals, in New York, that they are collectable by the company, irrespective of losses, or assessments to pay losses. 16 N. Y. 310; 2 Smith.

Now, although the general act provides for premium notes upon these preliminary engagements of insurance to be consummated on the organization of the company, and with a view to capital upon which to begin the business of insurance, there is no provision to be found in it prescribing the mode or manner in which premiums shall be paid or secured after the company has become organized and commenced operations. That seems to have been left to be regulated in the charter formed under the act.

The provision prescribing the giving of notes in advance for premiums, with a view to create capital, has no necessary relation to the subject of premiums to be received by the company after its organization, and in the course of conducting its ordinary business. The act had in view a different object in requiring the giving of these notes, and provided specially for their disposition and use with reference thereto. They *are made a part of the capital stock [*64 of the company, and negotiable and collectable for the payment of losses or otherwise, and, as we have seen, collectable as such capital, irrespective of loss or assessment for losses; and as they may be made payable on demand, or at a short day, are convertible into money, according to the decision in the court of appeals of New York, immediately on the company's becoming organized and ready for business.

Even if this provision could be regarded as bearing upon the subject of premiums after the organization of the company, it would furnish but feeble support to the argument against cash premiums, the difference being simply between cash and a note payable and collectable immediately. According to the act, and construction given to it in the case referred to, these notes have no necessary existence after the organization of the company. They may then be converted into money. They seem to have been made necessary under this system of insurance while the company was in the process of organization, by way of furnishing the incipient amount of capital required by the act.

It is argued, however, that the company in question is a mutual insurance company, as declared by the act; that, according to this system, the insured must be a member of it, and that a person insured upon a cash premium, without any further liability, cannot be a member. This argument is not well founded, either upon principle or authority. Admitting that the insured must be a member of the company, he is made so by the payment of the cash premium. The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property constitute a common fund, devoted to the payment of any losses that may occur. Now. the cash premium may as well represent the insured in

the common fund as the premium note; and this class of companies has been so long engaged in the business of insurance, it may well be that they can determine, with sufficient certainty for all practical purposes, the just difference in the rates of premium between cash and notes. These mutual companies, possessing the 65*] authority contained in the 8th section *of this charter, namely: to take cash premiums or premium notes, are, at the present day, in operation in several of the states, and it has never been supposed that the mutual principle has been thereby abrogated.

3 Ohio, 348, N. S.

It has also been argued, that inasmuch as the defendants have been organized upon the principle of a mutual insurance company, its business must be conducted, as it respects the premiums to be received, according to the plan of mutual companies previously chartered in the state of New York. If the previous companies were required by their charters to receive premium notes, and not cash, then this requirement distinguishes them from the one before us. If their charters contained no such provision, then they were left, like the present one, to regulate the mode of payment at discretion. Besides, mutual companies upon both plans had been chartered by the legislature of New York previous to the act of 1849, and hence no inference can be drawn, as it respects the charters of previous companies, from the unexpressed intent of the legislature in this act, if otherwise admissible.

The true answer, however, to this argument, we think, is that in the absence of any reference to previous charters by which the provisions of the same might have been incorporated in the present one, the court must look to the law itself for the purpose of expounding its provisions and ascertaining the intent of the legislature.

The general act prescribed the outlines of the system, and all the conditions and guards that were deemed essential to the security of persons applying for insurance, leaving the details and interior regulations to be arranged and determined by the company in their charter. Large powers were conferred, in general terms, as in the 10th section, "to declare in the charters" "the mode and manner in which the corporate powers given under and by virtue of this act are to be exercised;" and again, in the 12th section, the company "shall have power to make such by-laws" as may be deemed necessary for the government of its officers and the conduct of its affairs." And besides these general powers, inas- 66*] much as the company *is incorporated for the express purpose of insurance of property against fire, in the absence of any prescribed mode of payment of premiums, the power to prescribe it by the company is necessarily implied; otherwise, the object for which it was created would be defeated.

This question has been indirectly before several of the courts of New York, and in all of them, so far as any opinion has been expressed, as I understand, it has been in favor of the validity of these policies.

The practical construction of this act of 1849 by the public officers of the state, including the attorney general, who were required to supervise the preliminary steps made necessary to the organization of the company, and to certify that it had conformed to the provisions of the act, and the latter officers especially, that the charter was in accordance with it, is deserving of consideration. Under the construction thus given, numerous companies have been organized with charters like the present, providing for cash premiums, or premium notes, at the election of the insured, and an extensive business of insurance carried on in New York and several of the sister states; and, although this practical construction cannot be admitted as controlling, it is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt, or where the error is not plain.

The judgment of the court below is affirmed.

Mr. Justice **Daniel** dissents on the ground of a want of jurisdiction.

ROSS WINANS, *Plff. in Err.*, *v.* THE NEW YORK AND ERIE RAILROAD COMPANY.

(See S. C. 21 How. 88-103.)

Formal objection to deposition cannot be made at trial, when there is time, before trial, for motion to suppress or re-examine—experts, to what may be examined—not to prove construction of instruments—error, what is not, in refusing construction or evidence.

The refusal of the court to reject a deposition because the witness had not annexed to it a copy of a former deposition, which, in answer to a previous interrogatory, he admitted he had seen and had used to refresh his memory, is right.

Such an objection cannot be made on the trial, when the party had full time and opportunity before trial, to move for a suppression of the deposition or a re-examination of the witness.

Experts may be examined to explain terms of art, and the state of the art, at any given time, and may explain to the court the machines, models, or drawings exhibited.

But professors or mechanics cannot be received to prove to the court or jury what is the proper or legal construction of any instrument of writing.

A judge may obtain information from them, if he desire it, but cannot be compelled to receive their opinion as matter of evidence.

Where the court has given a correct construction to the patent, there was no error in refusing to give a different one, or in refusing to admit testimony which, under this construction, was wholly irrelevant to the issue on which the jury were about to pass.

Argued Dec. 20, 1858. Decided Jan. 10, 1859.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

The suit below was an action at law brought by Winans against the company for the infringement of letters patent. The patent was

NOTE.—*Depositions in United States courts, defects and irregularities in, how taken advantage of, and how waived.*

The general rule is that a deposition not taken according to the rules of law must be excluded if objection is made, unless there is waiver of the objection or consent to the mode in which they are taken. Evans v. Eaton, 20 U. S. (7 Wheat.) 356, 426; aff'g 3 Wash. 443.

granted said Winans on Oct. 1, 1834, for an "improvement in the construction of cars or carriages intended to run upon railroads."

The defendants pleaded the general issue, and gave notice of special matters of defense.

Upon the trial there was a verdict for the defendants, and the plaintiff made a bill of exceptions.

The first exception arose as follows:

In the course of the trial, the defendants offered to read in evidence the deposition of one Conduce Gatch, taken under a commission. The deposition consisted of 106 direct interrogatories and 103 cross interrogatories, and of the answers of the said Gatch thereto, and of three additional direct interrogatories, and the answers thereto.

The 100th cross-interrogatory and the answer thereto, referred to a copy of answers of said Gatch in the case of *Winans* v. *The N. Y. & Harlem R. Co.*

This copy "was not, nor was any copy of such copy, annexed to said deposition, nor were there any answers by Gatch to any part of the 102d cross-interrogatory, other than the said answer to the 100th cross-interrogatory."

The plaintiff's attorneys objected to the reading in evidence of the whole of said deposition, on the ground that Gatch was called by said 102d cross-interrogatory to annex to his said deposition a correct copy of the copy of the answers of said Gatch in the case of *Winans* v. *The N. Y. & Harlem R. Co.* and that Gatch had failed so to do. The court, thereupon, overruled said objection.

The substance of the other numerous exceptions, with a further statement of the case, appears in the opinion of the court.

Messrs. **Charles M. Keller, and Samuel Blatchford,** for the plaintiffs in error:

As to the first exception, the rule of evidence which excludes depositions under such circumstances, is well settled by authority.

Richardson v. *Golden*, 3 Wash. C. C. 109; *Dodge* v. *Israel*, 4 Wash. C. C. 323; *Kimball* v. *Davis*, 19 Wend. 437; *Brown* v. *Kimball*, 25 Wend. 259, 265; *Smith* v. *Griffith*, 3 Hill, 338.

As to the exceptions which relate to the offers to prove, made on the part of the plaintiff and overruled by the court below; these offers relate to expert testimony on the facts presented and proved by the plaintiffs' letters patent, which were in evidence as the foundation of the action; the said expert testimony being essential to enable the court to construe as matter of law the claim in the patent, and to enable the jury to ascertain as matter of fact the principle or mode of operation of the invention patented, and to determine the novelty thereof, as well as the infringement of the patent by the defendants. This testimony was admissible:

1st. As addressed to the court, with a view to the correct construction of the claim in the patent.

Winans v. *Denmead*, 15 How. 330, 340; Curt. Pat. §§ 123, 395; *Washburn* v. *Gould*, 3 Story, 122; *Neilson* v. *Harford*, Webst. Pat. Cas. 370; *Silsby* v. *Foote*, 14 How. 218, 226.

2d. Testimony was admissible as addressed to the jury as matter of fact. The claim is to be liberally construed, to give effect to the patent and to secure the invention actually made and described, if the language of the specification would admit of it.

Winans v. *Denmead*, and cases cited, 15 How. 330, 341.

And it was susceptible of proof, that the invention described in the plaintiff's patent was substantially different, and had a different mode of operation from a car of prior date. No construction of the claim of the patent can be sound in judgment of law, which includes in its scope, both the patent and the prior car.

The party who procured the deposition to be taken may object to any ommission or irregularity of the commissioner. Gilpins v. Consequa, Pet. C. C. 85; S. C. 3 Wash. 184.

But a party may not object to his own omission or irregularity, as his failure to give other party notice. Yeaton v. Fry, 9 U. S. (5 Cranch), 335.

All objections to the form of taking the depositions are required by rule to be indorsed on them before the cause is called. Jasper v. Porter, 2 McLean, 579; Brooks v. Jenkins, 3 McLean, 432, 439.

An objection to form cannot be taken for the first time on appeal. The Samuel, 14 U. S. (1 Wheat.) 9.

Where a motion is made to suppress deposition and denied at one term, and subsequently it is read as evidence on the trial without objection, it can not be objected to on writ of error to Supreme Court. Brown v. Tarkington, 70 U. S. (3 Wall.) 377.

Consent that a deposition may be read extends to incompetent as well as competent evidence. Harris v. Wall, 48 U. S. (7 How.) 693, 705.

Deposition read without objection cannot be afterwards excluded. Evans v. Hattich, 20 U. S. (7 Wheat.) 753; aff'g 3 Wash. 408.

Waiver of all objections to taking a deposition *debene esse* extends only to character in which deposition was taken. The Thomas & Henry v. United States, 1 Brock. Marsh. 367, 363.

Depositions read on a former trial by consent. Held, that upon a second trial ordered on appeal, the consent not being limited, plaintiff was entitled to read them. Vattier v. Hinde, 22 U. S. (7 Pet.) 252; aff'g 1 McLean, 110; Edmondson v. Barrell, 2 Cranch, C. C. 228, 232.

Where both parties appear and examine and cross-examine on taking deposition, party at whose instance it was taken cannot object, on account of any informality or irregularity in its taking, to its being read by the opposite party. Andrews v. Graves, 1 Dill. 108.

Objection to competency of witness, if known, is waived by attending examination: otherwise, if unknown, it may then be taken when deposition is offered. United States v. Hair Pencils, 1 Paine, 400.

Objection to regularity of proceedings is not waived by attendance on the examination of attorney of opposite party on notice, where he refuses to take part in it. Harris v. Wall, 48 U. S. (7 How.) 693.

Opposite party cannot, on trial, object to irregularities in form where he appeared on taking the depositions *de bene esse*, and without objection took part in the examination, and more than a year had elapsed. Shutte v. Thompson, 82 U. S. (15 Wall.) 151.

Depositions *de bene esse* under Judiciary Act of 1789 must be suppressed when it does not appear affirmatively that witness resides over 100 miles from place of trial. Dunkle v. Worcester, 5 Biss. 102. But see act of May 9, 1872.

When depositions have been filed three years, motion to suppress for irregularity is too late. Bank of Danville v. Travers, 4 Biss. 50.

Objections to defects and irregularities which might have been obviated by retaking the deposition must be noticed when the deposition is being taken or raised by motion to suppress before trial. Doane v. Glenn, 88 U. S. (21 Wall.) 33; Claxton v. Adams, 1 McArthur, 496.

Motion to suppress brings up regularity of order for and competency of witnesses if not previously waived. Eslava v. Mazange, 1 Woods, 623.

Conclusiveness of testimony of experts—see note, 42 L. R. A. 753.

Messrs. **J. C. Bancroft Davis** and **William White,** for the defendants in error:

As to the 1st exception:

1st. The exception assumes that the paper was asked for by the 102d cross-interrogatory, whereas an examination of the interrogatory itself shows that it was not asked for.

2d. The objection was not taken in time. It could have been properly raised only before the commencement of the trial.

Rules of the circuit court for the northern district of New York; Rule 6, Conkling's Treatise, p. 814; Rules of the district court for the northern district of New York; Conkling's Treatise, rule 43, 825; rule 44, 825; rule 83, 835; Rev. Stat. N. Y. part 3, ch. 7, tit. 3, art. 2, § 23, 4th ed. vol. II. p. 640; *Com. Bank of Penn.* v. *Union Bank of N. Y.* 19 Barb. 401; 11 N. Y. 210; *Union Bank of Sandusky* v. *Torrey,* 5 Duer, 628; 22 Barb. 27, 28.

The counsel have waived the objection.

Brown v. *Kimball,* 25 Wend. 259.

The evidence asked for is not material.

Smith v. *Griffith,* 3 Hill. 383.

It was a copy of a copy, and could not have been used.

Burton v. *Plummer,* 2 A. & E. 341; 1 Greenl. Ev. § 437.

The witness having testified, from his own recollection, to all the facts contained in his answer, the plaintiff had no right to have it in court.

Morse v. *Cloyes,* 11 Barb. 108, 1 Greenl. Ev. § 437; cases already cited.

The evidence also shows that the copy was not within the witness' control.

Mr. Justice **Grier** delivered the opinion of the court:

The patent, which the defendants are charged to have infringed, purports to be "for a new and useful improvement in the construction of cars or carriages intended to travel upon railroads."

The specification commences with an enumeration of the difficulties attending short curves in railroads from friction, and the consequent necessity of placing the wheels, where four only are used, near together. But in high velocities the shocks from obstructions or inequalities on the rails are thus greatly increased; so that a compromise is usually made between the evils consequent on too great a separation and too near approach, wherein the advantage of one is necessarily sacrificed for the sake of the other. The incessant vibration felt in traveling on railroad cars is mainly imputed to the minute obstructions which unavoidably exist, and the approximation of the wheels necessary to avoid friction tends to increase the effect of this motion, and its power to derange the machinery of the road.

The important object which the plaintiff's invention seeks to obtain, as regards comfort, safety, and economy, "is to devise a mode of combining the advantages derived from placing the axles at a considerable distance, with those of allowing them to be situated near each other."

The specification then states the methods heretofore used to remedy these difficulties; such as making the track wheels conical, which, in case of slow traveling, has been found an effectual correction. But in high velocities it caused a serpentine motion, not only on curves, but where the track was straight. To avoid this effect, an additional motive is furnished for placing the axles at a considerable distance apart.

For this purpose the patentee proposes to construct two bearing carriages, each with four wheels, to sustain the body of the cars, one at or near each end thereof; the two wheels on either side of these carriages to be placed very near each other. These wheels may be connected by a strong spring, double the *usual [*99 strength employed for ordinary cars. The use of this spring, though preferable, is not absolutely required, as the end in view may be obtained by constructing the bearing carriages in any of the modes usually practised, provided the fore and hind wheels of each of the carriages be placed near together; because the closeness of the fore and hind wheels of each bearing carriage, coupled remotely from each other, is considered as the most important feature of the invention.

On each of these carriages a bolster is placed, on which the car body rests, connected with each by a center pin or bolt passing down through them, thus allowing them to swivel or turn upon each other.

After this description of the improvement contemplated, and the objects to be gained by it (of which we have given a brief summary), the specification concludes with the following disclaimer and statement of what the patentee claims to have invented:

"I do not claim as my invention the running of cars or carriages upon eight wheels, this having been previously done; not, however, in the manner or for the purposes herein described, but merely with a view of distributing the weight carried more evenly upon a rail or other road, and for objects distinct in character from those which I have had in view, as hereinbefore set forth. Nor have the wheels, when thus increased in number, been so arranged and connected with each other, either by design or accident, as to accomplish this purpose. What I claim, therefore, as my invention, and for which I ask a patent, is the before described manner of arranging and connecting the eight wheels, which constitute the two bearing carriages, with a railroad car, so as to accomplish the end proposed by the means set forth, or by any others which are analogous and dependent upon the same principles."

The defense set up in the pleadings does not deny that defendants use cars constructed as described in the patent, but takes issue on the originality of the invention, averring, among numerous other matters, that the same, or substantially the same, improvement had been previously made and used on the Quincy Railroad, near Boston.

*The first bill of exceptions taken on [*100 the trial is to the refusal of the court to reject a deposition taken on interrogatories, because the witness had not annexed to it a copy of a former deposition, which, in answer to a previous interrogatory, he admitted he had seen and had used to refresh his memory.

There are two sufficient reasons why this exception cannot be sustained. 1st. By the rules of practice in force in the circuit court, such an objection cannot be made on the trial of an-

other cause, when the party, as in this case, had full time and opportunity to move for a suppression of a deposition or a re-examination of the witness.

And second, the paper was not in the power of the witness, but in that of the commissioner, or the plaintiff himself, who might have used it if he thought proper.

After the parties had each given evidence tending to prove the issues between them, and the defendants had closed their testimony, the plaintiff's counsel made nine distinct offers of proof, which were severally overruled as irrelevant, and exceptions taken.

They then proposed eight several instructions, which they requested the court to give to the jury, and took exceptions to the court's refusal. Besides all this, the charge was parceled out into fourteen paragraphs, and an exception taken to each.

To state each one of these thirty-one propositions at length, and discuss them severally, would be a tedious as well as an unprofitable labor.

There was in fact but one question to be decided by the court, *viz.*, the construction of the patent; the question of novelty being the fact to be passed on by the jury.

The testimony of experts which was rejected had no relevancy to the facts on which the jury were to pass. but seemed rather to be intended to instruct the court on some mechanical facts or principles on which the court needed no instruction, or to teach them what was the true construction of the patent.

Experts may be examined to explain terms of art, and the state of the art, at any given time.

They may explain to the court and jury the machines, models, or drawings exhibited. 101*] *They may point out the difference or identity of the mechanical devices involved in their construction. The maxim of "*cuique in sud arte credendum*" permits them to be examined to questions of art or science peculiar to their trade or profession; but professors or mechanics cannot be received to prove to the court or jury what is the proper or legal construction of any instrument of writing. A judge may obtain information from them, if he desire it, on matters which he does not clearly comprehend, but cannot be compelled to receive their opinions as matter of evidence. Experience has shown that opposite opinions of persons professing to be experts, may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinons, wasting the time and wearying the patience of both court and jury; and perplexing. instead of elucidating the questions involved in the issue.

If the construction given by the court to the specification be correct, and in fact the only construction of which it is capable, as we think it is, it would be wholly superfluous to examine experts to teach the court, what they could clearly perceive without such information, that the necessity for coned wheels to avoid friction on curves was a consequence of the fact that the wheels were fixed to the axle.

The improvement claimed by the patent being a device to remedy, among other things, the serpentine or wabbling motion of such wheels in high velocities, the testimony offered concerning them, if it would have any effect at all, would tend only to mislead both court and jury from the only issue in the case.

The following extracts from the charge will show that the judge has given the only construction which the language of this specification will admit, and one which had been previously given by Mr. Chief Justice Taney in 1839, and again by Mr. Justice Nelson:

"According to the import and true construction of the plaintiff's patent and specification, he claims to be the first inventor of 'a new and useful improvement in the construction of cars *and carriages intended to travel [*102 upon railroads,' which improvement consists in the manner of arranging and connecting the eight wheels, which constitute the two bearing carriages, with a railroad car, the object of which is to make such an adjustment of the wheels, axles, and bearings of the car, as shall enable a car with a comparatively long body to pass curves with greater facility and safety, and less friction, and as shall at the same time cause the body of the car to pursue a more smooth, even, direct and safe course, over the curvatures and irregularities, and over the straight parts of the road.

"The manner of such arrangement and connection is to place upon the upper bolsters of two bearing carriages, each having four wheels, with the flanches of each pair of wheels very near together, the body of the car, so as to rest its weight and have the bearing of the load upon the center or central portion of the bolsters, being also the center or central portion of the bearing carriages; the bolsters of the bearing carriages and car body, respectively, being connected by center pins or bolts, so as to allow them to swivel and turn upon each other, in the manner of the front bolster of a common road wagon, and the bolsters being placed at, near, or beyond the ends of the body.

"And the closeness of the fore and hind wheels of each of the two bearing carriages coupled as remotely from each other as may be desired, or can conveniently be done, for the support of one body, is a most important feature of the invention, with a view to the objects and on the principles set forth in the specification.

"The patentee does not claim to be the inventor of a car body (either for freight or for passengers) of a new or peculiar construction in size or form, nor of any single and wholly separate part of the entire car; but he claims, as his invention, the manner of arranging and connecting the eight wheels, which constitute the two bearing carriages, with a railroad car, in the mode and by the means described in his specification, for the ends before described, whether such railroad car is adapted to the transportation of freight or of passengers.

"The leading principle set forth in the specification, upon which the arrangement and connection act to effect the objects *aimed [*103 at, is, that by the contiguity of the fore and hind wheels of each bearing carriage, and the swiveling motion of the trucks or bearing carriages, the planes of the flanches of the wheels conform more nearly to the line of the rails, and the lat-

eral friction of the flanches on the rails, while entering, passing through, and leaving curves, is thereby diminished; while at the same time, in consequence of the two bearing carriages being arranged and connected with the body of a passenger or burden car, by means of the king bolts or center pins and bolsters, placed as remotely from each other as may be desired or can be conveniently done, and with the weight bearing upon the central portion of the bolsters and bearing carriages, the injurious effects of the shocks and concussions received from slight irregularities and imperfections of the track, and other minute disturbing causes, are greatly lessened."

The remarks of the court about the want of a disclaimer, where the patent claimed too much, though correct as a general statement of the law, could have little bearing on the present case, where the disclaimer, to be effectual, would include the whole invention claimed.

It is abundantly evident, therefore, that the court having given a correct construction to the patent, there could be no error in refusing to give a different one, or in refusing to admit testimony which, under this construction, was wholly irrelevant to the issue on which the jury were about to pass.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

Mr. Justice **Daniel** dissents on the ground of a want of jurisdiction.

DEAN RICHMOND, *Appt.*,
v.
THE CITY OF MILWAUKEE and Ferdinand Kuehn.

(See S. C. 21 How. 391-393.)

Value, how shown, to give jurisdiction—when to be shown—when too late—value in pleadings.

Where, as in ejectment or a suit for dower, the value does not appear in the pleadings or evidence, affidavits may be received to show that the value is large enough to give jurisdiction to this court.

A case will not be postponed or reinstated, in order to give the party time to produce affidavits of value.

They come too late, after the case has been heard and dismissed for want of jurisdiction.

Where the value is stated in the pleadings or proceedings of the court below, affidavits are never received to vary or enhance it, in order to give jurisdiction.

Argued Feb. 18, 1859. Decided Feb. 28, 1859.

APPEAL from the District Court of the United States for the District of Wisconsin.

On motion to reinstate and decide the case on the merits.

This case is stated by the court.

See also 62 U. S. (21 How.) 80.

Messrs. **R. H. Gillet** and **Brown & Ogden** for appellant.

Mr. **J. R. Doolittle** for appellees.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case was dismissed at a former day of the present term, because it did not appear that the value of the property in controversy exceeded $2,000. An affidavit has now been filed on the part of the appellant stating that the property was worth $2,500; and a motion made thereupon to reinstate the case, to which the counsel for the appellees consent.

There are cases—such, for example, as an ejectment, or a suit for dower—in which the value does not, according to the usual forms of proceeding, appear in the pleadings or evidence in the record. In such cases, affidavits of value have been received here, in order to show that the value is large enough to give jurisdiction to this court. That was the case in *Course* v. *Steadman*, referred to in the 13th rule of this court. The case is reported in 4 Dall. 22.

It was a proceeding to charge a tract with a lien created by a judgment; and, as the decree was against the respondent, it was necessary for her to show that the land was worth more than $2,000, in order to support the appeal. The case of *William* v. *Kincaid*, referred to in the above-mentioned case (4 Dall. 19), was an action for dower. But in both of these cases, the affidavits were filed before the argument on the merits; and in *Rush* v. *Parker*, 5 Cranch, 287, Mr. Justice Livingston expressed his opinion strongly against giving time to file affidavits of value, and the court refused to continue the case for *that purpose. And [*393 in the class of cases above mentioned, in which affidavits are received, there is no instance in which a case has been postponed or reinstated in order to give the party time to produce affidavits of value. Indeed, such a practice would be irregular and inconvenient, and might sometimes produce conflicting affidavits and bring on a controversy about value, occupying as much of the time of the court as the merits of the case.

And if this case were one of those in which affidavits could be received, they come too late after the case has been heard and dismissed for want of jurisdiction. But it is not a case of that description. The value of the lots about to be sold for corporation taxes was involved directly in the dispute. Their value is stated in the bill, and the amount of taxes imposed upon them, in order to show that the overcharge made by the corporation was unreasonable and oppressive; and their value is stated by the complainant to be "over $500"—the sum mentioned being only one fourth of the amount required to give jurisdiction to this court; and where the value is stated in the pleadings or proceedings of the court below, affidavits here have never been received to vary it or enhance it, in order to give jurisdiction. And the affidavit now offered could not have been received, even if filed before the argument of the case.

The motion to reinstate is, therefore, overruled.

NOTE.—*Jurisdiction of United States Supreme Court, dependent on amount. Interest cannot be added to give jurisdiction. How value of thing demanded may be shown. What cases reviewable without regard to sum in controversy.* See note to Gordon v. Ogden, 7 L. ed. U. S. 592.

THE PHILADELPHIA, WILMINGTON, & BALTIMORE RAILROAD COMPANY, *Plffs. in Err.*

v.

PHILIP QUIGLEY.

(See S. C. 21 How. 202-223.)

Corporations, liable for agent's acts in contractu or in delicto—communication by corporation to their constituents, privileged—but not when inserted in book for distribution—responsible for libel—publication, after suit commenced—general issue waives jurisdictional questions.

For acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances.

The communication by a corporation to their constituents, of the evidence collected by them as to the conduct of their officers and agents, and their conclusions upon the evidence, was a privileged communication, in the absence of any malice or bad faith.

But the privilege does not extend to the preservation of the report and evidence, in the permanent form of a book for distribution.

So far as the corporate body authorized the publication of the libel complained of in the form employed, they are responsible in damages.

Publication which took place after the commencement of the suit, cannot sustain a verdict.

The general issue raises an issue upon the merits of the complaint, and leaves the jurisdictional allegations without a traverse.

No question, involving the capacity of the parties in the cause to litigate in the circuit court, can be raised before the jury, under the general issue.

Argued Dec. 29, 1858. Decided Jan. 17, 1859.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action on the case brought in the court below, by the defendant in error, to recover damages for a libel alleged to have been published by the plaintiff in error.

The trial in the court below having resulted in a verdict and judgment in favor of the plaintiff for $5,000, with costs, the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Wm. Schley, C. Robinson,** and **Thos. Donaldson,** for plaintiff in error:

1. An action of libel cannot be sustained against the plaintiff in error. It is a railroad company, with defined and limited faculties and powers; and it can exercise no incidental powers, except such as are necessary to the full exercise of the faculties and powers expressly given by its charter. Being a mere legal entity, it is incapable of malice; and in the very definition of libel, malice is an essential element. The action should have been instituted against the natural persons, who published the alleged libel.

Queen v. *The Great North of Eng. R. Co.* 9 Q. B. 315; *Stevens* v. *Midland Co.'s R. Co.* 10 Exch. 352; *Commonwealth* v. *The Proprietors of New Bedford Bridge*, 2 Gray, 345; *State* v. *Great Work's Mill & Man. Co.* 20 Me. 41; *McLelland* v. *Bank of Cumberland*, 24 Me. 566; *Childs* v. *Bank of Missouri*, 17 Mo. 213; and for illustration, the cases of *Colman* v. *Eastern Counties R. Co.* 4 Railway C. 513; and *Salomans* v. *Laing*, 6 Railway C. 301, are referred to—showing that the corporation is not bound by acts of directors when such acts are *ultra vires*.

2. Even if the action of libel could be maintained against the plaintiff in error in a case of unlawful publication yet upon the proof in this case there was no such publication.

The communication by the president and directors to the stockholders, of the results of the investigation into the conduct of the company's officers, was a privileged communication; and even if it amounted to a publication, no action will lie, unless upon proof of express malice and the want of probable cause; and the burden of proving malice and the want of a probable cause was on the plaintiff below.

Shipley v. *Todhunter*, 7 C. & P. 680; *Somerville* v. *Hawkins*, 10 C. B. 583; *Taylor* v. *Hawkins*, 16 Q. B. 308; *Harris* v. *Thompson*, 13 C. B. 333; *Cockayne* v. *Hodgkinson*, 5 C. & P. 543; *Toogood* v. *Spring*, 1 Cromp. M. & R. 181; *Pedmore* v. *Lawrence*, 11 A. & E. 380 (39 Eng. C. L. 115); *Howard* v. *Thompson*, 21 Wend. 320; *Bradley* v. *Heath*, 12 Pick. 163; *Hopwood* v. *Thorn*, 8 M. G. & S. 315 (65 Eng. C. L. 291); *White* v. *Nichols*, 3 How. 266; *Cooke* v. *Wildes*, 30 L. & E. 284; *Vanwyck* v. *Guthrie*, 4 Duer, 268; *Vanderzee* v. *McGregor*, 12 Wend. 545; *Davison* v. *Duncan*, 40 L. & E. 219.

3. But there was no evidence of publication by the defendant of the matter complained of as libelous. The report of the president and directors to the stockholders of the company, communicating the results of the investigation, was no such publication; and the adoption of their report, and the consequent printing of the

NOTE.—*Privileged communications in libel and slander.* See note to White v. Nicholls, 11 L. ed. U. S. 501.

Libel and slander, actions for, by and against corporations.

An actions will lie against a corporation for libel. Aldrich v. Press Print. Co. 9 Minn. 133; Lawless v. Anglo-Egyptian Cotton Co. L. R. 4 Q. B. 262, 10 B. & S. 226; Maynard v. Fireman's Ins. Co. 34 Cal. 48; Latimer v. West Mom. News Co. 35 L. T. N. S. 44; Teuch v. Gt. West. R. Co. 33 Upper Can. Q. B. 8; rev'g 32 U. P. Can. Q. B. 2, 452.

A corporation may have a reputation which is equally as valuable to it as to a natural person, and may be injured in it in the same way. Trenton Ins. Co. v. Perrine, 3 Zab. 402.

A corporation aggregate may maintain an action for libel for words published of them concerning their trade or business, by which they have suffered special damage; and that, too, against a shareholder in the company. Met. Saloon Omnibus Co. v. Hawkins, 4 Hurl. N. 87.

Publishing of the plaintiff, an incorporated bank, that "it was liable at any time to be closed up by an injunction," is libelous without allegations of special damages. Shoe and Leather Bank v. Thompson, 18 Abb. Pr. 413.

Where chairman of a joint stock company was by statute authorized to sue for the company, it was held he might sue for a libel on the company though it was not a corporate body. Williams v. Beaumont, 10 Bing. 260, 3 M. & Sc. 705; Woodward v. Cotton, 1 C. M. & R. 44.

A corporation is capable of voluntary action, and hence may be the publisher of a libel. It is as possible for a corporation as for an individual to act maliciously. It may, therefore, cause the publication of a defamatory statement under such circumstances as would imply malice in law sufficient to support the action, and there may be such circumstances that express malice in fact may be proved. Whitfield v. South E. R. Co. 1 El. B. & E. 115; Aldrich v. Press Printing Co. 9 Minn. 133; Alexander v. N. East. R. Co. 34 L. J. N. S. 152, Q. B., 11 Jur. N. S. 619.

As to exemplary damages against a corporation. See Jefferson R. Co. v. Rogers, 28 Ind. 1; Ranger v. Gt. West. R. Co. 5 H. of L. Cas. 72.

testimony, and its authorized distribution among the stockholders, was no such publication.

Rex v. *Baillie*, 2 Esq. N. P. 91, cited in *Howard* v. *Thompson*, 21 Wend. 319.

4. There was no evidence of express malice on the part of the corporation, or on the part of the board of directors, or on the part of the stockholders. It is not a case in which vindictive damages could properly be given.

2. Greenl. §§ 253, 420; *Day* v. *Woodworth*, 13 How. 371.

5. The first instruction of the court below was erroneous in several particulars. It directed the jury that they might infer malice from the mere falsehood of any statement in the letter of Mahoney, respecting the plaintiff in his trade and occupation; and that the distribution of the printed book among any of the stockholders rendered the defendant liable in the action. The defendant, under this instruction, was not at liberty to claim a verdict, except upon proof of the truth of every statement in said letter; for the distribution of the book to some extent amongst the stockholders was not denied.

6. But the second instruction was even more exceptionable. It seemingly suggests to the jury the propriety of giving exemplary damages. The *quantum* of damages under this instruction was to be composed of two items; first, such amount as would render reparation to the plaintiff; and second, such amount as would act as an adequate punishment to the defendant; and in making up this blended amount the jury were told to give such damages as in their opinion were called for and justified, in view of all the circumstances of the case. The plaintiff sued in his character as a mechanic—for an alleged libel against him as a mechanic; and he complains of injury to his reputation, not as a man, but as a mechanic; and he claims special and not general damages. Now, there was certainly evidence, and strong evidence, to show that the plaintiff had not sustained any actual damage in his reputation, or in his business as a mechanic; and if so, the case was one not for vindictive, but nominal damages.

7. The circuit court, upon the proof adduced, had no jurisdiction in this case. The plaintiff and defendant were not citizens of different states.

The plaintiff sued as a citizen of Delaware. The defendant was described as "a body corporate in the state of Maryland, incorporated by a law of the general assembly of Maryland. But the proof showed that the defendant was also a body corporate in Delaware, incorporated by an act of the legislature of Delaware.

In the case of this company against Howard, 13 How. 307, this point did not arise, as the plaintiff in that case was a citizen of Illinois.

In the case of *Marshall* v. *The Balt. & O. R. Co.* 16 How. 314, no question was made below in relation to jurisdiction; and the proof did not present the precise question which arises in this case.

In *Rundle* v. *The Del. & Rar. Can. Co.* 14 How. 80-95, the facts were essentially different.

Nor was it necessary that this objection should have been made by plea in abatement. The cases of *Sheppard* v. *Graves*, 14 How. 510, and of *Jones* v. *League*, 18 How. 76, it is supposed, do not apply to a case like this. The objection does not present any question of disability of the plaintiff, or of privilege of the defendant.

Messrs. **Reverdy Johnson** and **Henry Winter Davis**, for defendant in error:

The defendant asked instructions.

1. That there was no right to a recovery, though the book were published by defendant; in other words, that libel will not lie against a corporation.

2. That if it would, this publication was a privileged communication.

3. That there could be no recovery unless express malice were found.

4. That there is no evidence of express malice.

The court refused those instructions and gave others to this effect:

1. If the jury find the publishing by defendants the falsehood of the libel, the report to the stockholders and acceptance by them, and the distribution among the stockholders or any of them after adjournment, the plaintiff can recover.

2. The damages are not what plaintiff has lost pecuniarily, but what beyond that the jury may think a fit reparation to plaintiff and punishment to defendant.

On the above case it will be insisted:

1. That a corporation may be liable for a libel.

P. & D. St. Co. v. *Hungerford*, 6 G. & J. 291; 7 G. & J. 44; *East Counties Railway* v. *Broom*, 2 Eng. L. & Eq. 406; 16 East, 8; Ang. & A. ch. 10, § 9; 14 Eng. C. L. 159; *Merrils* v. *Tariff Manuf. Co.* 10 Conn. 384; *Williams* v. *Beaumont*, 10 Bing. 260-270; *Goodspeed* v. *E. Haddam Bk.* 22 Conn. 530, 538; *Trenton M. L. I. Co.* v. *Perrine*, 3 Zab. 402.

2. That there is sufficient proof of the publication and printing by the corporation.

Clark v. *Corp. Washington*, 12 Wheat. 40; *Bank U. S.* v. *Dandridge*, 12 Wheat. 64; *Bank Columbia* v. *Patterson*, 7 Cranch, 299; *Union Bank* v. *Ridgeley*, 1 H. & G. 326.

3. That the publication was not in form or substance a privileged communication.

4. The measure of damages was rightly assigned by the court.

14 How. 468.

5. (*a*) The jurisdiction is sufficiently alleged.

(*b*) The question cannot now be raised on the record.

(*c*) If it could, the facts show jurisdiction as well as the averment.

Mr. Justice **Campbell** delivered the opinion of the court:

The plaintiff (Quigley), a citizen of Delaware, complained of the defendants, "a body corporate in the state of Maryland, by a law of the general assembly of Maryland," for the publication of a libel by them, in which his capacity and skill *as a mechanic and [*208 builder of depots, bridges, station houses, and other structures for railroad companies, had been falsely and maliciously disparaged and undervalued. The defendants pleaded the general issue. On the trial of the cause, it appeared that

in 1854, the president and directors, then in charge of the affairs of the defendants, instituted an inquiry into the administration and management of a person who had been superintendent of their railroad for ten years. Among other subjects the nature of his connection and dealings with the plaintiff, who had likewise been in the service of the corporation as "general foreman of all their carpenters," engaged the attention of the committee of investigation. The president of the company, who conducted this inquiry before this committee on behalf of the corporation, seems to have been convinced that the superintendent had exhibited partiality for the plaintiff, and had allowed him extravagant compensation for service, and the privilege of free transit over the road for himself, his workmen, and freight, to the detriment of the company, and in breach of his duty as superintendent. The superintendent defended himself against these and other imputations, and produced testimony to the skill and fidelity of the plaintiff while in the service of the company; also, to the value of his services, and to the effect that no unusual or improper favor had been extended to him.

The president of the company, in the course of the investigation, addressed a letter to an architect, who had some acquaintance with the plaintiff, to request his opinion of his skill as a mechanic, and whether the services of the plaintiff could have had any peculiar value to a railroad company. The reply of this architect was very pointed and depreciative of the plaintiff, affirming that "he was not entitled to rank as a third-rate workman," and "was unable to make the simplest geometrical calculations." All the testimony collected by the committee, as produced by the superintendent, was carefully reduced to writing, and printed; first, for the use of the president and directors, and afterwards was submitted to the company at their meeting on the 8th of January, 1855, with a report which exonerated in a great 209*] measure the superintendent *from any malpractice in consequence of his relations with the plaintiff. The investigation was searching, and testimony, which, with the report of the committee fills two printed volumes, was submitted to the company. The letter of the architect, in answer to the letter of the president, is printed in one of these volumes, and this publication is the libel complained of. Several of the directors testify they were not aware of the publication, and evidence was adduced that the plaintiff had declared that the investigation had resulted in increasing his business. A verdict was returned in favor of the plaintiff. The defendants are a company incorporated by the legislatures of Delaware and Pennsylvania, as well as of Maryland, to construct a railroad to connect the three cities which contribute to form its name, and a portion of their directors and stockholders are citizens of Delaware.

The defendants contend that they are not liable to be sued in this action; that theirs is a railroad corporation, with defined and limited faculties and powers, and having only such incidental authority as is necessary to the full exercise of the faculties and powers granted by their charter; that, being a mere legal entity, they are incapable of malice, and that malice is a necessary ingredient in a libel; that this action should have been instituted against the natural persons who were concerned in the publication of the libel. To support this argument, we should be required to concede that a corporate body could only act within the limits and according to the faculties determined by the act of incorporation, and therefore that no crime or offense can be imputed to it. That although illegal acts might be committed for the benefit or within the service of the corporation, and to accomplish objects for which it was created by the direction of their dominant body, that such acts, not being contemplated by the charter, must be referred to the rational and sensible agents who performed them, and the whole responsibility must be limited to those agents, and we should be forced, as a legitimate consequence, to conclude that no action *ex delicto* or indictment will lie against a corporation for any misfeasance. But this conclusion would be entirely inconsistent with the legislation and jurisprudence *of the [*210 states of the Union relative to these artificial persons. Legislation has encouraged their organization, as they concentrate and employ the intelligence, energy, and capital of society, for the development of enterprises of public utility. There is scarcely an object of general interest for which some association has not been formed, and there are institutions whose members are found in every part of the Union, who contribute their efforts to the common object. To enable impersonal beings—mere legal entities, which exist only in contemplation of the law--to perform corporal acts, or deal with personal agents, the principal of representation has been adopted as a part of their constitution. The powers of the corporation are placed in the hands of a governing body selected by the members, who manage its affairs, and who appoint the agents that exercise its faculties for the accomplishment of the object of its being. But these agents may infringe the rights of persons who are unconnected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principal of the exercise of corporate powers and faculties by legal representatives, is the recognition of the corporate responsibility for the acts of those representatives.

With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judical tribunals determined the legal relations which are established for the corporation by their governing body, and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety. *Trespass quare clausum fregit* was supported in 9 Serg. & R. 94; *Mound* v. *Monmouthshire Canal Co.* 4 Mann. & G. 452, Assault and

Battery; *Moore* v. *Fitchburg R. Co.* 4 Gray, Mass. 465; *East'n Co.'s R. Co.* v. *Broom*, 6 211*] Exch. 314. For damages by a *collision of rail cars and steamboats, *Phil. & Read. R. Co.* v. *Derby*, 14 How. 465; *N. Y. & Va. S. S. Co.* 19 How. 241. For a false representation, *Finnie* v. *Glasgow & S. W. R. Co.* 34 L. & Eq. R. 14; *Etting* v. *Bk. U. S.* 11 Wheat. 59.

The case of *The National Exchange Co. of Glasgow* v. *Drew*, 2 Mac. H. of L. Cas. 103, was that of a company in failing circumstances whose managers sought to appreciate its stock by a fraudulent representation to the company, and a publication of the report as adopted by it, that its affairs were prosperous. Two of its stockholders were induced to borrow money from the company to invest in its stock. The question in the cause was whether the company was responsible for the fraud. In the House of Lords, upon appeal, Lord St. Leonards said: "I have come to the conclusion, that if representations are made by a company fraudulently, for the purpose of enhancing the value of stock; and they induce a third person to purchase stock, those representations so made by them, bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company." . . . The report "becomes the act of the company by its adoption and sending it forth as a true representation of their affairs; and if that representation is made use of in dealing with third persons, for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those representations."

It would be difficult to furnish a reason for the liability of a corporation for a fraud, under such circumstances, that would not apply to sustain an action for the publication of a libel.

The defendants are a corporation, having a large capital distributed among several hundred of persons. Their railroad connects large cities, and passes through a fertile district. Their business brings them in competition with companies and individuals concerned in the business of transportation. They have a numerous body of officers, agents, and servants, for whose fidelity and skill they are responsible, and on whose care the success of their business depends. The stock of the company is a vendible security, and the community expects statements of its condition and management. There is no doubt that it was the duty of the president and direct- 212*] ors to *investigate the conduct of their officers and agents, and to report the result of that investigation to the stockholders, and that a publication of the evidence and report is within the scope of the powers of the corporation.

But the publication must be made under all the conditions and responsibilitiés that attach to individuals under such circumstances. The court of Queen's Bench, in *Whitfield* v. *South Eas. R. Co.* 96 Eng. C. L. (May, 1858) says: "If we yield to the authorities which say that, in an action for defamation, malice must be alleged, notwithstanding authorities to the contrary, this allegation may be proved by showing that the publication of the libel took place by order of the defendants, and was, therefore, wrongful, although the defendants had no ill will to the plaintiffs, and did not mean to injure them." And the court concluded: "That for what is done by the authority of a corporation aggregate, that a corporation ought as such to be liable, as well as the individuals who compose it."

The question arises, whether the publication is excused by the relations of the president and directors, as a committee from their board, to the corporation itself. It cannot be denied that the inquiries directed by those officers were within the scope of their power, and in the performance of a moral and legal duty, and that the communication to their constituents of the evidence collected by them, and their conclusions upon the evidence, was a privileged communication in the absence of any malice or bad faith. But the privilege of the officers of the corporation as individuals, or of the corporate body, does not extend to the preservation of the report and evidence in the permanent form of a book for distribution among the persons belonging to the corporation or the members of the community. It has never been decided that the proceedings of a public meeting, though it may have been convened by the authority of law, or of an association engaged in an enterprise of public utility, could be reported in a newspaper as a privileged publication. But a libel contained in such proceedings, if preserved in the form of a bound volume, might be attended with more mischief to private character than any publication in a newspaper of the same document. *The opinion of the [*213 court is, that in so far as the corporate body authorized the publication in the form employed, they are responsible in damages. The circuit court instructed the jury:

1. If the jury find, from the evidence in this case, that the defendants, by the president and directors of said company, published the letter from John T. Mahoney to S. M. Felton, president, etc., dated March 3, 1854, in the declaration mentioned, and that any or all of the statements in the said letter respecting the plaintiff in his trade and occupation are false; and shall further find that the said president and directors, at the annual meeting of the stockholders of said company, held 8th January, 1855, reported to the said stockholders their action in the premises, and that the proceedings of the committee of investigation (which contained the said letter) were then being printed, and, as soon as printed, would be distributed to the stockholders, and that said report was accepted by the stockholders; and if the jury shall further find, that, after the meeting of the stockholders had adjourned, the president and directors of said company distributed the book containing the said letter among the stockholders of this company, or any of them, then the jury may find for the plaintiff.

2. And if the jury find for the plaintiff under the first instruction, they are not restricted in giving damages to the actual positive injury sustained by the plaintiff, but may give such exemplary damages, if any, as in their opinion are called for and justified, in view of all the circumstaneces in this case, to render reparation to the plaintiff, and act as an adequate punishment to the defendant.

The first instruction is erroneous, because

the publication to which the court referred as blameworthy, and to authorize the jury to find a verdict against the defendant, took place after the commencement of this suit.

The second instruction contains the same error, and is objectionable for the additional reason that the rule of damages is not accurately stated to the jury.

In *Day* v. *Woodworth*, 13 How. S. C. 371, this court recognized the power of a jury in certain 214*] actions of tort to assess *against the tortfeasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations. Nothing of this kind can be imputed to these defendants.

The letter of Mahoney was reported to the company with other evidence that rendered it innocuous, and its statements were never adopted by them. The plaintiff has repeatedly affirmed that he had derived an advantage from the investigation by the company, and, upon reading all the evidence, as reported and published, we do not perceive how an impression unfavorable to him could have been made by it upon any candid mind. The circumstances under which the evidence was collected, and the publication made, repel the presumption of the existence of malice on the part of the corporation, and so the jury should have been instructed.

The averments in the declaration of the facts proper to give the circuit court jurisdiction over the parties are identical with those which were fully considered by this court, and received the sanction of two thirds of the judges in *Marshall* v. *The Baltimore and Ohio R. Co.* 16 How. 314. A repetition of the discussion that took place and was reported with that case is deemed to be unnecessary.

The only plea filed in this cause is the general issue. That plea raises an issue upon the merits of the complaint, and leaves the jurisdictional allegations without a traverse.

No question involving the capacity of the parties in the cause to litigate in the circuit court can be raised before the jury under such pleadings. *Conard* v. *Atlantic Insurance Co.* 1 Pet. 386; *Evans* v. *Gee*, 11 Pet. 80; *Wickliffe* v. *Owings*, 17 How. 47. The testimony that the states of Delaware and Pennsylvania had respectively granted a corporate character to the same corporators that form the corporation 215*] in Maryland, *for the extension of the railroad through those states, to connect the cities that appear in the name of the corporation, and the testimony that some of the directors of the several corporations reside in Delaware, in the condition of the pleadings, was immaterial and irrelevant.

For the errors we have noticed, the judgment of the Circuit Court is reversed, and the cause remanded.

PHILA., WILM. & B. R. CO. v. QUIGLEY.

Mr. Justice **Daniel:**

In the judgment of this court, so far as it directs a reversal of that of the circuit court, I fully concur. But, in my view, the decision has performed but half its proper office, by omitting to order a dismission of this case by the circuit court.

It is not designed here to repeat the arguments or the authorities so often and so unavailingly adduced, in opposition to the cognizance of the Federal court of controversies in which corporations are parties.

Some cursory recapitulation will, however, be attempted of previous decisions made here, as evincing the progress of relaxation and inconsistency from the first departure, from what, by me, at least, are deemed sound, legal, and constitutional principles, down to the remarkable instance exemplified in the case before us.

The first step in this progress was the decision that a corporation might be made a party in the Federal courts, by entirely destroying the existence of such a body; and by this process it was pretended that it was made capable of suing and being sued, and by imposing liabilities on private natural persons, who, by the very nature and character of the corporate body, and by the terms of its organization, possessed not one of its powers, and could exercise not one of its functions. *Vide* 5 Cranch, 61, *The Bank of the United States* v. *Deveaux*. Next, and in order to cover this glaring irregularity, it seemed necessary to transform a corporation into *quasi*, or into so much of a citizen as would authorize its pleading and being impleaded in the Federal courts, although the Constitution and the laws of the United States do not recognize nor make mention of any particular part or fraction of a citizen, *but [*216 confine the cognizance of the courts to controversies between citizens of different states, sustaining their full natural, political, and social relations. This was the object attempted in the case of *The Cincinnati Railroad Company* v. *Letson*, in the 2d of Howard, 497. It then became necessary to give to this citizen corporation a local habitation or residence, in order to fix his origin and position, on which it was, and is yet, perhaps, conceded, that his admission into the courts of the United States was dependent; and this court, to accomplish this purpose, seems to have settled upon one or the other of the following conclusions, or perhaps in part on both: that either the locality within which this citizen may be fabricated, or that within which his agents or factors (viz.: the president and directors) hold their place of business, determines his political position, his capacities and responsibilities, although it is palpable this latter conclusion abrogates completely the previous doctrine of this court, that the rights and powers of a corporation remain and adhere in the individuals interested in the company, and do not appertain regularly to the associated or organized body. From these anomalous conclusions have arisen the curious formula in pleading, by which access has been sought and permitted in the courts of the United States—as, for instance, a certain company, a body

corporate, created by some stated authority but without averring citizenship or residence on the part of that body, but leaving these to be implied by the court, sues or is sued. In the case under review, the party defendant below is averred to be the Philadelphia, Wilmington, & Baltimore Railroad Company, a body corporate in Maryland, incorporated by a law of Maryland. Here, then, is averred neither citizenship, nor an identity with, or an equivalent for citizenship, nor residence, nor commorancy anywhere, on the part of tne defendant. The corporate body is stated to be in Maryland, but whether in its organized constitution, or by the citizenship of its president and directors, or by its individual members, or whether in either character it is or is not of Maryland, is left for the court to supply; and this, too, in defiance of the unbroken chain of decisions from *Bingham* v. *Cabot*, 3 Dall. 382, down to *Sullivan* v. *Fulton S. B. Co.* 6 Wheat. p. 450, comprising 217*] twelve distinct cases *ruling, *in totidem verbis*, that under the 2d section of the 3d article of the Constitution, not only must the parties to suits in the Federal courts be citizens and inhabitants of different states, but that this character must be averred expressly, and must appear upon the record, and cannot be inferred from residence or locality, however unequivocally stated; and that the failure to make the required averment will be fatal to the jurisdiction of a Federal court, either original or appellate, and is not cured by the want of a plea or of a formal exception in any form, and that even the party who is guilty of the irregularity may avail himself of it upon appeal.

This case is marked by peculiarities, which, if they can, consistently with the rules of pleading and evidence, be regularly brought into view, will show more clearly than has hitherto been done, the effects of the anomalous proceedings above adverted to. It is ruled by all the cases, that where want of jurisdiction in the Federal courts is apparent on the face of the pleadings, the courts, original and appellate, are bound to take notice of this defect, and that there can be no requisition on parties to show it either by averment or proof. The establishment of this principle certainly dispenses with the necessity for proofs in such a case, for why undertake to establish by proof that which is admitted? Moreover, the character of the defect partakes more, perhaps, of matter of law than of fact. Hence it may be questionable, how far the introduction of any evidence, and still more of cumulative evidence, is or was admissible to show this admitted or patent defect, which it has been so often ruled that the court must take notice of without plea or demurrer. But we see by the record, that evidence, extensive and documentary, was introduced as to this point, and read without objection. And to what conclusions does this evidence, if admissible, inevitably lead? According to the decisions previously made here with respect to corporations—according, too, to the argument of counsel for the defendant in error—the Baltimore Railroad Company was created separately and exclusively by the state of Maryland, and its attributes of suing or being sued, and every other attribute or function, was imparted and perfected by that separate authority, which was *limited by the power of [*218 Maryland. So, too, the Philadelphia Railroad Company was separately and independently created by Pennsylvania; and, in like manner, and with like effect, the Delaware Railroad Company, by the state of Delaware. Neither of the states just mentioned had the power to create a citizen of another state, nor to create or invest any attribute or right of citizenship beyond its own jurisdiction. It follows, then, that the incorporation of these companies was in each a separate, independent, and distinct and complete act, operating only within the sphere of the legitimate authority that performed it, and any right or attribute of citizenship it could confer, would be imparted to its own subjects alone; it could not determine the polity of other communities, or the rights of their people. But, by some professional magic, these three separate creations, which, if invested with any of the qualities of citizenship, were necessarily circumscribed as to these by the authority of their respective states, are here converted into one. These three quasi citizens of different states are transformed into one. and, though threefold in form, less than one, and by this transformation are brought into tribunals where real citizens are not permitted to litigate without averring, and if denied, not without proving the truth and reality of their character in obedience to the command of the Constitution. In the present instance, this may subserve the convenience of the individual, but in another aspect the mischiefs incident to such a relaxation would be apparent and serious. It would be putting it in the power of separate corporations, deriving their origin from distinct sources by claiming a joint name or title, to select at will, for its purposes, a forum within that jurisdiction, within which either corporate body was created. The averments of citizenship and residence being dispensed with by this court, no check is left to such a combination and irregularity; and by this practice there is extended to artificial bodies, which are not, and cannot, from the nature of things, be citizens, privileges which belong by the Constitution to citizens only, and upon proof, if required, of the reality of their character as such.

It has just been remarked that the arguments against the *jurisdiction of the Federal [*219 courts over corporate bodies may be found in some of the opinions delivered in the case of *Marshall* v. *The Baltimore & Ohio Railroad Company*, and it is said that these arguments it is unnecessary to repeat, and it is seen that they have not been deemed of sufficient cogency to prevent a concurrence in proceedings and pretensions which those arguments were urged to condemn.

The relevancy or the justice of the above declaration I confess myself somewhat at a loss to comprehend. If it be intended by way of recantation, prompted by a conviction of the unsoundness of those arguments, and as a criticism upon those who are unable to chime in with the notes of such a *palinodia*, it would seem to me that a direct avowal of that conviction, and of the consequences to which it had led, would have been nothing more than justice to all. If, on the other hand, the soundness of those arguments is still regarded as a regular

deduction from constitutional principle, and from fealty to the Constitution, then a relinquishment of those arguments, or the failure to assert them on every occasion similar to that first calling them forth, however justifiable in the view of others, would in myself, by myself, be felt as a compromise of a sacred and solemn duty. The vindication of truth, whenever we shall be called on to speak or to act, can never, in my opinion, be properly shunned; I, therefore, am bound to reassert all which I have endeavored earnestly, however feebly, to maintain, and which I still believe.

I am further of the opinion, that apart from any question as to the peculiar jurisdiction of the Federal courts, this action could not be maintained in any forum possessing even general legal powers. It is to be borne in mind, that the proceedings in this case are not founded upon any express or peculiar right or authority vested by statute or other special and competent power, but are claimed as the legitimate consequences inherent in, and flowing from, the nature and constitution of corporations aggregate. By those who affirm this doctrine it is indispensable that they should show as inherent in, and consistent with, the constitution of such corporations, the attributes and qualities to which proceedings like the present are cal-
220* culated to apply, and with which they can, by any rational or logical comprehension, be made applicable. The metamorphosis which would transmute an aggregate corporation into a natural person, must necessarily transfuse into this new creation the capabilities and qualities of the being into which it is changed. Upon any other hypothesis, the fact of identity could not be. Natural persons are capable of the passions of love and hate; can contend in mortal combat by duel or otherwise; can go into the field in command of armies; can sit upon the bench of injustice, or in the legislative or executive departments of the government. According to this transmutation theory, all these qualities are imparted to its new Promethean experiment, who, of course, could he be only apprehended or laid hold of, might, like his prototype—or, more properly, his other self—be subjected for the misuse of those qualities to the extremest penalties of the law, the scaffold or the gallows. To my apprehension, this theory involves the confounding of all political, legal, moral, and social distinctions. By that apprehension, derived from the definitions of corporations aggregate, as given by Brooke, Coke, and Blackstone, and by the express language of this tribunal in the earlier cases decided by it, these bodies are regarded as merely artificial—a species of *fictiones juris*, created for particular objects, and vested certainly with no greater or higher attributes than the creator of those bodies has power to bestow. Man can have no power to confer mind, passion, or moral perception, nor moral powers, upon a mere fabrication of his own—a mere piece of parchment or paper. No *quo animo*, therefore, can be affirmed of a fiction to which no *animus*, or passion, or moral quality, can be imparted.

It has ever been admitted, that into slander or libel, malice essentially enters. Slander or libel is an injury inflicted with a wicked or malevolent motive. Reason and common sense would hence conclude, that where there could be motive of no kind whatsoever, there could be no malice, and therefore no offense of which malice is the essential, the leading, and distinguishing characteristic.

In several of the English cases it has been ruled, that trover *and trespass *quare* [*221 *clausum fregit* may be maintained against a corporation; and this, with respect to the latter action, is going a great way, as it is not very easy to explain in what mode a mere fiction or legal faculty can act *vi et armis;* yet a conceivable distinction may be taken between acts injurious in their effects and viewed as mere facts, and performed independently of or without motive, and for which the actor is bound to make reparation, and conduct, the character of which lies exclusively in the motive, and which, apart from such motive, can neither exist nor be conceived.

In conformity with these conclusions is the opinion of Aldersen, Baron, as late as the year 1854. *Vide, Stevens* v. *Midland Counties Railway Co.* 10 Exchequer Rep. 356.

But a precedent for the affirmation of such a legal, physical, and moral anomaly as an act to be characterized and appreciated by a quality which by no possibility can appertain to it, is relied upon in this case; and so far as that precedent is comprehended, it seems designed, at any rate, for an application like the one made of it in this cause. It is believed, however, to be a solitary precedent; and as the force of that precedent (owing, perhaps, to no fault in his Lordship's reasoning, but in those who are incapable of understanding his logic) is not very clearly apprehended; and as it most certainly contravenes the course of decision for centuries, the presumption of not yielding implicitly to the ruling of a Lord Chief Justice may perhaps be pardoned. This precedent is found in the case of *Whitfield et al.* v. *The Southeastern Railway Company*, just cited from the bench. That was an action for a libel, and the declaration was demurred to, for the reason that malice could not be affirmed of a corporation aggregate.

His Lordship says: "The demurrer to the declaration in this case can only be maintained on the ground that the action will not lie without proof of express malice, as contradistinguished from legal malice."

How is this expression of his Lordship to be understood? The averment of malice, and the application of that averment to the defendants, was a question arising upon the pleadings, and upon the character or capacity of the party complained of, *as disclosed upon the [*222 face of the declaration. Whether malice, either express or implied, could be imputed to the plaintiff, could have no influence *a priori;* if malice was alleged, it opened at once the only legitimate question arising upon the demurrer, *viz.*, could the defendants be guilty of malice? The character or the degree of malice was a question arising upon the proofs, and was the proper subject for the instructions from the judge. It would be difficult to find a precedent in pleading, wherein a distinct averment as to express or implied or legal malice was made.

His Lordship proceeds: "But if we yield to the authorities which say that in an action for defamation malice must be alleged, nothwithstanding authorities to the contrary." And

here, with a willingness always to be instructed, I would gladly learn what authorities those are to which reference is thus made; for within the sphere of my own inquiries going as far back as Owen, 51; Noy, 85; 1 Saunders, 242; 4 Bur. 2422; 3 Taunton, 246; and coming down to 8 Adolph. & Ell. 652; 1 M. & S. 639, it is held, without a dissentient, that the declaration must show a malicious intent in defendant; and although the word "maliciously" is not absolutely, necessarily requisite, yet words of equivalent import must be used; and it is said that the usual and better form of pleading is, falsely and maliciously. *Vide* 1 Rep. 273.

His Lordship further proceeds, or is made to say: "This allegation may be proved, by showing that the publication of the libel took place by order of the defendants, and was therefore wrongful, although the defendants had no ill will to the plaintiffs, and did not mean to injure them. Therefore, (note the conclusion), "the ground, on which it is contended that an action for a libel cannot be maintained against a corporation aggregate, fails." He who can connect this corollary with the premises surpasses any ingenuity of mine.

To return to his Lordship's argument:

"This allegation may be proved." What allegation, we ask? Why, the libel, a malicious publication, "by showing tnat it took place by order of the defendants although the defendants had no ill will to the plaintiffs, anu did not intend to injure them." Thus it is said to be 223*] the law, that a libel may exist *without an unfriendly intention; and with equal reason might it be alleged or imputed where the intention was amicable.

I give the concluding reasons ascribed to his Lordship for his decision. They are as follows:

"I may mention, that corporations aggregate are now so common, that I believe that a public journal is conducted by a corporation aggregate, limited. Therefore, it seems to us, that for what is done by the authority of a corporation aggregate, that a corporation aggregate ought, as such, to be liable as well, perhaps, as the individuals. Therefore, we think there ought to be judgment for the plaintiffs."

The connection between the number of aggregate corporations and their capacities or liabilities and the dependence in any degree of the one upon the other, I leave to those who have been favored with greater perspicacity than has been given to me. I am wholly unable to perceive them.

In fine, with due respect for others, and with becoming diffidence of myself, I am constrained to say, of the opinion in the case of *Whitfield* v. *The Southeastern Railway Company*, as it has been brought to the view of this court, that in its argument and conclusions it is confused and obscure; and is incongruous and contradictory, both in its reasoning and its conclusions. In the line of English adjudications it presents itself as solitary and eccentric, and in opposition to the most inveterate, the clearest, and reiterated distinctions announced by the sages of the law —distinctions having their foundation in reason and in the essential character of the subjects to which those distinctions have been applied. I cannot yield to that opinion my assent. I think, therefore, that for either of the objections before assigned there should be added to the reversal of the judgment of the circuit court an order for a dismission of the suit.

DANIEL H. LOWNSDALE *et al.*, *v.* JOSIAH L. PARRISH.

(See S. C. 21 How. 290-294.)

Appeals and writs of error from court of Oregon territory—jurisdiction, as to subject and amount.

By the act of Congress organizing Oregon territory it is provided (§ 9) that writs of error and appeals from final decisions of the supreme court of Oregon shall be allowed to the Supreme Court of the United States where the value of the property, or the amount in controversy, shall exceed $2,000, and also in cases where the Constitution of the United States, or an act of Congress, or a treaty of the United States, is brought in question.

Where the amount of damages does not appear from the bill, or otherwise, and it is difficult to see how either party to the suit could sustain damage, and neither the Constitution of the United States, nor an act of Congress, nor a treaty, was brought in question in the lower court; there is no jurisdiction in this court to examine and revise the decree of the supreme court of Oregon.

Argued Dec. 22, 1858. Decided Jan. 17, 1859.

APPEAL from the Supreme Court of the Territory of Oregon.

The case is fully stated by the court.

Messrs. **R. Johnson, R. Johnson, Jr., C. Cushing,** and **R. H. Gillet** for appellants.

Mr. **S. S. Baxter** for appellee.

Mr. Justice **Catron** delivered the opinion of the court:

Parrish filed his bill in equity against Lownsdale and others in a district court of Oregon territory, praying for an injunction to restrain the defendants from obstructing a narrow *piece of land, claimed as Water Street, [*292 lying in front of the complainant's storehouse, and a square of ground claimed as his, two hundred feet on each side, laid off into eight lots, as city property, within the city of Portland, and on one of which the storehouse stands. The strip of land lying in front of these lots extends to the Wallamette river; at that point, the land is several hundred feet wide. The complainant alleges that it was dedicated to the public as a street, to the use of the proprietors of the town, for the purposes of commerce; the river there being within the flow of tide, navigable for ships, and requiring a wide front space to accommodate loading and discharge of cargoes.

The district court found that Water street, in the city of Portland, was bounded by the river, opposite the lots of the complainant; and

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NOTE.—*Jurisdiction of United States Supreme Court dependent on amount. Interest cannot be added to give jurisdiction. How value of thing demanded may be shown. What cases reviewable without regard to sum in controversy*—see note to Gordon v. Ogden, 7 L. ed. U. S. 592.

What the record must show—see note, 63 L. R. A. 471.

that the defendants at the commencement of the suit were about to obstruct the same to the special injury of the plaintiff, as stated in the bill; and thereupon an injunction was granted, as prayed for. This decree was affirmed in the supreme court of Oregon, where the respondents carried the cause by appeal, and from that decree they have appealed to this court, and we are called on to revise the proceedings below.

The first question presented is, whether this court has jurisdiction and power to re-examine the controversy.

By the act of Congress organizing the inhabitants of Oregon territory into a government, it is provided (§ 9) that writs of error and appeals from final decisions of the supreme court of Oregon shall be allowed to the Supreme Court of the United States, where the value of the property, or the amount in controversy, shall exceed $2,000, to be ascertained by the oath of either party, or by a competent witness; and also in cases "where the Constitution of the United States, or an act of Congress, or a treaty of the United States, is brought in question."

The complainant assumes that he would sustain special damage by the obstruction of the space between his property and the river, but how much damage does not appear from the allegations in the bill, or otherwise; and it is dif-
293*] ficult for us to *see how either party to the suit could sustain damage to his rights of property, as the town was laid off in 1845, on property of the United States, whilst our inhabitants who had emigrated there, and those of Great Britain, held joint possession of the country in virtue of the treaty between the two Nations of October 20, 1818 (art. 13), which was continued in force by the convention of August 6, 1827.

In June and July, 1845, the people of Oregon territory, "for mutual protection, and to secure peace and prosperity among themselves," elected delegates, who met in convention, and adopted laws and regulations for their government, "until such time (say they) as the United States of America extend jurisdiction over us." In this plan of government, it is provided that anyone wishing to establish a claim to land shall designate the extent of his claim by line marks, and have it recorded in the office of the territorial recorder; the claim not to exceed a mile square, or 640 acres. The description of claim under which the complainant and the respondents set up title is founded on this regulation. By the treaty of 15th June, 1846, the line dividing our possessions and those of Great Britain west of the Rocky mountains was concluded; and on the 14th of August, 1848, Congress passed an act to establish the territorial government of Oregon, in which the laws then existing under the provisional government (established by the people) are continued, and declared to be operative until altered. "But (says the act, § 14) all laws heretofore passed in said territory, making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be, null and void." Congress passed no law in any wise affecting title to lands in Oregon territory till September 27, 1850; and the bill in this case was filed July 29, 1850, so that, when the litigation commenced, neither party to the suit had any title to or interest in the land whatever; and therefore the respondents and appellees could not sustain injury by being enjoined not to erect buildings on lands belonging to the government in which they had no interest. It is proper to remark here, that we have nothing to do with, nor can we notice, rights acquired to this *property by acts of Congress [*294 passed subsequently to the origin of this controversy.

Neither the Constitution of the United States, nor an act of Congress, nor a treaty, was "brought in question" in the lower court, neither side could have legitimately raised such a question, and called for its decision; and to give this court jurisdiction of the case, in this instance, the question must have been raised and decided in the lower courts, and it must so appear on the record. 16 Pet., 281.

Being of opinion that there is no jurisdiction in this court to examine and revise the decree of the supreme court of Oregon, we order the appeal to be dismissed.

JOHN T. MASON, *Plff. in Err.*,
v.
JOSEPH C. GAMBLE and David Gamble.

(See S. C. 21 How. 390, 391.)

Writ of error in revenue cases—value in controversy immaterial, when United States is plaintiff—otherwise, in suits by importer.

The act of May 31, 1844 (5 Stat. 658), authorizes a writ of error, at the instance of either party, upon a final judgment in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties, due or alleged to be due, without regard to the sum or value in controversy.

The writ of error is authorized in those cases only in which the United States is plaintiff, in the suit.

The law cannot be extended to suits brought by the importer against the collector; and in such cases where the sum of value in controversy does not exceed $2,000, the writ must be dismissed for want of jurisdiction in this court.

Argued Jan. 14, 1859. Decided Jan. 18, 1859.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

On motion to dismiss for want of jurisdiction.

The case is stated by the court.

Mr. **J. S. Black**, *Atty. Gen.*, for plaintiff in error.

Mr. **J. M. Campbell** for defendants in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

A motion has been made to dismiss this case for want of jurisdiction, upon the ground that the sum in dispute does not exceed $2,000.

The case is this: The plaintiff in error is the collector of the port of Baltimore, and, as such, demanded a certain amount of duties on goods imported by the defendants in error, which they believed was greater than the amount imposed by law. *The duties demanded [*391

were paid under protest, and this suit was brought to recover back the amount alleged to be overpaid. At the trial, the jury, under the instruction of the court, found a verdict in favor of the defendants in error for the sum of $193.88, upon which a judgment was entered against the collector; and this writ of error is brought on that judgment.

The act of Congress which is supposed to give jurisdiction in cases of this description is the act of May 31, 1844 (5 Stat. U. S., 658). This act authorizes a writ of error, at the instance of either party, upon a final judgment in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due, without regard to the sum or value in controversy. And it is true, that the same reasons which induced the legislature to give the writ of error in the cases mentioned in the law, apply with equal force to suits against a collector to recover back duties which he alleged to be due, and had already collected. The questions are of the same character, and the interest of the United States the same in either case. And it is most probable that suits against the collector were omitted in the act of Congress by some oversight or accident.

But, however that may be, the writ of error is authorized in those cases only in which the United States are plaintiffs in the suit. The language of the law is too plain to admit of doubt, and the words cannot by any reasonable or fair construction be extended to suits brought by the importer against the collector; and as the sum or value in controversy does not exceed $2,000, and the case is not provided for by the act of Congress referred to, *the writ must be dismissed for want of jurisdiction in this court.*

MARY ANN THOMAS, *Plff. in Err.*,
v.
ELIZA LAWSON *et al.*, Heirs at Law of James Lawson, Deceased, by George A. Gallagher, their Guardian *ad litem.*

(See S. C. 21 How. 331-343.)

General objection, when not sufficient—deed, when evidence in Arkansas—tax deed prima facie evidence of regularity of proceedings and validity of sale—onus probandi thrown on assailant of tax title—decree of court of that state, a bar against claims of illegality in proceedings.

Where the objections against the admission of a deed, were that the deed and the certificate bore upon their face unmistakable evidence of fraud, but what those marks of fraud were, is not stated, this court cannot inquire whether the decision admitting the deed was right.

By the law of Arkansas, every deed which shall be acknowledged or proved and certified as prescribed by that act and recorded, may be read in evidence in any court in that state without further proof of execution.

By a law of the same state, sales and conveyances made by the sheriff and collector for the nonpayment of taxes, shall vest in the grantee a good and valid title, and shall be evidence of the regularity and legality of the sale of such lands.

The intention of the statute is to cast the *onus probandi* on the assailant of the tax title, by making the deed evidence of the title of the purchaser, subject to be overthrown by proof of noncompliance with the law.

A deed from sheriff and collector on a tax sale, is prima facie evidence of the assessment, taxation, and forfeiture of the land; of the regularity of every proceeding previous to the sale; of the competency of the officer making the sale and conveyance; of the validity of the sale; and casts upon the assailant of any of these prerequisites, the burden of showing the absence or defectiveness of any of them.

But every question with respect to the assessment, or the nonpayment of the taxes, or the regularity of the proceedings of the sheriff and collector was in this case concluded by the petition of the purchaser to the state court, and the decree of confirmation pronounced upon that petition.

The jurisdiction of that court over the controversy is founded on the presence of the property, and like a proceeding *in rem* it becomes conclusive against the absent claimant as well as the present contestant.

By the law of that state, a judgment or decree confirming such sale operates as a bar against all persons thereafter claiming said land, in consequence of informality or illegality in the proceedings.

Submitted Dec. 22, 1858. Decided Jan. 24, 1859.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

The history of the case and a statement of facts appear in the opinion of the court.

Mr. **A. Fowler**, for plaintiff in error:

The deed from Borden, as collector, to Lawson, embracing the land in controversy, was clearly inadmissible as evidence, upon the following grounds,—to wit,

1st. The general objection applicable to all collectors' deeds upon general principles, in the absence of any statute making them *per se* evidence of title, or evidence at all, unless all the material previous steps and acts required by the laws, providing for the assessment and collection of taxes and sale of lands for the nonpayment thereof, etc., make it utterly inadmissible.

14 Pet. 328; 4 N. H. 375; 7 Cow. 88; 9 Mo. 885; 10 Sm. & M. 264; 26 Miss. 189; 8 Ark. 277; 15 Ark. 365; 11 How. 425; 13 Ark. 250; 1 Barb. 114; 18 How. 142; 15 Ark. 338.

As proof that the land was listed or assessed:

3 Ham. Ohio, 232; 14 Pet. 328; 8 Blackf. 351; 1 Munf. 430; 4 McL. 219; 18 How. 142.

And that it was taxed:

3 Ham. Ohio, 232; 14 Pet. 328; 4 Yerg. 307; 10 Ohio, 156.

And that it was advertised, as required by the statute:

3 Ham. Ohio, 232; 14 Pet. 328; 10 Ohio, 156; 11 How. 425; 26 Miss. 189; 4 McL. 219.

And that the sale was made according to law:

10 Ohio, 156; 13 Ark. 250; 15 Ark. 371; 4 McL. 219.

And that the collector had authority to sell:

3 Ham. Ohio, 232; 4 N. H., 375; 14 Pet. 328; 11 How. 425; 10 Ohio, 156; 13 Ark. 250; 13 Ark. 376; 2 Barb. 114.

In all such cases, in passing upon tax titles, the utmost strictness in performance of the substantial preliminaries, is always required, and the construction against such titles is strict, and the purchaser buys at his peril, and is bound to take notice of all irregularities.

8 Ark. 277; 11 How. 425; 13 Ark. 250; 16 How. 618.

The act of March 5, 1838, making such deeds evidence, is restricted, and only applies to sales made under that act.

Art. Dig. (1848) ch. 139, p. 888, § 112.

Mr. **G. C. Watkins** for defendants in error.

Mr. Justice Daniel delivered the opinion of the court:

This was an action of ejectment, instituted by the plaintiff, a citizen of Indiana, and as sole heiress of John Crow, deceased, against James Lawson, a citizen of the state of Arkansas, for the recovery of a tract of land situated in the state last mentioned, described in the declaration, and averred to be of greater value than $2,000. Pending the proceedings in the circuit court, Lawson, the original defendant, having died, the cause was revived against the defendants upon the record as his heirs, and upon a trial of the cause, on the 16th day of April, 1856, the jury rendered a verdict for the plaintiff, and on that verdict the court gave a judgment in favor of the plaintiff, with costs of suit. At a subsequent day of the term, the court, on motion of the defendants, awarded a new trial in their behalf; and on the 22d day of April, 1857, this cause being again heard, a verdict was rendered in favor of the defendants below, the defendants in error, and upon this verdict the court pronounced judgment in behalf of the defendants, inclusive of all the costs of suit.

In this action the defendant pleaded six several pleas: First, the general issue not guilty, on which there was a joinder; and five other pleas, all of which were either stricken out or 334*] overruled *upon demurrer except the fifth, to the following effect: That the defendant was a purchaser of the tract of land in the declaration mentioned, at a sale made by the sheriff and collector of the revenue of the county in which the said land was and is situated, for the nonpayment of the taxes assessed and due thereon, and that he has held the peaceable, adverse, and uninterrupted possession of the said land under and by virtue of his said purchase for more than five years next before the commencement of this suit. On this fifth plea, also, issue was joined.

Upon the trial in the court below, the plaintiff gave in evidence a patent from the United States, bearing date on the 1st day of February, 1821, to the plaintiff and others, heirs of John Crow, deceased, for the land in contest, which patent was read without objection, the titles of both plaintiff and defendants being deducible from that act of the government. The plaintiff further proved that she was the only surviving child and the sole heir of John Crow, and was the widow of James Thomas, who died in the year 1840; and that from the year 1839 she had resided in the state of Indiana, and was a citizen of that state. The plaintiff further proved the possession of Lawson, the ancestor of the defendants, of the land at the time of the institution of this suit, and his refusal to surrender possession to the plaintiff. And here the plaintiff rested her case upon the evidence.

The defendants, in support of their title and right of possession, offered in evidence a deed, bearing date on the 2d day of November, 1846, from W. B. Borden, at that date sheriff, and as such *ex officio* assessor and collector of the taxes for the county of Pulaski, in which county the lands in contest are situated, conveying those lands to the ancestor of the defendants.

In this deed it is recited, that in the year 1824, in conformity with the laws in force in the then territory of Arkansas, the lands in contest, with several other parts of sections, all situated in the county of Pulaski, were by the sheriff, as *ex officio* assessor and collector for the county, assessed for the taxes payable thereon for that year. That in conformity with the law, and within the time thereby prescribed, the sheriff, as *ex *officio* assessor and collect- [*335 or, filed in the office of clerk of the county court a list of lands and town lots owned and assessed to persons then residents of said county, in which list the lands in the said deed were embraced; that a copy of the list so made and filed was by the said officer put up at the door of the court house of said county, and published in the *Arkansas State Gazette*, a newspaper printed in the territory, for four weeks successively before the day of sale, as prescribed by law. That the sheriff as *ex officio* assessor and collector, in like conformity with law, on the 1st day of November, 1824, exposed and offered for sale, at the court house of the said county, at public auction, the several parcels or parts of sections of land above mentioned, for the payment of the taxes, and the penalty payable upon the amount of those taxes. That Thomas Newton became the purchaser of the several parcels of land, and transferred his certificate of his purchase of those lands to James Lawson. That the sheriff, as *ex officio* assessor and collector, made out and delivered to the purchaser a certificate of purchase containing the requisite description of the taxes and penalty on the lands listed for taxation, and that the amount was paid by Newton, the purchaser. That one year having elapsed since the sale by the sheriff, and that Newton, by James Lawson, having presented to Borden, the sheriff and *ex officio* assessor and collector, the certificate of purchase, and requested a deed to Lawson from the sheriff, the deed from Borden, as sheriff, etc., was made to Lawson.

The defendants next offered in evidence, under the certificate of the clerk of the circuit court of Pulaski county, a copy from the records of that court of the acknowledgment in open court on the 13th of July, 1849, by Borden, as late sheriff and collector of Pulaski county, of the deed executed by him to Lawson for the several parcels of land therein described, including the land in controversy, as having been sold by the predecessor of said Borden as sheriff and collector, under and by virtue of a levy and distress made upon such tracts of land to secure the payment of the state and county taxes, and the penalty and costs and charges due for the years 1824 and 1825.

*The defendants also proved that [*336 Thomas Newton, by a deed bearing date on the 21st of May, 1846, assigned and conveyed to James Lawson, in his lifetime, all the right, title, interest, and claim, in and to the lands

purchased by Newton of the sheriff in the year 1824, and embraced in the deed from Borden, sheriff, etc., to Lawson.

The defendants then offered the record, duly certified, of the proceedings on the chancery side of the circuit court of the county of Pulaski, on the 20th day of February, 1850, upon a petition in the name of James Lawson in his lifetime, setting forth the several facts and transactions recited in the deed from Borden to Lawson, and also the execution and recording of that deed; and further setting forth that he, Lawson, after the time allowed by law for the redemption of said lands, and more than six months before the commencement of the then present term of this court, caused a notice stating the authority under which said sheriff's sales took place, and also containing the same description of the lands purchased as that given in said sheriff's deed, and declaring the price at which said tracts were respectively bargained, the nature of the title by which the same are held, and calling on all persons who could set up any right to any part of said lands, in consequence of any irregularity or illegality connected with said sales, to show cause at the first term of the circuit court of said county, six months after the publication of said notice, being the present term of the court, why the respective sales so made should not be confirmed, pursuant to a petition to be filed in this court for that purpose, to be inserted and published in the *Arkansas State Democrat*, a newspaper published in Little Rock, for six weeks in succession, the last insertion to be more than six months before the commencement of the present term of this court, as by affidavit of the publisher, setting forth a copy of such notice, with the date of the first publication thereof, and the number of insertions sworn to and subscribed before a justice of the peace of said county, and properly authenticated and filed with said petition, fully appears to the court, and concluding with the decree of that court in the following words:

337*] *"Whereupon all and singular the allegations made in said petition being by the production of said deeds and due proofs of the publication of said notice, proven and established to the satisfaction of the court here, and no cause having been shown against the prayer of said petition by any person whomsoever, but the said application being and remaining wholly undefended—

"It is therefore considered and adjudged and decreed by the court here, that said sheriff's sales, and each of them, be, and the same are hereby, in all things confirmed, according to the statute in such case made and provided; and further, that this decree shall operate as a complete bar against any and all persons hereafter claiming said lands, or any part thereof, in consequence of any informality or illegality in any of the proceedings aforesaid, and that the title of each of said tracts of land be decreed and considered as hereby confirmed and completed in said James Lawson and his heirs and assigns forever; saving, however, to infants, persons of unsound mind, imprisoned, beyond the seas, or out of the jurisdiction of the United States, the right to appear and contest the title to said lands, within one year after their disabilities may be removed. And it is ordered that the petitioner pay the costs thereof."

To the admission of this record, the plaintiff in the circuit court objected, but the court permitted it to be read in evidence. The deed from Borden, sheriff, to Lawson, of the 2d of November, 1846, was also objected to by the same party, but was allowed to be given in evidence to the jury.

Several prayers for instructions were presented, both by the plaintiff and the defendants, and decisions thereon were made by the court. We shall consider the following only, as comprising the real merits of this controversy:

The objections urged against the admission of the deed from the sheriff to Lawson were—

1st. That the deed and the certificate of its admission to record bore upon their face unmistakable evidence of fraud. What those clear marks of fraud upon the face of those documents were, is not stated with sufficient particularity, in order to a correct comprehension of their character. The court to whom *this objection was presented must have [*338 decided upon an inspection of the papers (probably correctly); but whether correctly or otherwise, this court cannot now inquire, in compliance with assertions altogether vague, and pointing to no specific vice in any one of those papers. This first objection, therefore, to the admissibility of the deed is of no force.

But the deed from Borden was further objected to, because, as it was alleged—

2d. That there was no valid proof of the execution of such paper as a deed.

3d. There was no proof of the authority of the said William B. Borden to execute such deed, or that he was, at the date of its execution or acknowledgment, collector of taxes in and for said county of Pulaski.

4th. It was not accompanied by proof that the said tract of land in controversy was either assessed, or taxed, or advertised, or legally sold, in the year 1824, for taxes, or that the said Henry Armstrong, as such alleged sheriff, assessor, and collector, in the year 1824, had any authority to assess said tract of land for taxation, or to sell it for the nonpayment of such taxes.

5th. That such paper, purporting to be such deed, was not admissible in evidence until it should be first proved that all the material steps required by law, preparatory to and in the assessment and taxation of said tract of land, and in the advertisement and sale thereof in the year 1824, and all previous steps required by law prior to the execution of such deed, had been complied with, either by record evidence or by evidence *in pais*.

These four objections are met and overcome, first, by the language of the statutes of Arkansas; and second, by the interpretation given of those statutes by the supreme court of that state. By the law of Arkansas regulating conveyances (*vide* Digest of the Laws of 1848, by English & Hempstead, p. 268, § 26), it is declared that "every deed or instrument of writing conveying or affecting real estate, which shall be acknowledged or proved and certified as prescribed by that act, may, together with the certificate of acknowledgment, be recorded

339*] *by the recorder of the county where the land to be conveyed or affected thereby shall be situate; and when so recorded, may be read in evidence in any court in this state without further proof of execution." Again, in the same digest (pp. 888, 889, § 112, title "Revenue"), it is declared with respect to sales and conveyances made by the sheriff and collector for the nonpayment of taxes, that "the deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity; and shall be received in evidence in all courts of this state as a good and valid title in such grantee, his heirs or assigns, and shall be evidence of the regularity and legality of the sale of such lands." Again (p. 889, § 114), it is provided, "that if any collector shall die or be removed from office, or his term of service expire, after selling any land for taxes, and before making and executing a deed for the same, the collector then in office shall make and execute a deed to the purchaser of such lands, in the same manner, and with the like effect, as the officer making such sale would have done."

By another provision of the statute of Arkansas, a like power to that previously mentioned as vested in the sheriff, with respect to delinquent lands, is conferred upon the auditor of public accounts, and, in the exercise of that power by the latter officer, the provisions of the statute, both as to the acts to be performed, and the consequences to ensue from those acts, are substantially and almost literally identical with those relating to the proceedings by the sheriff.

Thus (Dig. p. 893, § 141), it is enacted that "the auditor shall execute, under his hand and the seal of his office, and deliver to each person purchasing lands or lots at such sale, a deed or conveyance, in which he shall describe the lands or lots sold, and the consideration for which the same was sold, and shall convey to the purchaser all the right, title, interest, and claim, of the state thereto;" and by § 142, "the deed so made shall vest in the grantee, his heirs or assigns, a good and valid title, both in law and equity, and shall be received in all the courts of this state as evidence 340*] of a good and valid title in *such grantee, his heirs or assigns, and shall be evidence that all things required by law to be done to make a good and valid sale were done, both by the collector and auditor."

In the interpretation of this provision *in pari materia*, the supreme court of Arkansas, in the case of *Merrick & Fenno* v. *Hutt*, 15 Ark. p. 338, says: "A more comprehensive provision could hardly be found, and it might seem, at first view, to make the tax title derived from the auditor, valid against all objections. But that was not the design. The evil to be remedied was, that the entire burden of proof was cast on the purchaser, to show that every requisite of the law had been complied with, and the deed of the officer was not even prima facie evidence of the facts therein stated. The general and prevailing principle was, that to divest the owner of land by a sale for taxes, every preliminary step must be shown to be in conformity with the statute; that it was a naked power, not coupled with an interest, and every prerequisite to the exercise of that power must precede it, and that the deed was not prima facie evidence that these prerequisites had been observed. The intention and scope of the statute were to change this rule so far as to cast the *onus probandi* on the assailant of the tax title, by making the deed evidence of the title of the purchaser, subject to be overthrown by proof of noncompliance with the substantial requisites of the law. Proof, then, that any of the substantial requisites of the law had been disregarded, or that the taxes have been paid, no matter by whom, would be sufficient to destroy the tax title, whether emanating from the auditor or the collector. The deed of the auditor is not required to contain recitals. All that is necessary is to describe the property sold, and the consideration, and to convey to the purchaser all the right, title, interest, and estate, of the former owner, as well as all the right, title, interest, and claim, of the state, to the land."

The same exposition of the statutes of Arkansas, and of the policy and necessity in which those statutes have had their origin, is given in the case of *Pillow* v. *Roberts* in this court, reported in the 13th of How. 472. The deed, then, from the sheriff and collector, Borden, to Lawson, was clearly prima facie *evi- [*341 dence of the assessment, taxation, and forfeiture of the land; of the regularity of every proceeding previously to the sale of the land forfeited; of the competency of the officer making the sale and conveyance; of the legal validity of the sale; and cast upon the assailant of any of these prerequisites the burden of showing the absence or defectiveness of any of them. And without such a showing, that which was prima facie proof will be taken as conclusive.

But every question with respect to the assessment of the lands in controversy, or the nonpayment of the taxes, or the regularity of the proceedings of the sheriff and collector, inclusive of the execution and recording of the deed from that officer, seems to have been concluded by the petition of the purchaser on the chancery side of the circuit court of Pulaski county, and the decree of confirmation pronounced upon that petition as herein already mentioned.

The provisions of the law by which this petition by the purchaser from the sheriff or auditor of lands sold for the nonpayment of taxes, and by which the proceedings upon such a petition, and the effect of a decree of confirmation pronounced thereupon, are contained in the Digest of the Laws, pp. 966, 967, under the head of "Tax Titles," sections from one to six, inclusive. By the section last mentioned (6th) it is declared that the judgment or decree confirming said sale shall operate as a complete bar against any and all persons who may thereafter claim said land in consequence of informality or illegality in the proceedings, and the title to said land shall be considered as confirmed and complete in the purchaser thereof, his heirs and assigns forever. The decree of the circuit court of the county of Pulaski, before referred to, expressly sets forth a compliance with every requisite prescribed in the aforegoing six sections of the statute, including the notice by publication calling on all persons

to show any objection to the purchase from the officer, in consequence of informality, irregularity, or illegality connected with the sale of the lands; the failure of any contestant to appear in obedience to such notice, and the expiration of the time limited in the saving reserved in behalf of those of whom exception is made in the statute.

342*] *Upon an inspection of the proceedings in the court of Pulaski, the court below was of the opinion that it constituted a valid title in the defendant against the whole world and charged the jury that "it devested the title of the plaintiff, and that since the rendition of said decree she had no title to the said tract of land, unless she has, since the date of said decree, obtained title thereto from or under the said James Lawson, or unless such decree was obtained by fraud."

Of the effect of a decree of confirmation like the one in this case, there exists no doubt under the construction of the statutes of Arkansas by the supreme court of that state, as declared in the case of *Evans & Black* v. *Percifull*, 5th Ark. 425. The court in that case held the decree to be conclusive, although they thought it erroneous; yet, inasmuch as it had not been reversed for error, they ruled that it could not be collaterally impeached; and they say, in express terms, that had there been no deed from the officer, in fact, the decree would have been conclusive of the sufficiency of the evidence to warrant it.

In the case of *Parker* v. *Overman*, in 18 How. 140, this court, commenting upon the statute of Arkansas, has said: "In case no one appears to contest the regularity of the sale, the court is required to confirm it on finding certain facts to exist; but if opposition is made, and it should appear that the sale was made contrary to law, it became the duty of the court to annul it. The judgment or decree in favor of the grantee in the deed operates as a complete bar against any and all persons who may thereafter claim such land in consequence of any informality or illegality in the proceedings. The jurisdiction of the court over the controversy is founded on the presence of the property, and like a proceeding *in rem* it becomes conclusive against the absent claimant as well as the present contestant."

This interpretation of the statutes of Arkansas is fully coincident with that propounded by the cases of *Merrick & Fenno* v. *Hutt*, and of *Evans & Black* v. *Percifull*, already cited; and sustain the correctness of the instructions of the circuit court as to the effect of the decree of confirmation of the circuit court of Pulaski county.

343*] *A question was raised in the circuit court, as to the effect of the five years' statutory limitation upon the rights of the parties; as, for instance, whether that statute would begin to run from the date of the deed of the sheriff or from the period of the recording of that deed, or whether it could operate at all upon the constructive seisin effected by the sheriff's deed, or required, in order to give it effect, an actual seisin by the purchaser from the sheriff. This question we do not deem it necessary, or even regular, in this case to discuss or determine. In the first place, the rulings of the court below with regard to it were in favor of the plaintiff in error, and therefore can constitute no wrong or *gravamen* on his part. In the next place, we consider that question embraced and concluded, or rather excluded, by the proceedings in chancery against the property, and the confirmation of the title by the decree.

The judgment of the Circuit Court is affirmed.

FREDERICK L. BARREDA and Philip Barreda, *Plffs. in Err.*,
v.
BENJAMIN H. SILSBEE *et al.*

(See S. C. 21 How. 146-170.)

Construction of contract for extra freight—declarations of defendant's agents, when admissible—what is proof of agent's authority—other charters and parol evidence, when admissible to fix price—parol evidence to show fraud.

By charter of a ship for transportation of guano from the Chincha islands to the United States, freight was to be paid at the rate of $25 per ton, and the ship was to have the benefit of any advance in freights made by the charterers in the United States before she finished loading at the islands. Held, that the plaintiffs were entitled to an additional compensation under this special clause, equal to the excess paid or contracted to be paid to other parties.

The declarations and statements of agents of defendants, made at the time other charters, relied upon by plaintiffs, were executed, were properly admitted as evidence.

Such charters, after they were executed by the owners, were forwarded to defendants, and received their signatures; these facts present strong presumptive evidence of authority of the agents fully warranting the court in submitting the question to the jury.

Such parol evidence did not conflict in any manner with the written contract.

Plaintiffs' rights being made to depend upon the subsequent transactions of defendants with third parties, it was clearly proper to admit proof to show what those transactions were.

For the purposes of any examination of the case which it is competent for this court to make under the Constitution of the United States and the laws of Congress, it must be assumed that the facts of the case have been correctly found by the jury.

Their finding is conclusive, unless a new trial is awarded by the court in which the case is tried, or in the appellate tribunal, for some error of law.

Parol testimony is always admissible, in matters of contract, to show fraud.

Argued Dec. 24, 1858. Decided Jan. 31, 1859.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action of assumpsit brought in the court below, by the defendants in error, to recover freight earned by the ship Shirley on a charter thereof, made to the plaintiffs in error, who are agents of the Peruvian government.

The trial in the court below resulted in a verdict and judgment for the plaintiffs, for the sum of $30,944.62, with costs; whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **John Nelson** and **S. T. Wallis**, for plaintiffs in error:

The clause in the charter-party sued upon, by which the benefit of a possible advance in guano freights within a fixed period, was given to the owners of The Shirley, must be inter-

preted to refer exclusively to an advance in freight which might be paid by the charterers for voyages similar to that which The Shirley was to perform for them, *viz.*, homeward voyages from the Chincha Islands to Hampton Roads or further north, and none other.

Gether v. *Capper*, 80 E. C. L. 696.

2. The charter-parties offered in proof, to show an advance under the stipulation in The Shirley's charter, and which constitute the only evidence in the case upon that point, tending to support the pretensions of the defendants in error, are on their face for voyages of a different character from that of The Shirley, and afforded no evidence to maintain the action.

3. Parol evidence was not admissible to affect the construction of the subsequent charters in question, or to show any intention or views of the plaintiffs in error and the other contracting parties in making them, because it is not pretended, and there is no evidence professing to show, that there was any outside contract of understanding in reference to any one of them varying or qualifying the written stipulations in any way, or that any intentions or views of the plaintiffs in error or of the other parties, were embodied or carried out otherwise than in and through the writings themselves, by which, and which only, all parties agreed to be and held themselves bound.

This point is in conflict with the court's second instruction, and is raised by the sixth prayer of the plaintiffs in error.

Shankland v. *The Corporation of Washington*, 5 Pet. 394; *Sprigg* v. *Bank of Mt. Pleasant*, 14 Pet. 200; *Selden* v. *Meyrs*, 20 How. 509.

4. Even if parol evidence had been admissible at all under the circumstances stated in the preceding point, the particular parol proof especially objected to by the plaintiffs in error, was not because it consisted exclusively of statements made by agents of the plaintiffs, not only without authority, but in direct opposition to the written instructions, which constituted their special and only authority. It was the naked offer of the unauthorized statements of agents—made while negotiating contracts which they were authorized to and did negotiate—produced in evidence, neither to contradict nor to qualify the written stipulations agreed on, nor to avoid the instruments themselves, but merely to show the existence of fraudulent intentions.

This point is raised by the 1st exception of the plaintiffs in error, and is in conflict with the court's instruction also.

2 Stark. Ev. 34; *Fairlie* v. *Hastings*, 10 Ves. 126, 127; *Betham* v. *Benson*, 1 Gow. 45.

5. The imputation of fraud on the part of the plaintiffs in error, was not only gratuitous but unnecessary. The case of the defendants in error could not be bettered by showing that the Boston charters, with the aid of parol testimony, amounted to what was patent in the New York charters without it. Hence the parol proof in controversy was as superfluous as it was in opposition to what was believed to be the established rules of evidence.

6. That even if the specific terms of the charter-parties in question could be overlooked or explained or altered by parol, and it were competent to treat them all as stipulating for a round voyage, out and home, for $30 per ton, which is the broadest construction that could be applied to them, they would still furnish no proof of an advance in freight for a voyage merely homeward, like The Shirley's, with the privilege and benefit to the outward voyage to the owners, instead of the freighters.

Messrs. **Reverdy Johnson** and **Brown & Brune**, for defendants in error:

The defendants in error refer to the following authorities:

1. Freight, in the general legal sense of the term, means all rewards, hire or compensation, paid for the use of ships.

Pothier, *Traite De Charte-parte*, n. 1; Valin, tom. 1, p. 639, cited in Abb. Ship. 5 Am. ed. marg. p. 405; 3 Kent, 219.

Freight is the reward which the law entitles a person to recover, for bringing goods lawfully upon a legal voyage.

Abb. 425; McCulloch, Com. Dig. "Freight"; Bouvier Law Dic. "Freight."

2. Parol testimony of the declarations and statements of Nesmith and Brown, the agents of F. Barreda & Bro., made by them in respect to the charter-parties which they were negotiating prior to and at the time of the execution thereof, is admissible and competent evidence to explain the meaning and purpose of unusual provisions to inform the ship owners whether the plaintiffs in error meant to avail themselves of privileges reserved in the charters, or would waive them, as well as to show the true character of the transaction, that there was in fact a rise in freights to the benefit of which the defendant in error was entitled, and that it was the object of the plaintiffs in error to disguise and conceal such rise by the form of the charter-parties executed by them.

U. S. v. *Gooding*, 12 Wheat. 469, 470; *Amer. Fur. Co.* v. *U. S.* 2 Pet. 364; *Stokes* v. *Saltonstall*, 13 Pet. 183–186, 194; *Wood* v. *U. S.* 16 Pet. 360; *Westcot* v. *Bradford*, 4 Wash. C. C. 500; *Haynes* v. *Rutter*, 24 Pick. 245; *Hammatt* v. *Emerson*, 27 Me. 332, 335; *Franklin Bank* v. *Steward*, 37 Me. 524; *Wilson* v. *Hart*, 7 Taunt. 303; *Crocker* v. *Lewis*, 3 Sumn. 1, 6–10; *Iasigi* v. *Brown*, 17 How. 183; 1 Greenl. Ev. § 285; 2 Cowen's Phil. Ev. 3d Amer. ed. 354–369; note 290, p. 587; 2 Stark. Ev. 7th Amer. ed. 765, 766, 790, 791; Gres. Eq. Ev. 288; Pow. Ev. 144, 147; 96 Law Library, 101, 102; *Duvall* v. *Medtart*, 4 H. & J. 15; *Byer* v. *Etnyre*, 2 Gill. 160; *Henderson* v. *Mayhew*, 2 Gill. 409; *The U. S.* v. *The Amistad*, 15 Pet. 594.

Mr. Justice **Clifford** delivered the opinion of the court:

This case comes before the court upon a writ of error to the circuit court of the United States for the district of Maryland. It is an action of *indebitatus assumpsit*, and was brought in the court below by the defendants in error, who were the original plaintiffs, to recover the freight earned by the Ship Shirley on a charter of the ship made by the plaintiffs to the original defendants for the transportation of guano from the Chincha islands to the United States. At the date of the charter-party, the defendants were the agents of the Peruvian government, and, as such, had been for some time in the habit of chartering vessels

to bring guano to the United States for sale. Its exportation from the islands is a government monopoly, in which none except those employed by the government are permitted to engage, and the defendants are the sole agents of that government in the United States. They reside in Baltimore, and have agents in New York and Boston, duly authorized to negotiate for vessels, and after the charters are signed by the owners, to transmit them to the defendants for their approval and signature. Their agents in Boston negotiated the charter of The Shirley, and, after it was executed in behalf of the owners, it was accordingly transmitted **152*]** and signed *by the defendants. It is dated Boston, April 11, 1854, and recites, among other things, that The Shirley was then lying at New York, and that she was to proceed to Callao, from Australia, where she was then bound, and from thence with all convenient despatch to the Chincha islands, to take in her cargo of guano. She was to be at Callao ready to load in the course of January and February, 1855, or sooner, and ninety running days were allowed for loading. After completing her loading, she was to proceed direct to Hampton Roads, her place of destination, to receive orders from the defendants or their agents to discharge at any safe port not south of Hampton Roads or north of Cape Ann. Freight was to be paid at the rate of $25 per ton, customhouse weight, and the ship was to have the benefit of any advance in the guano freights made by the charterers in the United States before she finished loading at the islands.

She sailed from New York the 1st of May, 1854, with a full cargo on owners' account, which she discharged at Australia, and sailed thence, in pursuance of her charter, to Callao and the Chincha islands. Her cargo of guano was loaded between the first day of January and the 9th day of March, 1855, and on the following day she sailed from Callao, and thence to her place of destination for orders. On her arrival at Hampton Roads, she received orders to go to Baltimore, which she accordingly did, and was there unloaded between the 1st and the 25th day of July, 1855, having brought home fourteen hundred and fifty-nine tons of guano. Some correspondence, however, had taken place between the parties before The Shirley arrived. On the 8th day of June, 1855, the plaintiffs wrote to the defendants, referring to that clause in the charter providing for an advance, and suggesting that they had been induced to make the charter at the solicitation of their agents, upon the assurance that they should receive every advantage from any rise in freight, and expressing their astonishment at learning that they did not intend to pay more than at the rate of $25 per ton, and signifying at the same time their willingness to listen to any fair proposition the defendants had to make. To that letter the defendants **153*]** *replied, under date of the 11th of June, 1855, to the effect that the guano freights had remained at the same rates since The Shirley was chartered; admitting, however, that they had since taken up certain vessels with the privilege of using them outwards, and saying that they had done so in several instances, and that in such cases they had allowed the vessels a compensation for that use, but that such additional compensation had nothing to do with the rates of guano, as would appear by referring to those charters. Other correspondence took place between the parties, or their counsel, which it is not necessary to notice at the present time. After the cargo of The Shirley was discharged, the defendants rendered an account of the voyage to the plaintiffs, showing a balance in their favor of $21,943.89, calculating the freight at $25 per ton, without any allowance for a rise under the advance clause of the charter, which was not satisfactory to the plaintiffs. They claimed a further sum under the advance clause, equal to $5 per ton upon the whole freight brought home. Seven other vessels were chartered by the defendants between the 11th day of April and the 27th day of May, 1854, for the transportation of guano from the Chincha islands to the United States. All of those charters were introduced by the plaintiffs, subject to objection, and they are substantially the same with that of The Shirley, and contain a similar clause, giving the vessels the benefit of a subsequent rise in the guano freights. On the 1st day of June, 1854, after these charters were executed, the defendants wrote to their agents in New York and Boston, inclosing a *pro forma* charter-party for vessels out and home, and authorized and instructed them to take up as many vessels as they could under such charters, without allowing the least deviation from its terms, and directing them in the same communications to keep former rates, without benefit of advance, for home charters. It recites that the vessel taken up shall proceed to Callao, from a port in the Indian or Pacific oceans, "where she is at present bound," and thence with all convenient dispatch to the Chincha islands to take in her cargo, *and that the vessel [***154** shall be ready to load in the course of January, 1855, and shall thence proceed to Hampton Roads for orders and to discharge, as is provided in the charter of The Shirley. Freight was to be paid on charters conforming to those instructions at the rate of $25 per ton, cutomhouse weight, and the charters were to contain the following stipulation:

"It is further agreed that, within one week from the date thereof, the owners of the vessel may, if they see fit, elect to dispatch her direct to Callao and the Chincha islands, to load, as hereinbefore provided; and in case the owners shall so elect, the charterers shall be entitled to all her earnings for such outward voyage, and shall further have the privilege of shipping by her such outward cargo, not exceeding two hundred tons, as they may desire, provided they shall do so within ten days after the owners shall have announced their election. The charterers, on the arrival of the vessel at the home port, to pay, in full satisfaction for such earnings and privilege, and of all outward freight, such gross sum as shall be equivalent to $5 per ton on the return cargo delivered."

Twenty-five vessels were subsequently taken up under charter-parties substantially conforming to that stipulation, all bearing date prior to the 30th day of July following that instruction. Sixteen were negotiated by the agents of the defendants residing in New York, five by the defendants themselves, and the remain-

ing four by their agents in Boston. In many of these charters, the clause prescribing the port from which the vessel was to proceed to Callao, as contained in the *pro forma* charter-party, was omitted, and another substituted in its place, as "from where she was bound," or "from Amsterdam, where bound," or from New York direct to Callao. These deviations, however, from the form of a charter furnished by the defendants must have been approved by them, as all the charters subsequently negotiated by their agents were duly transmitted to Baltimore, and received their signatures, before they went into operation. Some other deviations from the *pro forma* charter-party, of minor importance, were introduced into one or more of these charters, which it is not impor- 155*] tant *to notice in this investigation, as they all contained the stipulation above mentioned, which is the principal subject of controversy in this suit. Under that stipulation, the owner might elect, within a week from the date of the charter-party, to despatch the vessel direct to Callao and the Chincha islands; and in that event, the charterers had the privilege to ship the outward cargo for their own benefit, not exceeding two hundred tons, provided they elected so to do within ten days after the owner announced his decision to send the vessel direct; and in case the owner so elected and sent the vessel, no matter whether the charterers freighted her out or not, the owner was entitled in all events to demand $5 per ton on the return cargo of guano, in addition to the $25 agreed to be paid in the general clause of the charter-party already stated.

Whether the vessel carried out much or little freight, or none at all, was entirely immaterial to the owner, so far as respected the earnings of the vessel, as the additional compensation in any event was to be estimated and ascertained, not upon the outward freight, but upon the return cargo; and it made no difference in respect to time, as the owner contracted that the vessel, whether freighted or not, should be at Callao, ready to load in the course of January, under the penalty of $12,000.

That stipulation, whatever might have been its object, resulted in no material pecuniary advantage to the defendants. They did not furnish any outward cargo, except in a single instance, and then only to a small amount, consisting of seven or eight boxes of cigars. In another instance, they offered to ship two iron boilers for Callao, but the owners refused to take them as deck load, alleging that it would be dangerous, and a dispute led to a cancellation of the contract by mutual consent. Except in those two cases, the defendants never attempted to avail themselves of the benefits secured by that provision, either by furnishing the freight directly or by advertising the vessels. Their counsel insist that the additional compensation was paid for the privilege thus secured; and that it makes no difference whether it was exercised or not, inasmuch as they had the right to avail themselves of it if 156*] they saw *fit, and found it to be for their advantage. All or nearly all of the vessels proceeded directly from the United States, carrying out no freight for the defendants, and on their return were paid the additional $5 for every ton of guano brought home. How much that additional compensation amounted to does not appear, nor are there any *data* in the record from which it can be definitely ascertained. According to the charter of The Shirley, she was a ship of nine hundred and ten tons burden, and it appears that she brought home fourteen hundred and fifty-nine tons of guano, reckoned at custom-house weight. Eleven of the charters of other vessels give their tonnage, showing that their measurement, on an average, is a fraction more than eight hundred tons. Assuming that the average of the eleven, whose tonnage is given, is the true average of the whole number chartered containing that provision, and that each brought home cargo in proportion to The Shirley, it would show that the amount of the additional compensation allowed to those vessels under that clause could not have been much less than $150,000. Whatever the sum was, whether more or less than the amount supposed, it must be assumed, on the theory of the defendants, that it was allowed and paid by the charterers, in consideration of the privilege secured to load their own vessels outward for their own benefit, which privilege the case shows they never exercised to an extent to enable them to realize therefrom more than the sum of $50. It was insisted by the plaintiffs in the court below that this stipulation was inserted in those charters, as a device to avoid the effect of the advance clause in the charter of The Shirley and other vessels, which had gone out under similar charters, and that the real contract was one to give $30 per ton for the transportation of the guano to the United States, and consequently showed that the charterers, within the period specified, had made an advance in the guano freights equal to the amount of such additional compensation.

They also offered parol proof in support of their view of these transactions, which was received by the court, subject to objection.

*Such brief portions only of the testi- [*157 mony as are necessary to a proper understanding of the legal questions to be decided will here be reproduced.

In respect to the vessels whose charters required that they should proceed from some port in the Indian or Pacific ocean, the plaintiffs proved that the vessels proceeded direct to Callao, and that the owners, at the time the charters were made, did not and had not contemplated any such indirect voyage, and elected, in the act of executing the charters, to send the vessels direct, and, in some instances, were told immediately, by the agents of the defendants, who negotiated the charters, that they might proceed at once, as there was no outward cargo for them. Those charters from which the above clause had been stricken out still contained the stipulation in question, allowing the election to the owners as to the course of the voyage; and in such cases, the vessels went out in ballast direct to Callao, and on their return from Chincha islands with a cargo of guano were paid the additional compensation.

Another class of testimony was to the effect that the agents of the defendants in New York and Boston offered $30 per ton for the charter of the vessels to go direct, and, after the offers were accepted by the owners, that the charters were drawn up, containing this stipulation;

and that the owners, when the charters were presented for execution, inquired why they were so drawn, and were told that it was because they had made charter-parties at $25 per ton, and consequently did not wish that these charters should show more than that sum; and in one instance, the answer to the inquiry was, that they did not wish these charters to conflict with former charter-parties, which provided for a freight of $25 per ton, with the benefit of a rise. These declarations of the agents of the defendants were proved by the owners of the vessels who made the charters. It was proved by the defendants that their agents never had any authority in respect to such charters, except what was conferred by the letters of instruction of the 1st of June, 1854; and those agents, upon being called as witnesses, denied 158*] that *they had ever made the declarations ascribed to them by the witnesses called by the plaintiffs.

Further explanatory and rebutting testimony was introduced by the defendants; but, as it does not give rise to any legal question for the consideration of the court, it is omitted.

After the testimony was concluded, the counsel of the defendants requested the court to exclude from the consideration of the jury all the declarations and statements of those agents given in evidence by the plaintiffs, respecting the terms, conditions, or purposes, of the charter-parties negotiated by them, varying from the authority and powers confirmed on them by their written instructions; which the court refused to do, so far as regarded the declarations and statements made at the time the charters were executed, and ruled and determined that all such declarations and statements were admissible and competent evidence. To which refusal and ruling the defendants excepted, and their exception was allowed by the court.

Prayers for instructions were made by both parties—first by the plaintiffs, and then by the defendants. Those presented by the defendants were made the subject of exception. They are eight in number, including the one embraced in the third bill of exceptions; but inasmuch as we have come to the conclusion that the instructions given by the court cover the whole controversy between the parties, they will not be specifically examined; and for the further reason, that their separate consideration would be tedious and unprofitable.

The instructions given by the court are to the effect that, in addition to the balance proved on the account rendered, "the plaintiffs are entitled to recover such further sum, if any, as the jury may find to have been the advance on the freights agreed to be paid by the defendants to any one for bringing guano from the Chincha islands to the United States in charters executed here between the 11th day of April, 1854, and the day the jury shall find The Shirley finished loading at the Chincha islands.

2. "That in ascertaining whether any contract for advanced freight was made, the jury are not confined to the consideration 159*] *alone of the charter-parties executed after the 11th day of April, 1854, but are to consider them in connection with all the evidence in the case; and if they find that the real contract, in some one or more of the charter-parties, was a contract to bring guano here and deliver it at $30 per ton, and that the $5 clause was added to avoid any responsibility under the advance clause in the charter of The Shirley, then the $5 advance is an advance freight, within the meaning of the first instruction."

Under these instructions, the jury returned a verdict for the plaintiffs in the sum of $30,944.62; whereupon, the defendants brought a writ of error to this court.

1. They now insist, among other things, to the effect that the advance clause in the charter-party of The Shirley must be interpreted to refer only to homeward voyages from the Chincha islands to the United States.

2. That the charter-parties introduced by the plaintiffs to show an advance in the guano freights are on their face for voyages of a different character from that of The Shirley, and afforded no evidence to maintain the action.

3. That the parol evidence introduced by the plaintiffs was not admissible, and should have been rejected.

4. That even if the parol evidence were admissible, and it were competent to treat the charters under consideration as stipulations for a round voyage out and home, they would still furnish no evidence of an advance in the guano freights over the charter of The Shirley, unless it were shown that the earnings of The Shirley out, and the $25 per ton home, were less than the $30 per ton stipulated to be paid under that construction of these charters.

I. All of these propositions except one involve, directly or indirectly, the construction of the advance clause in the charter of The Shirley. Under that clause, The Shirley was to have the benefit of any advance in the guano freights, made by the charterers in the United States, before she finished loading at the Islands. She was chartered on the 11th day of April, 1854, and finished loading on the 8th day of March, 1855; *and consequently her own- [*160 ers were entitled, by the express words of the contract, to claim the benefit of any advance in such freights made by the defendants in the United States between those dates.

Such an advance in guano freights could only be made by the defendants, as they were the only persons in the United States who were authorized by their government to contract for its transportation. They could raise the price of transportation or reduce it, if the owners of vessels would accept their terms; and if not, they could refuse to contract; and if no contracts for an advance were made by them within the period specified in the charter of The Shirley, then her owners would have no claim for additional compensation. Their right to such compensation was not referred to the state of the market, but to the subsequent contracts made by the defendants for the transportation of guano from the Chincha Islands to the United States. Freights in general might rise ever so much, and it would not benefit the plaintiffs unless the defendants yielded to its influence, and made contracts to give higher rates for the transportation of guano. They might engage in any other branch of commerce, and give what rates of freight they pleased, and yet if they did not make any advance in the guano freights in the United States, it would not confer any benefit upon the plaintiffs. Any other

advance in freights, however great and by whomsoever made, were not to be taken into account in determining the question whether the plaintiffs were entitled to additional compensation. In order to avail the plaintiffs in that behalf, it must be an advance made by the defendants, and one paid, or agreed to be paid, as the price for the transportation of guano to the United States; and it must appear that the contract for such payment was made within the period specified in that clause of the charter of The Shirley. Looking, therefore, to the plain import of the language of the parties, and applying that language to the subject-matter of the contract, as described in the contract itself, it is clear that the word "freight," as qualified by the word "guano," was used in a special sense, and refers solely to the price paid or agreed to be paid, by the defendants, within the 161*] prescribed time for *the transportation of guano from the Chincha islands to the United States. According to the terms of the contract, the parties agreed that the subsequent transactions of the defendants, in the same trade, should furnish and constitute the standard or criterion by which their rights and duties towards each other growing out of that clause in the charter-party should be ascertained and determined. Their agreement was to the effect that the plaintiffs contracted unconditionally to perform the service mentioned, for which they were, in all events, to receive the sum specified in the general clause of the charter-party; and in case the defendants paid or contracted to pay other persons a greater sum for the like service before The Shirley finished loading, then the plaintiffs were entitled to an additional compensation under this special clause, equal to the excess so paid or contracted to be paid to such other parties. They chartered their vessel early in the season, as appears from the date of the charter-party, and it may fairly be inferred from the nature of the transaction and the surrounding circumstances, independently of the correspondence, that some such stipulation was regarded as necessary to protect their interests in the contingency of a rise in freights as the season advanced. Such contingent agreements are of frequent occurrence between merchants and ship owners, and are entitled to receive a liberal interpretation, as they are in furtherance of trade and equal justice between the parties. They are, perhaps, more frequently based upon the future state of the markets, and not, as in this case, upon the transactions of the merchant in the particular trade. Parties, however, have the right to select what criterion they please; and where their contracts are fairly made, they must receive a reasonable construction, so as to carry their intention into effect, and in general that intention must be gathered from the language employed, the surrounding circumstances, and the subject-matter. Our attention has been drawn to the case of *Gether* v. *Capper*, 80 Eng. C. L. 696, as asserting a contrary doctrine. On a careful examination of the facts of that case, and the opinions of the judges, we have come to the conclusion that it is not opposed to the views here expressed. It was an 162*] action for freight *upon a charter-party, Under the general clause, a given rate of freight was to be paid in all events, as in this case; and it contained a special clause, which stipulated that the plaintiff "was to receive the highest freight which he could prove to have been paid for ships on the same voyage, when the vessel passed Elsinore." At the trial, the plaintiff was unable to prove that any other vessel had made the voyage referred to in the charter-party. Failing in that attempt, he then offered proof that a higher rate had been paid for vessels about that time from Lundswall, or an adjacent port, to London, which is a very different voyage. Whereupon a verdict was taken for the plaintiff, reserving leave to the defendant to move to enter a verdict in his favor, or to reduce the damages, as the court should think fit. A rule to show cause was accordingly granted, and after argument it was made absolute. Separate opinions were given on the occasion by the judges, to the effect that the owner could not entitle himself to the additional compensation by proving that other vessels had been chartered at higher rates from Lundswall to London, that being a different voyage, and not within the fair intendment of the charter-party. Every one of the judges present placed the decision expressly upon the words of the charter-party, and the failure of the plaintiff to bring his case within their intendment. His right to additional compensation was made to depend, by the express words of the contract, upon his being able to prove that other vessels at the time specified received or were to receive higher rates of freight for the same voyage. He failed to exhibit the proof, and, of course, was not entitled to recover. His contract prescribed the criterion by which his claim to additional compensation was to be ascertained and determined, and he had no right to go out of the contract and select a new standard, to which the other contracting party had not consented. It is far otherwise with the plaintiffs in the case under consideration. Their case rests upon somewhat different grounds. They have proved the state of facts on which their right to recover depends. According to the verdict of the jury, and the instructions of the court, their case is brought within the legal intendment of the contract, leaving nothing for the consideration *of this court, except the legal questions [*163 presented in the bills of exception. Their ship was to have the benefit of any advance in the guano freight made by the charterers in the United States before she finished loading. They contracted to bring guano from the Chincha islands to the United States for a given rate per ton, and the defendants stipulated to pay that rate, and if they paid or contracted to pay other vessels a higher rate before The Shirley finished loading, then they agreed to give the plaintiffs an additional compensation equal to that excess; and for that excess of rate per ton the plaintiffs were entitled to recover, together with the balance of the account rendered, which was admitted to be correct by the defendants. These suggestions lead necessarily to the conclusion that there is no error in the charge of the circuit court, so far as respects the construction of the contract, as the instruction in that particular was in strict conformity to the views here expressed. It was to the effect that if the jury found that the defendants had agreed to pay others more than $25 per ton for bringing guano from the Chincha islands to the United States under charter-parties executed here be-

tween the dates before mentioned, then they were authorized to find a verdict in favor of the plaintiffs for that excess. All of the charters relied on by the plaintiffs as tending to show that such was the fact, were substantially of the same character, so that if one had that tendency, then all had, and that was conceded in the argument, and must have been so understood by the jury.

II. In the next place, it is insisted that the declarations and statements of the agents of the defendants, made at the time those charters were executed, were improperly admitted as evidence and two grounds are assumed in support of the proposition. First, that they were made without authority, and therefore were not admissible to affect the interests of the defendants; and second, that they were admitted in violation of the well-known rule that parol evidence is not admissible to explain, vary, or contradict a written instrument. All such declarations and statements made subsequently to the execution of the charters were properly ruled out and excluded from the consideration of the jury.

164*] 1. *Some brief reference to the facts of the case becomes necessary, in order to test the correctness of the first ground assumed under this last proposition. Full authority had been conferred upon those agents to negotiate for the vessels whose charters were introduced by the plaintiffs. Those declarations and statements were made by their agents in respect to the subject-matter of the negotiation, and at the time the charters were presented to the owners of the vessels for execution. After they were executed by the owners, they were forwarded to the defendants and received their signatures, and every assurance given by the agents to the owners of the vessels was subsequently made good by the defendants. They were told there was no outward cargo for them and that they might proceed immediately; and they were allowed to do so, without objection or remonstrance. The vessels carried out no freight, and, on their return, the owners were paid $30 per ton on the return cargo, without hesitation or complaint. Accompanying those explanations were others to the effect that the stipulation in question had been inserted in the charters, so that they might not conflict with those previously made providing for a rise in freight; and the circumstances fail to disclose any other substantial purpose for which it was done.

Parties do not usually contract heavy pecuniary obligations without some object in view; and as no substantial one is disclosed, except the one assigned by the plaintiffs, it is impossible to say, as matter of law, that the charters in question and the surrounding circumstances had no tendency to maintain the issue for the plaintiffs. Where the fact of agency, has been proved, says Mr. Starkie, either expressly or presumptively, the act of the agent, coextensive with the authority, is the act of the principal, whose mere instrument he is, and then, whatever the agent says, within the scope of his authority, the principal says; and evidence may be given of such acts and declarations, as if they had been actually done and made by the principal himself. That principle was directly sanctioned by this court in *United States* v. *Gooding*, 12 Wheat. 470, where the views of the author, as above quoted, were cited and approved. 2 Stark. Ev. 45. Whatever the agent *does in the lawful prosecution of [*165 the business intrusted to him by the principal, is the act of the principal; and there, says Mr. Greenleaf, his representations, declarations and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting a part of the *res gestæ*, and they are of the nature of original evidence, and not hearsay; and Judge Story, in his valuable treatise on the Law of Agency, maintains the same doctrine. 1 Greenl. Ev. 35; 113 Story on Ag. § 134. Acts and declarations of an agent are admissible under such circumstances, upon the ground that, whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal, and consequently may be proved in like manner as if the evidence applied personally to the principal. *American Fur Co.* v. *The United States*, 2 Pet. 364. On the whole case, we are of the opinion that the evidence of original authority in the agents was sufficient to warrant the court in submitting their declarations and statements to the jury.

In the same connection, it was also denied at the argument that there is any sufficient evidence in the case to show that the agents of the defendants had any authority to make deviations from the *pro forma* charter-party furnished to them on the 1st day of June, 1854. A recurrence to the evidence, however, will show that the suggestions are not well founded. They commenced negotiating for vessels under those instructions shortly after they were received, and continued the business till nearly the close of July. All the charters,—after they were executed by the owners, were warded to the defendants, and received their signatures. One bears date as early as the 5th day of June, and others as late as the 29th day of July, showing that they were approved as they were forwarded, and at different times. These facts present strong presumptive evidence of authority, fully warranting the court in submitting the question to the jury.

2. The second ground assumed by the defendants, under this proposition, is that the declarations and statements of their agents ought to have been excluded, for the reason that *parol evidence is not admissible to [*166 explain, vary, or contradict a written contract. That principle, as a general rule applicable to parties and privies, and their representatives and those claiming under them, is undeniable, and is not disputed by the counsel of the plaintiffs. They contended, however, in the court below, and still insist, that the right of the plaintiffs to demand additional compensation in this case was made to depend, by the express words of the contract, upon the subsequent transactions of the defendants in the same trade, and that the stipulation in the subsequent charters is so framed that it covers up and conceals the real nature of the contracts between the parties. They went farther in the court below, and still insist that the real contract was one to pay $30 per ton to bring guano from the Chincha islands to the United States, and that the stipulation was framed in the form in which it appears,

graduating $5 on the outward and $25 on the home voyage, for the express purpose of relieving the defendants from the responsibility which they had incurred to the plaintiffs, under the charter of The Shirley, and the jury have found all these alleged facts in favor of the plaintiffs. Whether the jury were warranted in so finding or not, is not a question for an appellate tribunal. That question cannot be re-examined by this court. For the purpose of any examination of the case which it is competent for this court to make under the Constitution of the United States and the laws of Congress, it must be assumed that the facts of the case have been correctly found by the jury. Repeated decisions of this court have affirmed the doctrine, which is but a repetition of the constitutional provision upon the subject, that no fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law,-and it is well known that the only modes known to the common law of re-examining the facts of a case, after they have been found by a jury, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or by the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings.

167*] *Parsons* v. *Bedford*, 3 Pet. 447; *U. S.* v. *King*, 7 How. 845; *Penhallow* v. *Doane*, 3 Dall. 102; *U. S.* v. *Eliason*, 16 Pet. 301; *Phillips* v. *Preston*, 5 How. 289.

Whether the evidence, when offered, is admissible, is a question for the court; but when admitted, the question whether it is sufficient or not is for the jury, and it is their province to draw from it all such inferences and conclusions as it conduces to prove, and which, in their judgment, it does prove; and their finding is conclusive, unless a new trial is awarded by the court in which the case is tried, or in the appellate tribunal, for some error of law. Guided by these principles, it must be assumed, in the further examination of this question, that the facts are as they have been found to be by the jury. It then appears that the real contract in these charters was one to pay $30 per ton for bringing guano from the Chincha islands to the United States, and that the stipulation in question was inserted in the charters to cover up and conceal the real nature of the contract, in order to enable the defendants to relieve themselves from the responsibility which they had incurred in their previous contract with the plaintiffs; and the question is, whether the parol evidence was properly admitted to prove those facts. When the plaintiffs offered to prove those facts in the court below, the question was then presented to the circuit court precisely as it is here stated. Evidence, when offered at the trial, must be assumed to exist, and to be true, for the purpose of determining the question of its admissibility. Proof, such as was offered and received in this case, could only be rejected upon one of two grounds—first, that the evidence of the facts was not admissible; and second, that if the facts were proved, they would have no tendency to maintain the action. That they would maintain the action if proved, no one can doubt; so that the only question is, whether they were admissible.

One further explanation is necessary, in order to present the question in its true light. It is not pretended that the parol evidence conflicts in any manner with the written contract on *which the suit was brought. On the [*168 contrary, the objection is directed solely to its effect upon the charter-parties subsequently executed by the defendants with the owners of the other vessels. Those charters were introduced by the plaintiffs as evidence in the cause, to show their right to recover. They also relied on the circumstances attending the transactions, and the declarations and statements of the agents who negotiated them, and the subsequent conduct of the defendants in respect to the same subject matter. At the trial, the charters were submitted to the jury as evidence, and the jury were told, in effect, that they were not confined to the charters alone, but were at liberty to consider them in connection with all the other evidence in the case, in order to ascertain what the real contracts were between those parties.

Where the effect of a written agreement collaterally introduced as evidence, as in this case, depends, not merely on the construction and meaning of the instrument, but upon extrinsic facts and circumstances, the inferences of fact to be drawn from it must be left to the jury. It was so held by this court in *Etting* v. *The Bank of the United States*, 11 Wheat. 75, and we think the principle is correct. In that case, the testimony consisted of various communications and reports made to the bank, of their own transactions, and of the admissions of the parties or their agents, and it was insisted on the part of the bank, that the jury were not at liberty to draw inferences of fact from the written evidence; to which objection, Marshall, Ch. J., replied that "were the fact as alleged, and were it true that all the testimony is in writing, the consequence drawn from it cannot be admitted." Other cases have been decided by this court, applying the same doctrine as in *Iasigi* v. *Brown*, 17 How. 183. That was an action brought to recover damages against the defendant for a false representation respecting the pecuniary standing of a third party, whereby the plaintiff had been induced to sell goods, and had incurred loss. Letters were introduced, and facts and circumstances connected with them proved; and this court held that it was for the jury to say, after examining the letters in connection with the facts and circumstances, whether they were *calculated to inspire, and did inspire, [*169 a false confidence in the pecuniary responsibility of the party to which the defendant knew he was not entitled.

Another view of the question is also very properly invoked by the plaintiffs. Their claim to additional compensation, by the express words of the contract, was made to depend upon their being able to exhibit proof that the defendants had paid other parties a higher rate than $25 per ton for the same service. Oral proof to that effect, if credible, was as good as written. They were at liberty to rely upon the one or the other, or upon both combined, as circumstances might indicate it to be for their interest or convenience. Beyond ques-

tion they might introduce those charters for that purpose, if they saw fit; or, if they had the means, and preferred to do so, they might prove their case by other evidence; and it cannot be maintained that their right to do so was in any manner impaired after those charters were introduced. They were not parties to those contracts, nor did they in any legal sense claim under them. Their rights being made to depend upon the subsequent transactions of the defendants with third parties, it was clearly proper to admit proof to show what those transactions were.

Several courts and text writers have stated the principle much broader than it is here laid down. The rule excluding parol proof, in such cases, says Mr. Greenleaf, cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth, through the ignorance, carelessness, or fraud of the parties, and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written instruments of others. In *Krider* v. *Lafferty*, 1 Whart. 314, it is held that the rule is applicable only in suits between parties to the agreement, and their representatives and those claiming under them, and not to strangers. It is also held in England, in several cases, that the rule is not applicable to strangers. *King* v. *Inhabitants of Cheadle*, 3 Barn. & Ad. 833; 2 Taylor's Ev. § 827, and cases cited; *Wilson* v. *Hart*, 7 Taunt. 295; *Overseers of Berlin* v. *Norwich*, 10 Johns. 229; Poth. on **170***] Obl. by Evans, n. 766; 2 *Cow. & H. notes, 354, 368; *Reynolds* v. *Magness*, 2 Ired. 26; 1 Greenl. Ev. § 279.

Parol testimony is always admissible in matters of contract, to show fraud, notwithstanding its effect may be to contradict what is in writing. That principle is too well established and too generally acknowledged to require any confirmation. Parties have the right to make their own contracts; and, in general, when they are satisfied, that is sufficient, and others have no right to complain. Cases, however, occasionally arise where a contract, though bona fide between those who made it, may operate as a fraud upon third parties; and in this case, assuming the facts to be as they have been found by the jury, and as the evidence tends to prove that the stipulation in question was inserted in those charters for the purpose of enabling the defendants, by that device, to avoid their responsibility to the plaintiffs, whether the owners of the vessels knew the purpose or not, the act so far partakes of the nature of a fraud between the parties to this suit as to authorize the introduction of parol evidence, to show what the truth was in regard to those transactions.

For these reasons, we are of the opinion that the instructions given by the circuit court were correct, and that there is no error in the record.

The decree of the Circuit Court, therefore, is affirmed, with costs.

Dissenting, Mr. Justice **Grier**, Mr. Justice **Catron**, and Mr. Justice **Wayne**.

THE INSURANCE COMPANY OF THE VALLEY OF VIRGINIA, *Plff. in Err.*, *v.* MOSES C. MORDECAI.

(See S. C. 21 How. 195-202.)

Writ of error, when must be returnable—cannot be amended—defect in, cured only by appearance, not by citation.

This writ of error was made returnable on the second Monday in January, in the present term. The writ of error must be returnable on the first day of the term, and a writ of error with a different return day is not authorized by law, nor by the rules and practice of this court.

Neither can the writ of error be amended.

The defect can be cured, only by the voluntary appearance of the party, entered on the record.

Nor can the mistake be corrected by a citation from this court.

The case must, therefore, be dismissed.

Argued Jan. 21, 1859. Decided Jan. 31, 1859.

IN ERROR to the District Court of the United States for the Western District of Virginia.

This was an action of debt brought in the court below, by the defendant in error, on a judgment recovered in the circuit court of the United States for the district of South Carolina.

The court below having entered judgment for $4,546, with interest and costs, in favor of the plaintiff, the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

On motion to dismiss.

Mr. **Conway Robinson**, for plaintiff in error:

Grounds relied on in opposition to motion to dismiss:

1. Under § 22 of the act of Congress establishing the judicial courts of the United States, a writ of error issued by the clerk of the supreme court is to returnable at a certain day and place therein mentioned; but that day need not be the first day of the next term.

The form of a writ of error is given in Curtis's Digest, p. 599. It may be that in most cases it is now made returnable to the first Monday in December, and that formerly, when the term commenced the second Monday in January, it was in most cases made returnable to that day. This, however, is not because of any necessity to make it returnable to the first day of the term, but because that in most cases is a convenient day.

It would be of no avail to make it so returnable, when there is not, between the day on which the writ of error issues and the first day of the next term, time to give the adverse party the twenty or thirty days' notice required by the act of Congress.

Nor will it do to say that during the twenty or thirty days next preceding the commencement of a term no writ of error is to issue. For that would make it impossible ever to obtain, under § 23, a supersedeas to a judgment rendered within those twenty or thirty days.

2. Under the act of Congress of May 3, 1792, section 9, it was the duty of the clerk of the Supreme Court to transmit to the clerks of the inferior courts the form of a writ of error ap-

proved by two of the judges of the Supreme Court, and it was lawful for the clerks of the inferior courts to issue writs of error agreeably to such forms, as nearly as the case may admit.

Brightly, Dig. p. 137, § 4, p. 260, § 6, p. 896, § 5, 11.

It may reasonably be presumed that in discharge of the duty prescribed by this act, the form of a writ of error was approved by two of the judges of the Supreme Court, and transmitted to the clerks of the inferior courts, and that the writ of error in this case was issued agreeable to such form. If so, the writ of error must be lawful, unless there be something in the act which in terms requires the writ to be returnable to the first day of the term. But this is carefully avoided by the act, which directs merely that the writ of error shall be returnable to the Supreme Court.

3. If there be any irregularity in the writ, it is merely clerical, like the irregularity in *Course* v. *Stead*, 4 Dall. 22, and *Blackwell* v. *Patten, etc.* 7 Cranch, 277; *Mossman* v. *Higginson*, 4 Dall. 12.

Wood v. *Lide*, 4 Cranch, 180, modifies or explains *Hamilton* v. *Moore*, 3 Dall. 371, and *Blair* v. *Miller*, 4 Dall. 21. In those cases the objection was not that the writ was defective in form, but that after the return day, a whole term passed before the record and writ of error was filed in the Supreme Court.

Mr. **P. Phillips** for defendant in error, in support of the motion.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The defendant in error, on the 8th of October, 1858, obtained a judgment against the plaintiffs in error in the district court of the United States for the western district of Virginia.

200*] *On the 18th of the same month, this writ of error was sued out, and made returnable on the second Monday in January then next ensuing—in other words, it was made returnable on the second Monday in January, in the present term of this court; and the defendant in error was cited to appear here on that day.

A motion has been made to dismiss the case, upon the ground that, in order to bring the judgment of the district court before this court, the writ of error must be returnable on the first day of the term, and that a writ of error with a different return day is not authorized by law, nor by the rules and practice of this court.

By the act of Congress of May 8, 1792 (1 Stat. 278), it was made the duty of the clerk of this court to transmit to the clerks of the several circuit courts of the United States the form of a writ of error, to be approved by two of the judges of this court; and the clerks of the circuit courts were by that act authorized to issue writs of error agreeably to such form, as nearly as the case would admit. And it is by virtue of this act alone that the clerk of a circuit court, or of a district court exercising the jurisdiction of a circuit court, is authorized to issue a writ of error to remove a case to this court.

Immediately after its passage, the form of a writ of error was adopted and transmitted to the clerks of the circuit courts, pursuant to its provisions; and that form made it returnable on the first day of the term of this court next ensuing the issuing of the writ—that is, on the day appointed by law for the meeting of the court. The form then adopted has never been changed, nor are we aware of any case in which a writ of error with a different return day has been sanctioned by this court.

It is unnecessary, therefore, to inquire what may be the rules of practice in this particular in other courts. The legal return day was fixed under the authority of the act of 1792; and a writ of error issued by the clerk of a circuit court or of a district court exercising the powers of a circuit court, with a different return day, or differing in any other material respect from the form transmitted, is without authority of law, and will not bring up the case to this court.

*The rules of the court have been [*201 framed in conformity with this return day of the writ; and the rule which permits a defendant in error to docket and dismiss a case if the transcript is not filed by the plaintiff within the time therein limited, necessarily presupposes that the writ is returnable on the first day, and that the plaintiff might then file the transcript.

He may, it is true, return the writ with the transcript at any time during the term, unless the case has been docketed and dismissed, when it cannot afterwards be filed without the special order of the court. But this permission to return the writ, and file the transcript at a subsequent day, is upon the principle that, for certain purposes of convenience or justice, the term is considered as but one period of time—as one day, and that day the first of the term. The writ before us was obviously issued by some oversight of the clerk, who followed the form used when this court met on the second Monday in January, without, it would seem, adverting to the circumstance that the day of meeting had been changed by law, and that the first Monday in December, and not the second Monday in January, was the first day of the term.

Neither can the writ of error be amended. The defendant in error was cited and admonished to appear on the second Monday in January; and if the writ were amended, it could not be maintained with this citation, for the defendant must be cited to appear on the same day that the writ is returnable. The citation is the regular and familiar process from a court of justice, notifying and requiring the defendant to appear and make his defense, if he has any, on the return day of the writ. And the common-law process of a writ of error made returnable on one day, and a summons to the defendant to appear at another, would be without precedent, and would be as objectionable as the entire absence of a citation. And the want of proof that the defendant was cited has always been held to be a fatal defect in the process prescribed and required by the act of 1789, whereby a party is authorized to bring the judgment of an inferior court before this court for revision—a defect which can be cured only by the voluntary appearance of the party entered on the record.

202*] *Nor can this mistake be corrected by a citation from this court. The act of Congress requires it to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court.

The case must, therefore, be dismissed for want of jurisdiction in this court.

ROBERT CAMPBELL *et al., Plffs. in Err.,*
v.
CLEMENT BOYREAU.

(See S. C. 21 How. 223-228.)

In trials at common law, no question can be reviewed, except upon process, pleadings, or judgment, unless facts are found by a jury, or are admitted—findings of fact by court, not recognized—no exception, unless jury impaneled—this court do not regard facts found by judge—no question for re-examination—laws of state cannot authorize proceedings in this court.

In trials at common law, no question of the law can be reviewed in an appellate court upon writ of error (except only where it arises upon the process, or pleadings, or judgment, in the cause), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court.

The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act.

Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were at the bar.

And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal.

Consequently, as the circuit court had jurisdiction of the subject matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and, on that ground, only, affirmed.

Neither the laws nor the practice of any state can authorize a proceeding in the courts of the United States different from that which was established by the acts of 1789 and 1803.

Argued Jan. 21, 1859. Decided Jan. 31, 1859.

IN ERROR to the Circuit Court of the United States for the Northern District of California.

The case is sufficiently stated by the court.

No counsel appeared for the plaintiff in error.

Messrs. **R. J. Brent, J. J. Crittenden, and J. H. Bradley,** for defendant in error:

No exception lies in any case where the law and facts are tried by the court.

Weems v. *George*, 13 How. 197; *Craig* v. *Missouri*, 4 Pet. 427; 9 Pet. 282.

The writ of error in this case brings up only questions of law arising upon the finding of the court, and not questions of fact.

U. S. v. *King*, 7 How. 844; *Penhallow* v. *Doane*, 3 Dall. 54; *Hyde* v. *Booraem*, 16 Pet. 169; *Minor* v. *Tillotson*, 2 How. 392.

This case, then, coming up on the writ of error, to review the errors of the court in matters of law only, the facts found by the court are to be taken as conclusive whether the court was or was not warranted in finding the facts certified.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This is an action of ejectment (although the pleadings are not in the form prescribed by common law) to recover a tract of land called *San Leandro*, situated in California. It was brought in the circuit court of the United States for that district. The parties agreed to waive a trial of the facts by a jury, and that the facts as well as the law should be decided by the court, upon the evidence adduced by the parties.

In pursuance of this agreement, evidence was offered on both sides; and the court proceeded to decide the facts in dispute, and then proceeded to decide the questions of law arising on the facts so found by the court; and finally gave judgment against the plaintiffs in error, who were defendants in the court below. And this writ of error is brought to revise that judgment.

It appears by the transcript that several exceptions to the opinion of the court were taken at the trial by the plaintiffs in error—some to the admissibility of evidence, and others to the construction and legal effect which the court gave to certain instruments of writing. But it is unnecessary to state them particularly; for it has been repeatedly decided by this court, that, in the mode of proceeding which the parties have seen proper to adopt, none of the questions, whether of fact or of law, decided by the court below, can be re-examined and revised in this court upon a writ of error.

It will be sufficient, in order to show the grounds upon which *this doctrine has [*226 been maintained, and how firmly it has been settled in this court, to refer to two or three recent cases, without enumerating the various decisions previously made, which maintain the same principles. The point was directly decided in *Guild* v. *Frontin*, 18 How. 135; which, like the present, was a case from California, where a court of the United States had adopted the same mode of proceeding with that followed in the present instance. And the decision in that case was again reaffirmed in the case of *Suydam* v. *Williamson*, 20 How. 432; and again in the case of *Kelsey* v. *Forsyth*, 21 How. 85, decided at the present term.

Indeed, under the acts of Congress establishing and organizing the courts of the United States, it is clear that the decision could not be otherwise; for, so far as questions of law are concerned, they are regulated in their modes of proceeding according to the rules and principles of the common law, with the single exception of the courts in the state of Louisiana, of which we shall presently speak. And by the established and familiar rules and principles which govern common-law proceedings, no question of the law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment, in the cause), unless the facts are found by a jury, by a gen-

eral or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court.

The finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the 227*] *court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the circuit court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed.

The cases referred to in the argument, which were brought up by writs of error to a circuit court of Louisiana, do not apply to this case. The act of Congress of May 26, 1824 (4 Stat. 62), adopted the practice of the state courts in the courts of the United States. And a writ of error to a circuit court of that state, therefore, is governed by different principles from a like writ to the circuit court of any other state. And as, by the laws of Louisiana, the facts, by consent of parties, may be tried and found by the court without the intervention of a jury, this court is bound, upon a writ of error, to regard them as judicially determined, and treat them as if they had been found by the special verdict; and the questions of law which arise on them are consequently open to the revision of this court.

But the practice in relation to the decisions in that state is an exception to the general rules and principles which regulate the proceedings of the courts of the United States; nor can the laws or the practice of any other state authorize a proceeding in the courts of the United States different from that which was established by the acts of 1789 and 1803, and the subsequent laws carrying out the same principles and modes of proceeding.

Upon the grounds above stated, the judg- 228*] ments in this case *must be affirmed. But it must at the same time be understood that this court express no opinion as to the facts of the law as decided by the circuit court, and that the whole case is open to re-examination and revision here, if the questions of fact or law should hereafter be brought legally before us, and in a shape that would enable this court to exercise its appellate jurisdiction.

LESSEE OF WILLIAM C. FRENCH and Wife, *Plff. in Err.*,

v.

WILLIAM H. SPENCER, JR., *et al.*

(See S. C. 21 How. 228-241.)

Act of May 6, 1812, and act of 1816—where the law does not make exception, courts cannot—what description in deed, sufficient—patent dates back to location—patent inures to benefit of prior alienee—estoppel by deed.

The act of May 6, 1812, the 4th section of which declares that no claim for military land bounties shall be assignable or transferable until after the patent has been granted, and that all sales, mortgages, or contracts made prior to the issuing of the patent, shall be void, is not part of the act of 1816.

Where the legislature makes a plain provision, without making any exception, the courts can make none.

Where the warrant is recited in the deed, and the quantity of land it calls for; and the grantor grants, bargains and sells, to the grantee, his heirs and assigns, forever, the said three hundred and twenty acres of land.—Held that the deed was a valid conveyance of grantor's interest in the land at the time the deed was executed.

The patent relates back to the location of the warrant, and constitutes part of the title.

An intermediate bona fide alienee of the incipient interest may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a court of equity could afford him.

Where the grantor sets forth on the face of his conveyance, by averment or recital, that he is seised of a particular estate in the premises, and which estate the deed purports to convey, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was seised and possessed at the time he made the conveyance.

Argued Jan. 13, 1859. Decided Jan. 31, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of ejectment brought in the court below, by the plaintiff in error, to recover a certain tract of land in Indiana.

The trial below having resulted in a verdict and judgment for the defendants, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **R. W. Thompson,** for plaintiffs in error:

The plaintiffs assign the following errors:

1. The circuit court erred in admitting, against their objection, the instrument dated June 28, 1816, as evidence for the defendants.

2. The court erred in giving instructions to the jury.

The instrument dated June 28, 1816, is upon its face void, because it is in direct violation of the several acts of Congress in relation to bounties and land for military services. It was not an instrument assignable at common law. If assignable, it must be because of the several acts of Congress on the subject.

The counsel referred to the acts of Dec. 24, 1811 (2 Stat. at L. 667); Jan. 11, 1812 (2 Stat.

at L. 671, 672, § 12); Feb. 6, 1812 (2 Stat. at L. 676, § 2); May 6, 1812 (2 Stat. at L. 720, §§ 2 and 4); March 5, 1816 (3 Stat. at L. 256); April 16, 1816 (3 Stat. at L. 285-287, § 5).

These several acts in force at date June 28, 1816, show conclusively that it was the design of Congress to prevent the alienation of these bounties by the parties to whom they were granted.

In 1819 Mr. Wirt, Attorney General, gave an opinion that a Canadian land warrant was not assignable.

Public Land Laws, part 2, p. 6; also, Id. pp. 9, 15, 16, 160.

Subsequently, however, Congress passed the act of March 3, 1821, recognizing and so far as it could be done, legalizing the assignment of Canadian land warrants.

3 Stat. at L. 641.

This act did not reach this case. Its provisions extend only to cases where the warrant had been assigned and not located at that time. It merely authorized previously assigned warrants to be located. But the paper of June 28, 1816, was not in point of fact an assignment of the warrant by Fosgit to Spencer. There was then no warrant in existence, and consequently nothing to assign. Nor was it a deed of conveyance. Fosgit, under the foregoing acts, had no more power, before the issue of the patent, to make such a deed than he had to make an assignment; but it does not purport to be a deed of conveyance. At one place it uses the words of bargain and sale; at another, those which create a trust. Where the words of a deed are so uncertain that the intention of the maker cannot be discovered, it will be held to be void for uncertainty.

1 Greenl. Ev. § 300; *United States* v. *King*, 3 How. 773.

Where there are any words in a deed which evidently appear repugnant to the other parts of it and to the general intention of the maker, they will be rejected as senseless.

Ferguson v. *Harwood*, 7 Cranch, 414; *Worthington* v. *Hylyer*, 4 Mass. 196; *Jackson* v. *Clark*, 7 Johns. 217; *Cutler* v. *Tufts*, 3 Pick. 272; *Bott* v. *Burnell*, 11 Mass. 163; *Jackson* v. *Root*, 18 Johns. 336.

But if it had been designed as a deed of conveyance, it did not convey the legal estate to Spencer.

Coke, § 446; Hilliard, Abr. 309, § 25.

The patent was not issued until Oct. 26, 1816, and until then the legal title was in the United States.

Foley v. *Harrison*, 15 How. 447; *Dubois* v. *Newman*, 4 Wash. C. C. 77; *Wilcox* v. *Jackson*, 13 Pet. 516; *Green* v. *Liter*, 8 Cranch, 229; *Irvine* v. *Marshall*, 20 How. 558; *Bagnell* v. *Broderick*, 13 Pet. 436.

If, then, this instrument is a conveyance at all, it conveys at most an equity which does not avail the defendants in this action.

Again; if it be conceded to be a deed of conveyance, it is a quitclaim merely, by which Fosgit parted only with the equitable estate that he possessed at its date. A subsequently acquired estate does not pass where there are no covenants of title.

Van Rensselaer v. *Kearney*, 11 How. 297; *Pelletreau* v. *Jackson*, 11 Wend. 116; *Jackson* v. *Waldron*, 13 Wend. 212.

It is, however, insisted that it is to be presumed from lapse of time, that the legal estate had been conveyed to Spencer. This abandons the ground that the instrument of June 28, 1816, is a conveyance, and treats it as an executory contract to convey, and yet is the point upon which the case was decided in the circuit court. This presumption, that a deed was executed by Fosgit to Spencer, does not arise in the case as it now stands. The case turned in the court below upon the single question of the validity and effect of the paper of June 28, 1816, and both the instruction of the court and the bill of exceptions show this. It would be an easy matter to show that no such presumption can be indulged in this case, if that question should ever arise. There is nothing to base it upon. It is not shown that twenty years have elapsed since Fosgit was in a condition to execute the agreement to convey (3 Phil. Ev. Cow. & Hill's notes, 505, cases cited); nor that he ever knew that the legal estate had passed to him by the issue of the patent, or that after his death his heirs ever knew it. The disability and ignorance of the party always repel presumptions.

3 Phil. Ev. C. & H.'s Notes, 497; 3 Johns. Ch. 129; *Hurst* v. *McNeil*, 1 Wash. C. C. 70; *Henderson* v. *Hamilton*, 1 Hall. 314.

Besides all this, there is no period of twenty years' possession claimed under adverse title.

3 Greenl. 120.

Whatever was the character of the paper of June 28, 1816, the circuit court erred in telling the jury that it was "a complete defense to this action;" and therefore they "should find for the defendants." It was the duty of the court to construe it, so far as the intentions of the parties can be elicited from it, for the purpose of deciding whether it is relevant to the matter in controversy, and the act of the parties by whom it purports to have been executed. There the authority of the court ends. In this case, it belonged to the jury alone to decide whether or no Fosgit intended by this paper to convey the particular lands in dispute, and whether Spencer so understood it at the time the paper was executed.

Reed v. *Proprietors of Locks and Canals*, 8 How. 288.

It was not *per se* a conveyance of the land described in the patent.

The court had no right to decide what was the intention of Fosgit; it was for the jury to decide upon the weight of the evidence.

Mr. **H. Bennett** for defendants in error.

Mr. Justice **Catron** delivered the opinion of the court:

Silas Fosgit obtained a warrant for three hundred and twenty acres of land as a Canadian volunteer in the war of 1812 with Great Britain. This warrant he caused to be located in the Indiana territory, June 3, 1816, on the land in dispute. On the 28th day of that month he conveyed the land to William H. Spencer, who died in possession of the same; it descended to his children and heirs, who continued in possession, and are sued in this action by one of the two heirs of Fosgit, who died about 1823. A patent was issued by the

United States to Fosgit, dated in October, 1816. The deed from Fosgit to Spencer was offered in evidence in the circuit court, on behalf of the defendants, and was objected to:

1st. Because it is void on its face, being in violation of the acts of Congress touching the subject of bounty land for military services, and against the policy of the United States on that subject.

2d. Because said writing, on a fair legal construction of its terms, conveys no legal title (and, indeed, no title at all, of any kind) to the lands in question; and,

3d. Because said writing is irrelevant and incompetent as evidence in this cause.

The court overruled the objections, and permitted the defendants to give the writing in evidence, and instructed the jury that it was a complete defense to the action; to all of which the plaintiff excepted.

1. Was the writing void because it was in violation of acts of Congress touching the sale of bounty lands before the patent had issued? This depends on a due construction of the act of 1816. It gave to each colonel nine hundred and sixty acres; to each major eight hundred acres; to each captain six hundred and forty acres; to each subaltern officer four hun- [*237] dred acres; *to each noncommissioned officer, musician, and private three hundred and twenty acres; and to the medical and other staff in proportion to their pay, compared with that of commissioned officers. Warrants were ordered to be issued by the Secretary of War, subject to be located by the owner, in quarter sections, on lands within the Indiana territory, surveyed by the United States at the time of the location. And three months additional pay was awarded to this description of troops.

By the acts of 1811, ch. 10; 1812, ch. 14, § 12, and that of May 6, 1812, ch. 77, § 2, it was provided that each private and noncommissioned officer who enlisted in the regular service for five years and was honorably discharged and obtained a certificate from his commanding officer, of his faithful service, should be entitled to a bounty of one hundred and sixty acres of land; and that the heirs of those who died in service should be entitled to the same, to each of whom by name a warrant was to issue. The act of May 6, 1812, provided for surveying, designating, and granting these bounty lands; the 4th section of which declares that no claim for military land bounties shall be assignable or transferable until after the patent has been granted; and that all sales, mortgages, or contracts, made prior to the issuing of the patent, shall be void; nor shall the lands be subject to execution sale till after the patent issues.

It is insisted that this provision accompanies and is part of the act of 1816, and several opinions of Mr. Attorney General Wirt are relied on to sustain the position that the acts granting bounty lands are *in pari materia*, and must be construed alike. He gave an opinion in 1819 (2 L. L. and Opinion 6), that a land warrant issued to a Canadian volunteer was not assignable on its face, or in its nature, and consequently that the patent must issue in the name of the soldier. But he did not decide, nor was he called on to do so, that, after the warrant had been located and merged in the entry, that the equitable title and right of possession to the land could not be transferred by contract.

The act of 1816 involves considerations, different from the previous provisions, for the protection of the enlisted common soldier. A class of active, efficient, American citizens, who *had emigrated to Canada, were com- [*238] pelled to leave there on the war of 1812 breaking out; they returned to their own country, and went into its service; and when the war was ended, both officers and soldiers were compensated in lands and money for this extraordinary service. The act of Congress orders the warrants to be delivered to the respective owners, to be located by them; whereas the common soldier, provided for in the acts of 1811 and 1812, did not receive his warrant, but the government bound itself to locate the land at its own expense. Congress may have thought it not at all necessary to guard the Canadian volunteers against being overreached by speculators, and deprived of their bounty lands. This, however, is mere conjecture. The act of March 5, 1816, has no reference to, or necessary connection with, any other bounty land act; it is plain on its face, and single in its purpose. And, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the legislature makes a plain provision, without making any exception, the courts can make none. *McIver* v. *Regan*, 2 Wheat. 25; *Patton* v. *McClure*, Mart. & Yerg. 345, and cases cited; *Cocke & Jack* v. *McGinnis*, Ib. 365; *Troup* v. *Smith*, 20 Johns. 33. We are therefore of the opinion that Fosgit could sell and convey the land to Spencer after the entry was made.

2. The next ground of objection to the deed is, that it conveys no title when fairly construed. It has a double aspect, obviously, for the reason that the parties to it did not know, at the time it was executed, whether or not the land had been located by Fosgit's agent. The issuing of the warrant is recited in the deed, and the quantity of land it calls for; and then the grantor says: "For the consideration of five hundred dollars, I have assigned and set over, and by these presents do grant, bargain, sell, transfer, assign, and set over, to said William H. Spencer, his heirs and assigns, forever, the said three hundred and twenty acres of land; to have and to hold the same in as full and ample a manner as I, the said Silas Fosgit, my heirs and assigns, might or could enjoy the same, by virtue of the said land warrant or otherwise."

*Then follows an irrevocable power [*239] from Fosgit to Spencer, his heirs or assigns, to locate the warrant, obtain a patent, etc.

The warrant having been located on land already surveyed, it could easily be identified. The description is to the same effect as if the deed had said, I convey the land covered by my warrant of three hundred and twenty acres.

We are, therefore, of the opinion that the deed was a valid conveyance of Fosgit's interest in the land sued for at the time the deed was executed.

The third exception to the deed is covered by the foregoing answers.

3. The charge of the court to the jury held, as a matter of law, that the deed was a complete defense to the action, and that the patent

issued to Fosgit related back to the location of the warrant, and constituted part of Spencer's title.

This consideration involves a question of great practical importance to states and territories where entries exist on which patents have not issued, as sales of such titles are usual and numerous. The incipient state of such titles has not presented any material inconvenience, as it is usually provided by state laws that suits in ejectment may be prosecuted or defended by virtue of the title.

In Indiana, it is provided by statute that "every certificate of purchase at a land office of the United States shall be evidence of legal title to the land therein described." That is to say, for the purposes of alienation and transfer, and for the purposes of litigating rights of property and possession, a certificate of purchase shall be treated as a legal title; and to this effect it is competent evidence in an action of ejectment. *Smith* v. *Mosier*, 5 Blackf. 51.

After the patent issued, this title was exclusively subject to state regulations, in so far as remedies were provided for its enforcement or protection; and therefore no objection can be made to any state law that does not impugn the title acquired from the United States.

Whether the patent related back in support of Spencer's deed is not a new question in this court. It arose in the case of *Landes* v. *Brant*, 10 How. 372, where it was held that a pat-**240***] *ent issued in 1845 "to Claymorgan and his heirs," by which the heirs took the legal title, related back and inured to the protection of a title founded on a sheriff's sale of Claymorgan's equitable interest, made in 1808. There, as here, the contest was between the grantee's heirs and the purchaser of the incipient title. The court holding, that when the patent issued, it related to the inception of title, and must be taken, as between the parties to the suit, to bear date with the commencement of title.

It is also the settled doctrine of this court, that an entry in a United States land office on which a patent issues (no matter how long after the entry is made), shall relate to the entry, and take date with it. *Ross* v. *Barland*, 1 Pet. 655. The fiction of relation is, that an intermediate bona fide alienee of the incipient interest may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a court of equity could afford him.

4. We hold that, on another ground, the instruction was clearly proper.

Here, the after-acquired naked fee is set up to defeat Fosgit's deed, made forty years ago in good faith, for a full consideration, and to oust the possession of Spencer's heirs, holding under that deed. The rule has always been, that where there was a warranty or covenants for title, that would cause circuity of action if the vendee was evicted by the vendor, then the deed worked an estoppel. But the rule has been carried further, and is now established, that where the grantor sets forth on the face of his conveyance, by averment or recital, that he is seised of a particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was seised and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title, as between parties and privies. *Van Rensselaer* v. *Kearney*, 11 How. 325; *Landes* v. *Brant*, 10 How. 374.

It follows that the heir of Fosgit is estopped by her father's deed from disturbing the title or possession of Spencer's heirs.

It is ordered that the judgment of* [*241** *the Circuit Court be affirmed.*

FINLAY McKINLAY and Alexander Garriock, Composing the Firm of McKinlay, Garriock, & Co., *Appts.*,

v.

WM. MORRISH, Master and Claimant of the Ship "Pons Ælii," on Behalf of Robert and Edward Formby, Owners of Said Ship.

(See S. C. 21 How. 343-356.)

Allegation insufficient for proof of unseaworthiness—burden of proof is on libelants—libel in agent's name or principal's—right of consignee to sue.

An allegation of negligence of the master will not let in the libelant to prove unseaworthiness of the vessel.

The burden of proof of such an allegation is upon the libelants, and the testimony must be positive, or so violently presumptive as to be sufficient, by the rules of evidence, to supply the want of direct proof.

It is well settled in admiralty proceedings, that the agent of absent owners may libel, either in his own name, as agent, or in the name of his principals, as he thinks best.

From the nature of the contract of a bill of lading, the consignee has a right to sue, in a court of admiralty, for any breach of it.

Argued Jan. 10, 1859. Decided Jan. 31, 1859.

APPEAL from the Circuit Court of the United States for the District of California.

The libel in this case was filed in the district court of the United States for the northern district of California, by the appellant, to recover damages alleged to have been sustained on a shipment of soap made at Liverpool to be carried to San Francisco.

The said court having entered a decree dismissing the libel with costs, the libelants took an appeal to the circuit court of the United States for the district of California, which court affirmed said decree; whereupon the libelants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **Daniel Lord** for appellants.

Messrs. **R. J. Brent** and **Reverdy Johnson** for appellees.

Mr. Justice **Wayne** delivered the opinion of the court:

This is the case of a foreign vessel having been libeled in a port of the United States when about to leave it, her master having refused to pay for the damage said to have been sustained on a shipment of soap, made at Liverpool, to be carried to San Francisco, California, *via*

NOTE.—*Admiralty jurisdiction as to matters of contract*—see notes, 18 C. C. A. 347, 27 C. C. A. 530.

Honolulu. The shipment was made by Matthew Steele & Son. It was said in the bill of lading to be in good order and condition, and the undertaking was to deliver it so to Messrs. McKinlay, Garriock, & Co., or to their assigns.

The consignees libeled the ship, alleging that, though they were always willing to receive the shipment in good order, the master of the ship had not made it, and that they had refused to receive it, on account of the injury it had sustained from a want of proper care in loading, storing, landing, relanding, and restoring the soap, and owing to the careless, negligent, and improper manner of storing it under the deck of the ship, which was open and leaky, through which water passed, and damaged it to the amount $9,500.

The respondent meets the charges by a direct denial of them, averring if the soap had been in any way injured, it may have been from causes beyond his control by any care whatever, and should be attributed to causes or perils excepted to, as they were expressed in the bill of lading, *viz.*, "all and every danger and accident of the seas and navigation of whatsoever nature." The respondent also declares that his ship was, at the time of her sailing from Liverpool, in good, tight, and strong condition, well manned, and that her cargo was well dunnaged and stowed; but that, in the course of the passage to Honolulu, she encountered heavy storms and gales, which strained and caused her to leak, and had compelled him to throw overboard a part of the cargo, for the preservation of the rest of it, and of the vessel; 346*] and that during the passage *he had used every precaution to preserve the cargo that was within his power, and that of his officers and crew.

The libel and answer are directly at issue, and no answer can be made more responsively to the charges in a bill than this is.

Accordingly, then, to the rules of pleading in admiralty, there is no necessity for doing so; nor are we permitted to consider much of the testimony in this record. When litigants make their case in express allegations and by express denials of them, and then introduce testimony inapplicable to the issues they have made, it is not a part of the case, unless as it shall inferentially bear upon other evidence properly in it, upon which the parties rely for the determination of their controversy. This case furnishes as apt an illustration of the rule just mentioned as can be given. The libelants put their case upon bad and careless stowage, etc., of the soap, and upon leaks in the deck in the ship, through which water passed and damaged it. The respondent denies both; but he goes on to state that his ship was tight and strong for the voyage when he left Liverpool, and both parties question the witnesses as to that fact; though the libelants had not charged that their goods had been injured from that cause, and had not put in issue at all the soundness and seaworthiness of the ship for the voyage she was about to make. This same point of pleading was before this court in the case of *Lawrence* v. *Minturn*, 17 How. 100, 110, 111, which was as learnedly argued, and as deliberately decided as any other case in admiralty has been in our time. This court then said: "We find the conduct of the master in making the jettison to have been lawful; and the remaining inquiry is whether the necessity for it is to be attributed to any fault on the part of the master or owners. The libel alleges the loss of the goods to have been through the mere carelessness (just as this case does) and misconduct of the master and mariners. We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libelants have at the hearing so much insisted upon, and what we think is the main question in this part of the case—the sufficiency of the ship to carry the cargo. It *is no doubt the [*347 general rule, that the owner warrants his ship to be seaworthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owner does not amount to negligence or want of skill of the master and mariners. There would be much difficulty, therefore, in maintaining, as a general proposition, that an allegation of negligence of the master would let in the libelant to prove unseaworthiness of the vessel." And in the next paragraph of that opinion, page 111, it will be seen that the rule of pleading in such cases was not enforced only upon the ground that the inquiry in that case necessarily led to an examination whether the jettison was occasioned by the negligence of the master in overloading the ship.

It was a nice distinction, but a true one, and it will have its influence hereafter upon other cases having the same difficulties as that had. It has been adverted to, to warn the profession that the irregularities of pleading in admiralty, now too frequently occurring, have attracted our attention, and will be treated hereafter according to the rules and practice for pleadings and proofs in admiralty cases. Without doing so the jurisdiction of admiralty may often be practically extended to controversies not belonging to it; and though that may be inadvertently done, it will not be the less mischievous.

With this rule in view, we will not examine much of the testimony in the case before us, though it was made much of the argument of the respective counsel representing the parties. It excludes from the merits of the case all in the record relating to the storm in the Bay of Biscay, the leak which it caused, and the repair of it. Both parties have treated it, by their pleadings, as having in no way caused any damage to the soap; also, the storm which afterwards tried the seaworthiness of the ship to the utmost, when she was weathering Cape Horn, without any diminution of it, except so far as to inquire if it could have been that the seas which she then shipped had damaged the soap, by the water passing through the seams of a deck imperfectly calked. And we exclude, also, all that testimony made up of the opinions of supposed experts in regard to the causes of the alteration in the quality of the soap, *excepting [*348 such of them as are sustained by facts which have the character of legal proof.

By treating the case in this way, the controversy becomes exclusively one upon the alleged want of proper care in stowing, etc., the soap; and upon the charge made against the captain of the ship, that he had negligently allowed the seams of her deck to be in an open and leaking condition, by which water had passed through them upon the soap.

Our examination of the case has been made

accordingly. It will be found to coincide with the admissions made in his argument by the learned counsel of the appellants. Two of his points were that the injury or change in the quality of the soap was not owing to the effects of the gale occurring in the Bay of Biscay, shortly after the ship left Liverpool, though it had produced a leak; next, that the heavy weather on the passage around Cape Horn did not produce any leak nor do any injury to the tightness of the ship, reserving, however, the charge that the water which she then shipped had passed through the leaks in her deck, and damaged the soap. Then, after stating other propositions of obligation upon the ship, before she could be released from liability, and omissions of the duty by the captain, and the proofs which were necessary to excuse them, which he contended had not been made, the case was put altogether upon bad stowage, and the leaks in the deck, as both had been alleged in the libel.

First, as to the stowage. Two witnesses were examined, both of them professing to know how soap in boxes should be stowed for a long passage. They say that the stowage was improper, on account of the boxes having been placed or piled in tiers in one part of the ship, and that they were stowed up to the main deck, and not chocked. One of them added, that regard should be had, in stowing, to the nature of the goods to be stowed; that soap should not be stowed in so solid a bulk as this was, but should have been distributed more over the ship. Waterman, another witness, who had never seen the ship, and of course knew nothing of the stowage, merely said that soap stowed twenty-five tiers deep, he should think was badly stowed, and would be apt to be injured. Such 349*] is the *whole of the testimony to prove bad stowage in this case, unless the opinions of other witnesses, expressed in the course of their examination, without any facts having been given by them to sustain their opinions, are taken as evidence. On the other hand, Nicholson, a man of more than thirty years' experience as a nautical man, who visited the ship by the invitation of the port warden, to examine the soap and who went into the hold for that purpose, says, in answer to the question, How was the cargo stowed? "Some of the boxes appeared to me to be restowed. I do not think the upper part was the original stowage. There were a great number of them in sight, and the cargo seemed to be to be very well stowed." Noyes, who was called upon, as port-warden, to survey the ship, and two days afterwards to survey the cargo, says the soap was stowed in the after part of the ship, abaft the after hatch. It was all stowed together, and well stowed. Then Lowry, the stevedore who discharged the cargo of the ship, who saw her hatches opened, says the soap was well stowed.

There are differences between the witnesses as to the stowage of the soap, but not contradictory assertions. As to credit, they stand alike. But there is a distinction in their declarations, which, with us, is conclusive. The three first named speak of the manner of stowage, with reference to the effect which might be produced upon soap in boxes, stowed in a vessel in tiers, as these boxes were. Without a word of proof from themselves, or from anyone else, or from Mr. McCulloch, the chemist, who was called upon by the libelants to analyze the soap as it then was, to show the correctness of the apprehension or opinion of the witnesses, that, from the composition of soap, it was liable to deterioration from being stowed in a mass in the hold of the vessel, and without any evidence that it was customary to stow soap, in boxes, differently, the other three witnesses speak of it as a nautical stowage, and without any qualification, say that the soap was well stowed. Our conclusion is that the soap was not injured as a consequence from having been stowed as it was.

We proceed to the consideration of the second charge in the libel. It is also an imputation of negligence upon the captain *of the ship. [*350 It is that the soap had been injured by the deck having been allowed by him to remain in an open and leaking condition, whereby the water thrown or falling on it passed through upon the soap beneath. It is indefinite as to the time when the leaking of the deck occurred, and uncertain as to the extent of it, but determinate enough to suggest the kind and quantity of testimony which is necessary to sustain such charge in the circumstances under which it has been made. The seaworthiness of the ship when she began the voyage not having been questioned in the libel, it must be taken that she was tight in her deck when she left Liverpool, and, if she became otherwise afterwards, that it must have occurred when she was at sea. There is no direct proof of it in the record, nor any cause, from tempest or storm, from which such an injury to the ship can be presumed. The burden of proof of such an allegation is upon the libelants, and the testimony to sustain it must be positive, or so violently presumptive as to be sufficient, by the rules of evidence, to supply the want of direct proof. Here there is no proof, positive or presumptive, when, where, or from what cause, the leaking of the deck happened, or had been made. None that it had been, or might have been, occasioned by any straining of the ship from the storms which she had encountered on her passage. Indeed, that is disclaimed. None that the oakum with which her decks were calked had washed out of the seams of it, or that it had shrunk so as to leave them open. And it was only suggested that they were opened by the heat of a long summer passage, and that they could have been recalked after

The suggestion is in opposition to the proofs in the case. The ship sailed from Liverpool on the 26th of September, stanch and tight, and arrived at Valparaiso on the 26th or the 27th of January following, just four months and a day from the time of her sailing. The slight injuries which she suffered from the storm in the Bay of Biscay, and those encountered off Cape Horn, were repaired at Valparaiso. Thence she went to Honolulu, on the 28th of February, where she was twenty-four days, and calked there her top sides and waterways, and she arrived at San Francisco on the 7th June, having had fine *weather all the way from Val- [*351 paraiso. But it is proved that the soap could not have been injured from any leaks in her top sides or waterways, as the tiers of boxes next to them on either side were in a better condition than those which had been piled farther off.

These dates show that the ship had not a longer passage to Valparaiso than is usual at the time of year when she was making it; also, that it had been made through different latitudes, without encountering any great continuous heats—certainly not such as could have had the effect to displace or shrink the calking of the deck into leaking, which is not denied to have been good and tight when the ship left Liverpool. It is not probable that such an exposure for so short a time had forced her deck seams. Besides, it has not been shown by any reliable testimony that there had been, at any time when the ship was on her way to Valparaiso, any leaking from her deck, or any such afterwards, until her arrival in San Francisco, from which, by any possibility, the soap could have been injured in the way and to the extent it was represented to have been by some of the witnesses, who expressed the opinion that there had been leaks in the deck of the ship, through which salt water had leaked upon the soap. Indeed, it appears to us that all of the witnesses who said so, did it rather by way of inference from the calking which another witness said had been done to the ship, and from the condition in which the soap was, than from an examination of the ship. The witness Goodsell, more relied upon than any other witness to prove the leaks in the deck, does not do so satisfactorily from the usual examination made by shipwrights when they are called upon to ascertain such a fact. He says: "I found the poop deck, lately calked, leaking on larboard side—six on starboard and one seam about half on the starboard side, to main deck. I should think that the waterway seams, plank shear seams, and one or two seams inside to main deck, or main deck, looked as if water had run down into the hold of the ship on both sides." He adds, he went into the hold of the ship and examined the under part of the deck. "I saw indications of the deck having leaked in the wake of the seams I have been speaking of; they looked as if they 352*] had leaked *all along, but more abaft than forward of the main deck." This is very uncertain testimony; more of opinion than fact in it, even as to the calking of which he speaks, and the result of all that he says concerning the seams below the deck, has more of inspection in it than of examination. The difference between them will readily be recognized from the positive language of two other witnesses, who say they examined the seams of the deck below with their knives, and found them hard; one of them adding, it is impossible for a man to tell, after two or three weeks, whether a vessel is newly calked, without trying her seams. Lowry, the stevedore who discharged the cargo, upon being asked if he had seen any traces of salt water in the top of the boxes of the soap, or on the ceiling of the deck, answers that he had not, but that he saw some places marked with chalk by some persons; that he tried them with his knife, and found them perfectly tight. Such is the testimony in the case, concerning the charge in the libel that the soap had been damaged by leaks in the deck of the ship, which her captain had neglected to have calked. In our opinion, it is altogether insufficient. Noyes, the portwarden, who surveyed the ship, says he could find no leaks over or above where the soap was, that he could discover. He also saw no traces of the deck having been recently calked. Indeed, there is not a witness who has said that there were leaks in the deck. Several express the opinion that there were, from the discoloration of the boxes on them outside, and from that of the soap in them. Goodsell ventures further than any other witness to cause such an impression; but his language is, "I should think," and it "looked" to him as if water had run down into the hold from the waterway seams, the plank shear seams, and one or two seams inside, to deck or main deck. This conjectural way of speaking by a witness must yield to the positive declarations of Nicholson, Lowry, and Noyes.

Having determined that the soap had not been injured by bad stowage or leaking from the deck, we will now briefly state to what causes its altered condition should be attributed. We have concluded that its discoloration and dampness are to be found in the acknowledged facts and proofs in the cause. The *shipment [*353 was made at Liverpool on the 21st June, and was on board of the ship for a year, less fourteen days. After the shipment and stowage, the ship remained all of the summer at the dock in Liverpool. She sailed on the 26th of September. From that time the ship's hatches were closed until her arrival at Honolulu, in February. They were then opened for the purpose of discharging a part of the cargo which had been shipped for Honolulu. To do that, it was necessary to remove about three hundred boxes of the soap from their stowage, and to land them. They were taken to the ship, restowed as they had been at first, and it does not appear by any evidence that it had been perceived at Honolulu by anyone that this upper tier so removed had been injured, or that the boxes had then any appearance of water having leaked upon them. The ship sailed from Honolulu and arrived at San Francisco on the 7th June. From the day of her sailing, the 26th September, she was at no time within such a temperature of heat as would of itself have impaired the quality of the soap. From England, in 10° north of the equator, the average temperature from the time of her sailing is 62°. Ten degrees north and south of the equator the average temperature for the months of September and October is 81°.

The average temperature in November is about 41°, and that of Valparaiso is about 62°. These averages of temperature are taken from the most approved charts, and are decisive that the soap has not been injured by the temperatures through which the ship passed on her passage to Valparaiso. From that port the ship came to Honolulu, a distance not much short of six thousand miles, in the most favorable weather, without encountering heavy seas or head winds. She made that distance in the usual time, forty-five or fifty days. Honolulu is in the latitude of 21° 19′ north, longitude 157° 52′ west. Nor are the temperatures such between Valparaiso and Honolulu as could have produced any change in the condition of the soap. From Honolulu the usual run to San Francisco is from fifteen to twenty days. As a general rule, the course of ships bound from the first to San Francisco would be to the northward of it, to be sure of good winds. In

354*] the absence, then, of other *probable causes, to account for the change in the quality of the soap, we must resort to the proofs on the record, and from them we have concluded that the soap was injured by the temperature of the ship's hold, or what is called the sweat of the ship, which no mode of ventilation, consistent with safe navigation, has yet been thought sufficient to prevent. In this particular the ship was not more liable from defective construction to this vapor than merchant vessels ordinarily are. Her hatchways were good, the covers for them are not complained of, her hatch bars and tarpaulings were sufficient, or they are not denied to have been so; and it has not been suggested that they were not all applied to cover the hatchways, and to protect the cargo from sea water and rain. Nor is this sweat in ships any mystery to practical seamen. They term it to be vapor emitted from the mixed cargoes of ships by the heat of the hold of a ship, cast off sometimes only in fumes, at other times in steam, which shows itself in the latter case sometimes in drops of water in the same way as rain is produced from vapor. Several of the witnesses—all of them were accustomed to the sea—say that the sweat of this vessel caused the discoloration of this soap. Besides, it was a second-class article, differing originally in color from a first-rate article of the same kind. It is true that the chemist who analyzed it says that it had been made of good materials, and was well saponified, and he says that sweat is a mere evolution of water in a state of vapor; and that the boxes could not have been stained in that way, and that they were stained by some external means. But the proofs in the case show that there was no leakage in the deck by which the water could have passed upon them; it must yield to the declarations of those witnesses better acquainted than he is, from their professional acquaintance with the effects of the sweat of the soap upon these cases. We unhesitatingly ascribe the discoloration and dampness of the soap to the rocking of the ship, the nature of the compound of soap, and to the long agitation of the soap in the boxes to which it had been subjected in a boisterous passage. The devaporation of water from the vapor of the soap itself, with which it is cleansed in the making, heated by the sweat of the ship, would be 355*] *concentrated in the boxes, upon the soap, and would discolor it and make it damp, without any sensible diminution of its weight; and we are confirmed in this conclusion by the witnesses who examined and weighed it, having testified that the boxes were of the same weight marked upon them when they were shipped at Liverpool. We feel bound to notice one point made in the argument of the cause by the counsel of the appellees, which is not an open question in this court. It was, that the appellants had no legal title to maintain their libel. In the case of *Houseman* v. *The Schooner "North Carolina,"* 15 Pet. 49, the same objection was made. This court said: "An objection has been taken to the right of the appellee to sue in his own name, as agent for the consignees, or to sue at all, as his power of attorney from them bears date after the libel was filed; and it is also objected, that J. & C. Lawton, the consignees, had no right to institute proceedings to recover more than their proportion of the cargo shipped on their account. No authority has been produced in support of these objections, and we consider it as well settled in admiralty proceedings, that the agent of absent owners may libel, either in his own name, as agent, or in the name of his principals, as he thinks best; that the power of attorney, subsequent to the libel, is a sufficient ratification of what he had done in their behalf, and that the consignees have such an interest in the whole cargo; that they may proceed in this case, not only for what belonged to them and was shipped on their account, but for that portion also which was shipped by Porter, as his own, and consigned to them." The same conclusion was repeated in 17 Howard (*Lawrence* v. *Minturn*), without any qualification, as we understand that case. In the first as well as in the second of these cases, the point was put on the interest which a consignee has in the consignment, as consignee, and not as owner of any part of it; that, from the nature of the contract of a bill of lading, the consignee had a right to sue, in a court of admiralty, for any breach of it. Whatever may be the uncertainty concerning the consignee's right to sue in a court of law, from the conflicting decisions to be found upon that right, there are none that he may sue in a court of admiralty in the United States. *When that case, however, occurs in this [*356 court, it will be decided; and we now merely remark that, from our examination of most of the cases in the common-law reports, upon the facts of those cases, we have been brought to the conclusion that there is no rule of general application as to when the consignor or consignee should bring the suit at common law, but that it will always be important to consider in whom the right of property, and sometimes in whom the right of possession, was vested at the time of the breach of the contract or neglect of duty which is complained of.

We direct the affirmance of the decree from which this appeal was taken.

Dissenting, Mr. Justice **Nelson.**

GEORGE SMITH, *Appt.*,
v.
JOHN J. ORTON.

(See S. C. 21 How. 241-244.)

Sale of equitable interest in contestation—after mortgage is paid, mortgagee may be compelled to surrender a title.

An equitable interest in contestation may be the subject of a bona fide sale and transfer by deed, in the like manner, that a mortgagor's equity may be sold and conveyed.

After a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title.

Argued Jan. 14, 1859. Decided Jan. 31, 1859.

APPEAL from the District Court of the United States for the District of Wisconsin.

The bill in this case was filed in the court below by the appellant. The defendant demurred. The court sustained the demurrer, and entered a decree dismissing the bill. From this decree the complainant took an appeal to this court.

A further statement appears in the opinion of the court.

Messrs. **J. S. Brown** and **J. R. Doolittle** for appellants.

Messrs. **William P. Lynde, E. Mariner,** and **R. H. Gillet,** for appellee:

It appears from the bill that the appellant is the assignee of the interests of Knab, Davis, and Butler, in the premises pending the suit of *Orton* v. *Knab,* 3 Wis. 576, and that a decree has been rendered in that case against Knab and in favor of the respondent, by a court of competent jurisdiction. He is, therefore, bound by that decree.

Story Eq., § 405, 406, cases cited; *Murray* v. *Ballou,* 1 Johns. Ch. 581; *Murray* v. *Lylburn,* 2 Johns. Ch. 441; *Orton* v. *Smith,* 18 How. 263.

The appellant has not made a case which entitles him to relief in a court of equity. We lay out of the case everything that pertains to the title acquired directly from Davis. He held the legal title as trustee for Hubbard, and at his request conveyed it. That was a discharge of his interest in the premises, and he does not appear to have acquired any other. We may also lay Hubbard's title or equity out of the case.

1. Because it appears that he had no interest or equity in or to the lands, that this court can recognize or enforce.

2. If Hubbard had an equitable estate, the appellant has no assignment of it. He has only a bare conveyance of the fee, which does not convey an equitable estate where the grantor has not the legal title.

Again; if this is a bill of peace, it does not set forth either a clear legal title or possession in the appellant. If the appellee has any title, it is a legal title; and if the appellant has a legal title, a court of law is the proper forum to litigate it. If this is a bill to have a trust declared, it contains no averment that the appellee is seized of any legal estate of which to declare him a trustee.

Mr. Justice **Catron** delivered the opinion of the court:

The bill was demurred to, and the demurrer sustained below, and the facts appear only on the face of the bill. Davis held the legal title to the two lots (Nos. 7 and 8) in dispute, lying in or near the city of Milwaukee, in the state of Wisconsin. Davis held the legal title as trustee for Otis Hubbard. In June, 1851, Hubbard, for a good and valuable consideration, conveyed the premises to Joachim Gruenhagin, by a deed in fee, by which the grantee became seised of the entire interest of Hub-**242*]** bard. *In December, 1852, Gruenhagin, for a good and valid consideration, conveyed the premises to James S. Brown; and in January, 1853, Brown, for a valuable consideration, conveyed to the complainant, Smith. The complainant afterwards also got deeds from Davis and Knab.

Hubbard had sold two other lots in Milwaukee to one Schram, the title to which was outstanding in the names of persons residing beyond the state of Wisconsin. Schram required security for the title from Hubbard.

Butler, a relation of Hubbard, got Knab to give a bond for title, binding himself jointly with Butler, as security to Schram.

To secure himself against loss for his undertaking to Schram, Knab required of Hubbard security to indemnify him, should Hubbard be unable to make a title to the lots sold to Schram; and Hubbard got Davis, who held the legal title to the lots, to convey them to Knab, as security and for no other consideration.

On the same day (22d of July, 1848) that the title bond to Schram was made, Knab executed to Butler a bond covenanting that if Butler would procure the deed from the trustees of Hubbard, and comply with the bond to Schram, he (Knab) would convey the lots to Butler, for which he held Davis's deed. Butler failed to procure the deed, and Hubbard did so himself.

In March, 1851, Butler assigned Knab's bond to Orton, the respondent.

Hubbard never received any consideration whatever for the lots thus transferred; and it is alleged that the bond from Knab to Butler was a secret and fraudulent contrivance on the part of Butler, to cheat Hubbard and obtain his property, and that he was defrauded thereby.

Smith obtained a deed for the lots from Davis, and also one from Knab; but as Davis had no interest, having long previously conveyed to Knab, notning passed by his deed, unless, as is assumed by the bill, an equity of redemption resulted to Davis.

And as Orton had filed a bill in a state court against Knab, *which was pending [***243** when Smith took his deed from Knab, and as Knab was not allowed to disavow his own bond, Orton got a decree against Knab for a conveyance of the legal title (which conveyance was regularly made), and therefore the deed from Knab to Smith was of no value. Having been made whilst the suit was pending, it could only have any useful effect on the contingency of Knab's successful defense.

Orton having succeeded, his decree related to the commencement of the suit, and gave him the elder and better legal title, Smith's deed being "subservient to the rights of the parties in litigation." 1 Story's Com. Eq. § 406.

Orton has the legal title, beyond dispute. Smith is asserting Hubbard's equity and Davis' right of redemption; and prays by his bill, among other things, "that Orton be decreed to release to him (Smith) all claim or interest in said lots."

Neither party has, or ever had, actual possession of the premises; nor is this of any consequence, as the contest is for the legal title.

Butler certainly had neither a legal nor equitable interest in the property when he sold to Orton. He held Knab's title bond, with full knowledge that Knab held as trustee for Hubbard. And this bond was assigned to Orton, who, according to the allegations of the bill, took it with Hubbard's equity inhering to it.

What effect Orton's decree against Knab may have to protect Orton under the legal title, on a plea of bona fide purchaser of an equity, we decline to decide; nor will we discuss the question, as this cause may again come before this court, and involve that question.

The remaining question for consideration is whether Smith can be heard in a court of equity, being an assignee of an equitable interest in contestation.

Gruenhagin purchased and took a deed for Hubbard's equity, and was clothed with his interest before any litigation was instituted affecting the title. And as neither Gruenhagin, Brown, nor Smith, were parties to the suit of Orton against Knab, the decree against Knab did not in anywise impair the equity obtained from Hubbard, who, likewise, was no party to 244*] *that suit and who had conveyed to Gruenhagin before it was commenced.

Hubbard's equitable title being distinct from the legal title in controversy between Orton and Knab, no reason existed why it should not be the subject of a bona fide sale, and transfer by deed, in like manner that a mortgagor's equity may be sold and conveyed. After a mortgage debt is discharged, the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title. And that is substantially the case the bill makes; for after Hubbard satisfied Schram's bond made for title by Knab and Butler, Knab held the naked legal title, with an undoubted right in Hubbard to call for its surrender. And his assignee stands on the same footing. 4 Kent's Com. 157. And so the statutes of Wisconsin, in effect, provide. Revised Statutes of 1849, ch. 59, § 7, ch. 77, §§ 6 and 7.

We are of the opinion that the court below erred in sustaining the demurrer to the bill, and *order the decree to be reversed, and remand the cause*, with directions that the District Court proceed in it according to the 34th rule of this court, governing chancery proceedings.

THE BRIG "JAS. GRAY," Wm. Cushing *et al.*, Owners, *Libts. and Appts.*,

v.

THE OWNERS OF THE SHIP "JOHN FRASER," and the Steamer "General Clinch."

(See S. C. How. 184-195.)

Collision—local harbor regulations—vessel's light—duty to show—duty of steamer having vessel in tow—non-liability of tow, for collision.

Local authorities may prescribe at what wharf a vessel may lie, and for how long; when she may load and unload; where she may anchor in the harbor, and for what time, and what light she may display at night.

When the light of a brig differed in character and place from the one which the regulations and usages of the port required,—Held, that she committed a fault which justly subjected her to damages for the collision.

When she was at anchor at a place where vessels were continually passing, it was her duty to show at night the usual signal light of a vessel at anchor.

It was the duty of the officers to see that the light was securely and properly fastened, so as to present the bright sides to the incoming vessels.

It was especially the duty of the officer in command of the steamboat in a crowded harbor, when his tow was following him at a rate of six or seven miles an hour, to have scanned carefully the surrounding objects before he cast loose the towline, and to see that there was nothing in the way of the tow which she could not avoid by means of her own rudder, without the aid of the steamboat, and also to have given reasonable notice of his intention, in order that she might prepare to take care of herself.

The steamer having the tow held answerable, as well as the brig, for the consequences of this disaster.

The tow was the *res* or thing which struck the brig, and did the damage. But the mere fact that one vessel strikes and damages another, does not of itself make her liable for the injury; the collision must in some degree be occasioned by her fault.

The loss must be equally divided between the brig and the steamer.

Argued Dec. 31, 1858. Decided Feb. 3, 1859.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The libel in this case was filed in the district court of the United States for the district of South Carolina, by the appellants against the ship John Fraser and the steamer General Clinch to recover damages sustained in a collision.

The said court entered a decree dismissing the libel against the steamer, but sustaining it against the ship.

The circuit court, on appeal, reversed this decree against the ship, and entered a decree dismissing the libel; whereupon the libelants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **C. Cushing** and **R. H. Gillet**, for appellants:

1. Damages for collision are awarded in admiralty, where blame is attributable to the vessel charged as wrongdoer alone, or where both the vessels are in fault.

Conkl. Adm. 299.

2. When there has been a want of diligence or skill on both sides, the loss must be apportioned between the parties in equal moieties.

Abb. Ship. 303; *The Woodrop Sims*, 2 Dod. 83; *The Monarch*, 1 W. Rob. 21; 3 Kent's Com. 271; Story, Bail. § 608; *Strout* v. *Foster*, 1 How. 89; *Reeves* v. *The Constitution*, Gilp. 579; *The Catharine* v. *Dickinson*, 17 How. 170; *The Scioto*, Davies, 359; 6 McL. 221, 229, 252.

3. The neglect of the rules of proper management by one party, will not dispense with the exercise of ordinary care and caution by the other.

Abb. Ship. 311, 312.

4. A vessel in motion is bound, if possible, to steer clear of and avoid a vessel at anchor.

The Girolamo, 3 Hagg. Adm. 169; *The Eolides*, 3 Hagg. 367; *The Neptune*, 1 Dodd Adm. 467.

5. Vessels propelled by steam are required to take all possible care, by the use, if necessary, of all the means which they possess, to run clear of sailing vessels.

NOTE.—*Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see note to St. John v. Paine, 13 L. ed. U. S. 537. *Collision. Rules for avoiding, steamer meeting steamer*—Williamson v. Barrett, 14 L. ed. U. S. 68, 35 L. ed. U. S. 453, 30 C. C. A. 630.

The Fashion v. *Ward*, 6 McL. 152, 175; *The Perth*, 3 Hagg. Adm. 414; *The Shannon*, 2 Hagg. Adm. 173; *St. John* v. *Paine*, 10 How. 557.

6. A steam vessel passing another vessel, whether a steamer or sailing vessel, in a narrow channel, must always leave the vessel she is passing on the larboard hand.

Conkl. Adm. 310; N. Y. Rev. Stat. part 1, Title 10, § 1; *The Friends*, 1 Rob. 485; *Waring* v. *Clarke*, 5 How. 502; *St. John* v. *Paine*, 10 How. 550; *The Monticello* v. *Mollison*, 17 How. 152.

7. If a steam vessel meet a sailing vessel, and the latter be steering wrong, the former has no right to disregard that, but is to make the requisite change of her own course.

The Hope, 1 W. Rob. 154, 157; *Genesee Chief* v. *Fitzhugh*, 12 How. 443.

8. Vessels generally, but especially steamers, are held to constant and viligant lookout.

17 How. 170; 18 How. 584; 20 How. 563; 12 How. 443, 462.

9. The damages, if due, are awarded against the vessel wrongdoer and her owners.

Story, Bail. 608; Conkl. Adm. 299; 1 Hagg. Adm. 109, 121.

10. The presence of a branch pilot on board of either the tug or tow, does not diminish the responsibility of the master and owners.

Denison v. *Seymour*, 9 Wend. 1.

11. In case a vessel in tow of a tug, collides with another vessel to her injury, the tow is responsible as the immediate wrongdoer, but the tug also is in fault. This independently of questions of redress or contribution, as between the tow and the tug.

The Express, Olcott, 258; Blatchf. 305.

The counsel then reviewed the testimony in the case, and endeavored to show that under the above principles The Clinch and The John Fraser were both in fault and liable, while The James Gray was free from fault.

The relation of the city ordinance to the case, is without consequence in law.

18 How. 223, 570, 584; 17 How. 155, 154; 20 How. 543, 541; 19 How. 108, 241; Conkl. Adm. 310.

Messrs. **Brown** and **Porter**, for the ship John Fraser:

The appellants are not entitled to recover damages claimed, as the collision was occasioned by the misconduct of the suffering parties alone.

Strout v. *Foster*, 1 How. 90; *The Scioto*, Davies, 359; Abb. Ship. 315; *Morrison* v. *Steam Navigation Company*, 20 Eng. L. & Eq. 455.

The James Gray was lying in a narrow pass or thoroughfare in the harbor of Charleston from the 1st to the 5th February, inclusive, without urgent necessity, contrary to the general law maritime and the established port regulations.

Strout v. *Foster*, 1 How. 90; *The Scioto*, Davies, 359; 1 and 2 Port Regulations.

The counsel further reviewed the testimony, to show that the James Gray was in fault, and cited also the authorities.

Sproul v. *Hemmingway*, 14 Pick. 1; 2 Am. Law Jour. 337; *The Christina*, 3 Wm. Rob. 27; 6 Wheat. 311.

Mr. **Nelson Mitchell**, for The General Clinch:

On the question of the location of The James Gray, the counsel cited the case of *Valentine* v. *Clough*, 29 Eng. L. & Eq. 54.

He also argued that the light displayed was not of a proper character, and concluded: In no view of the evidence, it is submitted, can there be a decree against the steamer in these proceedings, which are *in rem*. There was no collision with the steamer, nor was she the material instrument of any damage or injury to the brig. The relation of principal and agent is exclusively personal, and cannot exist between things. When a vessel is towed by a steam-tug, the latter is in the employment and under the control of the former.

The Christina, 3 Wm. Rob. 27.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This is a case of collision in the port of Charleston, in South Carolina.

The brig James Gray took on board a valuable cargo at Charleston, destined for Antwerp, and in the prosecution of her voyage hauled off from the wharf into the stream and anchored [*186 on the 1st of February, 1856. The place where she anchored was in the harbor, and was the place where vessels bound out usually anchored for a short period, to make their final preparations for sailing on their voyage. It was, however, a thoroughfare for vessels bound in, and through which they were almost continually passing. She remained there until the collision took place, which happened on the night of the 5th of the month above mentioned, about seven o'clock, shortly after daylight had disappeared. On that evening The John Fraser came in from sea, in tow of The General Clinch. The latter was a steamboat, occasionally employed in towing vessels in and out of the harbor, and was properly fitted and manned for that purpose. There was ample room on both sides of The James Gray for the tug and the tow to have passed with safety, if The James Gray had been seen in time. But she was not seen, either from The General Clinch or The John Fraser, until the steamboat was abreast of her, and at the distance of not more than forty or fifty fathoms. She was then, for the first time, seen by those on board The General Clinch, which had just before, and almost at the same moment, cast off the hawser by which she was towing The John Fraser. The towing line was about fifty fathoms in length, according to the testimony of the pilot of The General Clinch, and was attached to the larboard bow of the tow, and it was cast off by the General Clinch without any previous notice of the intention to do so at that particular moment; and it appears to have been altogether unexpected on board The John Fraser. And as soon as she was cast off, and not before, those on board of the John Fraser, for the first time, discovered The James Gray directly ahead, and upon which she was running. She endeavored to avoid her by putting her helm hard to starboard, in order to pass on the same side and in the wake of the tug; her speed, however, from the tide and the impulse she had received from the steamboat, was then about six knots an hour; and she reached the brig before her course could be sufficiently changed to avoid a collision. The rigging of the John Fraser became entangled in the bowsprit of the brig, which it carried away, and

caused other damage to the vessel to a serious amount.

187*] *So far the facts are undisputed; we come now to the points in controversy.

The libel is filed *in rem* by the owners of The James Gray against the ships above mentioned, alleging that she was free from fault, and that the damage was occasioned altogether by their negligence and mismanagement, and claiming the right to charge them with the whole amount of the loss sustained.

The owners of The John Fraser and the owners of The General Clinch answer separately, each of them charging the misconduct of The James Gray as the cause of the disaster, but each of them also imputing some degree of blame to each other.

They charge against The James Gray that she was lying in a thoroughfare in the harbor, in violation of the local port regulations, and without the light that these regulations required. And they produce two ordinances of the corporate authorities of the city of Charleston, one of which provides that no vessel shall lie in this thoroughfare for more than twenty-four hours, and inflicts certain penalties for every disobedience of this ordinance; and the other requires all vessels anchored in the harbor to keep a light burning on board from dark until daylight, suspended conspicuously midships, twenty feet high from the deck.

The power of the city authorities to pass and enforce these two ordinances is disputed by the libelants. But regulations of this kind are necessary and indispensable in every commercial port, for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there; where she may unload or take on board particular cargoes; where she may anchor in the harbor, and for what time; and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of

188*] *Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States.

Yet, upon the evidence before the court, we do not think The James Gray ought to be regarded as in fault, by remaining at anchor in the harbor beyond the time limited in the city ordinance. She was seen there by the harbormaster day after day, without being ordered to depart; nor did he seek to inflict the penalty. The object of this regulation was obviously to prevent this thoroughfare from being crowded by vessels at anchor, which would make it inconvenient or hazardous to vessels coming into the port. And from the conduct and testimony of the harbormaster, it may be fairly inferred that this regulation was not strictly enforced when the thoroughfare was not overcrowded, and that single vessels were sometimes permitted to remain beyond the time fixed by the ordinance, without molestation from the city authorities. And this lax execution of the regulation would soon become a usage in the port, and will account for the indifference with which the harbormaster saw her lying there three days beyond the limited time, without even remonstrance or complaint. He appears to have acquiesced. And if this was the interpretation of the ordinance by the local authorities, it ought not to be more rigidly interpreted and enforced by this court.

But the omission of the light, prescribed by the regulation, stands on different grounds. There was certainly no acquiescence of the local authorities in that respect; and, upon the testimony, it is a matter of dispute whether she had any light or not. That question will be considered hereafter. But it is admitted on all hands that she had not a light suspended conspicuously midships, twenty feet above the deck, as the regulation requires; and the light which she alleges she used was not the ordinary globe lamp used by vessels at anchor, but a lantern of triangular form, with one side dark, and the light shining only through the other two, and which, consequently, could not be seen by those who approached on the dark side. The ordinance obviously contemplated the usual signal light of a vessel at anchor, which is bright on every side, and can be seen by those who are approaching from any direction. *And as [*189 the regulations of the port required a light of this kind, suspended in the manner hereinbefore mentioned, The James Gray could not be justified in disregarding this regulation, and substituting a light of a different description, and placed in a different part of the vessel. Those who were coming into port had a right to presume that a vessel anchored in this thoroughfare would have the light prescribed by the port regulations. They would look for no other, nor expect to find a vessel in their way without one, and might be misled as to the exact position of the vessel, if a light of a different character were shown or hung up in a different place. And as the light of the brig (if she had one) differed in character and place from the one which the regulations and usages of the port required, and which incoming vessels would look for, she committed a fault which justly subjects her to damages for the collision. She had not taken those means to avoid it which the regulations of the port in which she was lying required and prescribed.

But, apart from the regulations of the local authorities, we think The James Gray was in fault upon the established principles of maritime law. She was at anchor at a place where vessels were continually passing. It was her duty, therefore, to show at night the usual signal light of a vessel at anchor—that is, a globe lamp, or one without any dark side to it, which could be seen from any direction, and hung high enough in the rigging to be seen at a distance.

The witnesses who were on board of The General Clinch and The John Fraser say she had no light of any kind immediately before and at the time of the collision; and in this they are supported by the testimony of other witnesses who were observing her about the same time. But those who were on board of The James Gray testify to the contrary, and their testimony is confirmed by others; and we think that, upon the whole evidence, the just conclusion is that she had a light, in a lantern

of triangular form, with one dark side, hanging on the fore swift sure, twenty feet and some inches above the deck. The fore swift sure is, we understand, the foremost rope of the foremast shrouds.

190*] *Now, a light of this description is not ordinarily used as a signal light for a vessel at anchor; but is used at sea, fastened at the bowsprit, with the opaque side to the ship, so as to throw a strong light ahead. And it is obvious that such a lantern, fastened to a single rope at the top only, and more than twenty feet from the deck, would be liable to waiver, from the motion of the vessel as she was riding at anchor, and to turn its dark side sometimes in one direction and sometimes in another; and if such a light was used as a signal light, it was more especially the duty of those in charge of the brig to see that the lamp was securely fastened, so as to present its bright sides in the direction in which vessels were likely to approach.

But this is not proved to have been done. It is true that one of the witnesses for the libelants (Wycoffe) says it was securely fastened at the top and the bottom, with the dark side to the stern. This may have been the way in which it was usually fastened, but none of the witnesses examined by the libelants know how it was fastened that night. Wycoffe does not appear to have even been on deck when it was put up. It was put up by a boy; and when the light appeared dim after the collision, Wycoffe says he started to take it down; but the boy was too quick for him, and took it down and trimmed it.

The second mate, who gave the order to the boy to put it up, went below to his tea immediately afterwards, without waiting to see that his order was properly executed; and the first mate went down with him; and no one but this boy appears to have known how it was fastened to the rope that night. He was not examined as a witness, nor is his name mentioned. They speak of him as "the boy," and we think it was great want of care on the part of the officer in charge of the deck to confide this important duty to the heedlessness of a boy. His age is not stated, nor his previous pursuits, nor how long he had been on board, nor his knowledge or fitness for the duty intrusted to him. The place where the brig was anchored, and the character of the light they were about to display, made it the more imperatively the duty of the officers to see that it was securely and properly fastened, so as to present the bright sides to the incoming vessels, as she was in 191*] most danger of being *run into by them. But without the testimony of the boy who put it up and took it down, or any proof of his age and character, from which it might be inferred that the duty was well and faithfully performed, the court cannot say that a sufficient light was displayed to warn vessels coming into the harbor that she was at anchor in this thoroughfare.

Indeed, the just inference from the testimony would be otherwise; for if the lantern was carelessly hung, and liable to move to some extent from one to the other, so as at one moment to present its bright side, and a moment after its dark side in the same direction, it would account for the difference in the testimony of different witnesses, who looked at her from the same point of view, some testifying that she had no light and others that she had a very bright one.

Independently, therefore, of the local regulations, The James Gray, upon the general principles of maritime law and usages, cannot be acquitted of negligence, and must share in the loss.

But the conduct of those on board of The General Clinch was equally culpable. For if, as they contend, the brig showed no light, or if the dark side of the lantern was turned towards her when she was approaching, yet it is satisfactorily proved that the night was light enough to have enabled her to see the brig at a distance abundantly sufficient to pass with her tow without danger to either, and that she must or would have been seen with a proper lookout.

The General Clinch was not under the control of the captain of The John Fraser, but under the command and direction of her own pilot, who was substituted for her regular captain, who was not on board. She could select her own course and her own rate of speed, and was bound to keep a vigilant and competent lookout in the thoroughfare in which vessels so frequently anchored. But there is no proof to show that this was done. The three hands who were at the stern of the steamboat, awaiting the order to cast off the hawser, were certainly not lookouts. The pilot who was in command had his attention drawn to other matters, and was preparing to give the order to cast loose the hawser, and in communicating with the ship he had in tow. It is said, indeed, that there were two *of the crew in the [*192 forward part of the vessel, whose duty it was to keep a lookout; but, being colored persons, they could not, by the laws of South Carolina, be examined as witnesses. But the law requires of a colliding vessel that she shall prove not only that she had a competent lookout stationed at the proper place, but also that the lookout was vigilantly performing his duty. And if she placed there persons who cannot be witnesses, it is her own fault; it was her own voluntary act, and can therefore be no sufficient reason for the absence of that proof which the law requires her to produce.

It was especially the duty of the officer in command of the steamboat, in a crowded harbor like that, when his tow was following him at the rate of six or seven miles an hour, and her course necessarily directed by the steamtug, to have scanned carefully the surrounding objects before he cast loose the tow-line, and to see that there was nothing in the way of the tow which she could not avoid by means of her own rudder, without the aid of the steamboat, and also to have given reasonable notice of his intention, in order that she might prepare to take care of herself. But this was not done. He suddenly let go the towing line, without notice or warning to The John Fraser. And the moment after he had done so, and not before, he found his own vessel almost aboard of a vessel at anchor, and the head of The John Fraser, under the direction and impulse his ship had given her, directed upon the anchored vessel, and too near to avoid a collision when she had lost the aid of The General Clinch.

This state of things could not have happened without great want of care on the part of the

steam-tug. Indeed, this negligence is apparent from the testimony of the pilot himself, who was acting as captain. He says his station was on the wheel-house; and that after he let go The John Fraser, he had just time to walk from the bow to the aft part of the steamer, when he saw The Gray. She was not, therefore, first seen from the wheel-house or the bow, but from the stern of his vessel, when he was nearer to her than he was to the ship he was towing. The stern of the vessel is not the first place from which The James Gray would have been seen, **193***] if the wheel-house was a *proper place, and he had performed there the duty of a lookout. And as regards the two hands which he states were forward as lookouts, they appear never to have seen the brig until after she was discovered by the pilot from the stern, when in the act of passing her bow, for they gave no notice of a vessel ahead, and do not appear to have seen her before her proximity was announced by the pilot. If stationed forward as lookouts, it is very clear that they were not performing that duty, and the collision was the natural consequence of their negligence; for The James Gray was plainly seen from The John Fraser the instant the steam-tug dropped the tow-line and turned out of her way; and as the tow-line was fifty fathoms long, the steamboat could unquestionably also have seen her as she approached her, at least at that distance ahead, as well as from the stern; and if she had been seen even at that distance, and The General Clinch had held on to the hawser, she could have carried The John Fraser safely past, and without danger.

And upon such proofs of negligence and of want of proper caution, the court is of opinion that The General Clinch is justly answerable, as well as The James Gray, for the consequences of this disaster.

So far as the ship John Fraser is concerned, we see nothing in the evidence from which any fault or mismanagement can justly be imputed to her. According to the usage of trade at that port, she engaged a steamboat, well acquainted with the harbor and its usages, to bring her in. When fastened to the hawser, and in tow, she was controlled entirely by the steam-tug, both as to her course and speed. The steamboat was not subject to the orders of the commander of The John Fraser, but was altogether under the control and direction of her own commander for the time. A lookout on board of The John Fraser would be of little or no value, for the view ahead was obstructed by the steam-tug, and she could do nothing more than watch the motions of the steamboat, and use her own rudder, so as to keep her as nearly as might be in the wake of the tug to which she was attached. She had a right to suppose that a proper lookout **194***] would be kept by the *steamboat, and that she would not be led into dangers from which no effort on her part would enable her to escape. And she was brought into this dangerous proximity to The James Gray, and then cast loose, under circumstances which rendered a collision inevitable; and she was driven against the vessel at anchor altogether by the direction and impulse which she received from the controlling power of the steamboat, and not by any act of negligence or mismanagement on her part.

It is, indeed, said by some of the witnesses, that if she had put her helm to the larboard, instead of the starboard, as soon as she was cast off, she might have passed in safety on the other side of The James Gray. But the weight of the proof is clearly to the contrary; and we are convinced that she adopted the only chance for safety, by putting her helm to starboard, and endeavoring to pass on the same side that the steam-tug had passed.

It is true that The John Fraser was the *res* or thing which struck The James Gray and did the damage. But the mere fact that one vessel strikes and damages another does not of itself make her liable for the injury; the collision must in some degree be occasioned by her fault. A ship properly secured may, by the violence of a storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it. Yet she certainly would not be liable for damages which it was not in her power to prevent. So also ships at sea, from storm or darkness of the weather, may come in collision with one another, without fault on either side; and in that case, each must bear its own loss, although one is much more injured than the other. This was decided by this court in the case of *Stainback* v. *Rae*, 14 How. 532; and the decision placed upon the ground that neither of them had committed a fault, and could not, therefore, justly be charged with any portion of the injury which the other had sustained. And as this collision was forced upon The John Fraser by the controlling power and mismanagement of the steam-tug, and not by any fault or negligence on her part, she ought not to be answerable for the consequences.

The result of this opinion is that the loss must be equally *divided between The [*195 James Gray and The General Clinch, according to the rule laid down by this court in the case of *The Schooner Catharine et al.* v. *Dickinson et al.* 17 How. 170.

The decree of the Circuit Court is, therefore, reversed; and the case remanded, with directions to adjust the loss upon the principles stated in this opinion.

We do not assent to so much of this opinion as makes The James Gray liable for negligence, merely for want of exact conformity to port regulations.

S. Nelson.
R. C. Grier.
Nathan Clifford.

RUFUS ALLEN *et al., Libts. and Appts.,*
v.
HENRY L. NEWBERRY, Claimant of the Steamboat "Fashion," etc.

(See S. C. 21 How. 244-248.)

Admiralty jurisdiction on the lakes—shipment between ports of same state.

The act of Congress of 26th of February, 1845, prescribing and regulating the jurisdiction of the Federal courts in admiralty upon the lakes, con-

NOTE.—*Ebb and flow of tide, as to civil and criminal jurisdiction*—see note to United States v.

fines that jurisdiction to "matters of contract and tort, arising in, upon, or concerning steamboats, and other vessels" employed in business of commerce and navigation between ports and places in different states and territories upon the lakes.

In suit upon a contract of shipment of goods between ports and places of the same state, the district court has no jurisdiction in admiralty; such jurisdiction belongs to the courts of the state.

Argued Dec. 7, 1858. Decided Feb. 3, 1859.

APPEAL from the District Court of the United States for the District of Wisconsin.

The libel in this case was filed in the court below, by the appellants, to recover damages resulting from an alleged breach of contract of affreightment.

The court below having dismissed the libel, the libelants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **S. G. Haven** for appellants.

Messrs. **R. H. Gillet** and **Alfred Russell** for appellee.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal in admiralty from a decree of the district court for the district of Wisconsin.

The libel states that the goods in question were shipped on board the Fashion at the port of Two Rivers, in the state of Wisconsin, to be delivered at the port of Milwaukee, in the same state, and that the master, by reason of negligence and the unskillful navigation of the vessel, and of her unseaworthiness, lost them in the course of the voyage.

The respondent sets up, in the answer, the seaworthiness of the vessel, and that the goods were jettisoned in a storm upon the lake.

The evidence taken in the court below was directed principally to these two grounds of defense; but, in the view the court has taken of the case, it will not be important to notice it.

The act of Congress of 26th February, 1845, prescribing and regulating the jurisdiction of the Federal courts in admiralty upon the lakes, and which was held by this court in the case of *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, to be valid and binding, confines that jurisdiction to "matters of contract and tort, arising in, upon, or concerning steamboats and other vessels" . . . "employed in business of commerce and navigation between ports and places in different states and territories upon the lakes, and navigable waters connecting said lakes," etc.

This restriction of the jurisdiction, to business carried on between ports and places in different states was doubtless suggested by the limitation in the Constitution of the power in Congress to regulate commerce. The words are: "Congress *shall have power to regulate [*246 commerce with foreign nations and among the several states, and with the Indian tribes." In the case of *Gibbons* v. *Ogden*, 9 Wheat. 194, it was held that this power did not extend to the purely internal commerce of a state. Chief Justice Marshall, in delivering the opinion of the court in that case, observed: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between parts of the same state, and which does not extend to or affect other states." Again, he observes: "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, when they do not affect other states, and with which it is not necessary to interfere for the purpose of

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Bevans, 4 L. ed. U. S. 404; and note to The Thomas Jefferson, 6 L. ed. U. S. 358.

Admiralty jurisdiction as to matters of contract—see notes, 18 C. C. A. 347, 27 C. C. A. 530.

To what places the jurisdiction of admiralty is confined.

It is laid down as a general rule in common-law books, that the admiral's jurisdiction is confined to matters arising on the high seas, and that he cannot take conusance of contracts, etc., made or done in any river, haven, or creek, within any county; and that all matters arising within these are triable by the common law. 4 Inst. 137-140; 12 Co. 139; Moor. 122, 892; Godb. 261; 2 Sid. 81; Hob. 79, 212; 13 Co. 52; 2 Brownl. 10, 37; 2 Bulst. 322; Roll. R. 133.

The term "high seas" has been variously defined, *viz.*: "It is no part of the sea where one may see what is done on the other side of the water." 4 Inst. 140, 131; 12 Co. 80; Moor. 892. What is within the body of the county is no part of the sea. 4 Inst. 140. Admiralty court cannot hold plea of a thing done upon the River Thames, because done within the body of a county. Roll. Abr. 531; Owen, 122; 2 Brownl. 37; Leon, 106; Moor. 916; 2 Roll. R. 413. Nor of a matter arising at Limehouse. Cro. Jac. 514; 2 Roll. Rep. 49; Moor. 891. Such place as is covered with salt water is *mare altum*. Owen, 123. See note to U. S. v. Wiltberger, 18 U. S. (5 Wheat.) 76.

It hath been resolved that, between the high and low water mark, the common law and admiralty have *imperium divisum*, the one when it is not, and the other when it is, covered with water. Sir Henry Constable's case, 5 Co. 107; And. 89; 3 Inst. 113; 2 Inst. 51; U. S. v. Grush, 5 Mason, 290; 1 Kent, 337-342; U. S. v. Bevans, 16 U. S. (3 Wheat.) 336, 357, 361, 365-360; Beere's Case, 2 Leach, C. Ca. 1093; Ry. & Russ. 243; U. S. v. Coombs, 37 U. S. (12 Pet.) 72; Waring v. Clarke, 46 U. S. (5 How.) 464; 1 Bl. Com. 110.

Admiralty jurisdiction extends to all things done on the high seas. Johnson v. Bales, etc., 2 Paine, 601; S. C. Van Ness, 5.

The degree of ebb and flow of tide does not affect the question of jurisdiction. Any impulse of the tide is sufficient. Peyroux v. Howard, 32 U. S. (7 Pet.) 324.

In a voyage of 46 miles on tide water and 30 on canal, admiralty jurisdiction sustained. The Robert Morris, 1 Wall. C. C. 33. See The Orleans v. The Phoebus, 36 U. S. (11 Pet.) 175.

Collisions in a river where tide ebbs and flows (also far above tide water) are within the admiralty jurisdiction of the United States, though the locality be within the body of a county. The English statutes to the contrary are not in force here. Waring v. Clarke, 46 U. S. (5 How.) 441; Jackson v. The Magnolia, 61 U. S. (20 How.) 296; The Commerce, 66 U. S. (1 Black.) 574; N. J. St. Nav. Co. v. Merch.'s Bank, 47 U. S. (6 How.) 354.

So of collisions on tide water though vessel be at wharf or pier in harbor. The Lottie, Olc. 329; Borden v. Hiern, Blatchf. & H. 293.

The civil jurisdiction of admiralty, in cases of contract or tort, embraces tide waters within the bays, inlets of sea, harbors along sea coast of the country, and in navigable rivers. U. S. v. Wilson, 3 Blatchf. 435.

Torts in tide water, in foreign ports, are included. Thomas v. Lane, 2 Sumn. 1; The Eagle, 75 U. S. (8 Wall.) 15.

Admiralty jurisdiction granted by U. S. Constitution extends to the navigable lakes and rivers of U. S. without regard to ebb and flow of tide of the ocean, and is not defeated, because the place of the transaction was written in the body of a county of a state. Genesee Chief v. Fitzhugh, 53 U. S. (12 How.) 443; Frets v. Bull, 53 U. S. (12

executing some of the general powers of the government. The completely internal commerce of a state, then, he observes, may be considered as reserved for the state itself." *Ib.* 195.

This distinction in the act of 1845 is noticed by the present Chief Justice in delivering the opinion in *The Genesee Chief*. He observed: "The act of 1845 extends only to such vessels when they are engaged in commerce between the states and territories. It does not apply to vessels engaged in the domestic commerce of a state."

This restriction of the admiralty jurisdiction was asserted in the case of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank*, 6 How. 392, the first case in which the jurisdiction was upheld by this court upon a contract of affreightment.

It was then remarked that "the exclusive jurisdiction of the court in admiralty cases was conferred on the national government, as closely connected with the grant of the commercial power. It is a maritime court, instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of con-
247*] tract, to those concerning *the navigation and trade of the country upon the high seas, etc., with foreign countries and among the several states.

"Contracts growing out of the purely internal commerce of the state, etc., are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the Federal courts."

The contract of shipment in this case was for the transportation of the goods from the port of Two Rivers to the port of Milwaukee, both in the state of Wisconsin; and upon the principles above stated, the objection to the jurisdiction of the court below would be quite clear, were it not for the circumstance that the vessel at the time of this shipment was engaged in a voyage to Chicago, a port in another state. She was a general ship, with an assorted cargo, engaged in a general carrying business between ports of different states; and there is some ground for saying, upon the words of the act of 1845, that the contracts over which the jurisdiction is conferred, are contracts of shipment with a vessel engaged in the business of commerce between the ports of different states. But the court is of opinion that this is not the true construction and import of the act. On the contrary, that the contracts mentioned relate to the goods carried as well as to the vessel, and that the shipment must be made between ports of different states.

This view of the act harmonizes with the limitation of the jurisdiction as expressed, independently of any act of Congress, in the case of *New Jersey Steam Navigation Company* v. *The Merchants' Bank*, before referred to.

We confine our opinion upon the question of jurisdiction to the case before us, namely: to the suit upon the contract of shipment of goods between ports and places of the same state.

The court is of opinion that the district court had no jurisdiction over it in admiralty, and that the jurisdiction belonged to the courts of the state.

It may be, that in respect to a vessel like the present, having cargo on board to be carried between ports of the same state, as well as between ports of different states, in cases of sale or bottomry of a cargo for relief of the vessel in distress, of voluntary stranding of the ship, jettison, and the like, where *contribution [*248 and general average arise, that the Federal courts shall be obliged to deal incidentally with the subject, the question being influenced by the common peril in which all parties in interest

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How.) 466; Jackson v. Magnolia, 61 U. S. (20 How.) 296; Raymond v. The Ellen Stewart, 5 McLean, 269; McGinnis v. Pontiac, 5 McLean, 359; Newb. 130; Eads v. The H. D. Bacon, Newb. 274; Scott v. The Young America, Newb. 101; Nelson v. Leland, 22 How. 48; Newb. 1. 197, 443; The Belfast, 74 U. S. (7 Wall.) 624; The Eagle, 75 U. S. (8 Wall.) 15; The Flora, 1 Biss. 29; Transportation Co. v. Fitzhugh, 66 U. S. (1 Black.) 574; Hine v. Trevor, 71 U. S. (4 Wall.) 555; Ins. Co. v. Dunham, 78 U. S. (11 Wall.) 1.

Contracts growing out of the internal commerce of a state are not within admiralty jurisdiction. Under the Constitution, this is left to be regulated by state authority (Allen v. Newberry, *supra;* Maguire v. Card, 62 U. S. [21 How] 248); nor is a claim, sought to be enforced by proceedings *in rem*, for materials and labor for repair of a steamboat engaged in running upon waters wholly within the limits of a state. The Troy, 4 Blatchf. 355.

When admiralty jurisdiction has once attached, it is not devested by reason of any further acts done upon land, in continuation of the maritime act, which gave jurisdiction. American Ins. Co. v. Johnson, Blatchf. & H. 10, 12 Mod. 135; Bee, 369; 1 Kent's Com. 379.

Admiralty has jurisdiction over contracts of affreightment between two ports of same state, where from the usual course of the voyage, part is upon the high seas, out of the jurisdiction of any state. Carpenter v. The Emma Johnson, 1 Cliff. 633.

So, also, where contract of affreightment is to be performed wholly between ports within the same state. The Mary Washington, 1 Abb. U. S. 1.

Action for damages for injury to goods carried on board a vessel between two ports of the Hudson river, is within admiralty jurisdiction, notwithstanding both ports are in same state and owners of vessel and of cargo are all residents of such state. The Leonard, 3 Ben. 263.

The Saginaw river (Mich.) is a public navigable water within the admiralty jurisdiction of Dist. Ct. The General Cass, 5 Am. L. T. Rep. 12; 1 Brown, Adm. 334.

Ferryboat plying on Mississippi river between points on opposite sides, within a distance of six miles, is amenable to admiralty. The Gate City, 5 Biss. 200.

The admiralty jurisdiction of United States courts extends to a tort committed by collision on an artificial ship canal connecting navigable waters within that jurisdiction. The Oler, 14 Am. L. Reg. 300; 2 Hugh. 12.

The waters of Welland canal are within the admiralty jurisdiction of the United States courts. The Avon, 1 Brown, Adm. 170.

Admiralty jurisdiction of U. S. Dist. courts does not extend to seizures made on land. United States v. Winchester, 99 U. S. (9 Otto,) 372.

Admiralty has jurisdiction of a libel by mariners for wages against a vessel plying on navigable waters, though these waters are entirely within one state. The Sarah Jane, 1 Low. 203; Roberts v. Skolfield, 3 Ware, 184.

In a proceeding *in rem* against a canal boat for oats shipped from Buffalo to New York by Erie canal, part of which were stolen from the boat, it was held by the district court that admiralty had jurisdiction to enforce such a contract, although part of the service was to be performed on the Erie canal, and although the boat was built to navigate the canal and had no means of locomotion in herself. The E. M. McChesney, 15 Blatchf. 183. The decree in this case was sustained by the Supreme Court. Chief Justice Waite delivered the opinion, in which he concurred in the opinion of the district judge.

are concerned, and to which ship, freight, and cargo, as the case may be, are liable to contribute their share of the loss.

A small part of the goods in question in this case were shipped for the port of Chicago, but are not of sufficient value to warrant an appeal to this court.

The decree of the court below dismissing the libel, affirmed.

Mr. Justice **Daniel:**

I concur in the decree for the dismission of the libel in this case, but not for the reasons assigned by the court. It being my opinion, as repeatedly declared, that the admiralty jurisdiction, under the Constitution of the United States, is limited to the high seas, and does not extend to the internal waters of the United States, whether extending to different states or comprised within single states. If there be any inefficiency in this view of the admiralty powers of the government, the fault is chargeable on the Constitution, and on the want of foresight in those who framed that instrument, and it can be legitimately remedied by an amendment of the Constitution only.

Dissenting, Mr. Justice **Grier**, Mr. Justice **Catron**, and Mr. Justice **Wayne**.

HENRY HILL, *Plff. in Err.*,
v.
CALEB B. SMITH *et al.*

(See S. C. 21 How. 283-287.)

Guaranty of stock, when valid.

Where plaintiff, on sale of land to a railroad, received from defendants their guaranty that certain stock of the railroad company which plaintiff received for the land should be worth par in three years, or defendants should make it up to par or pay him whatever sum said stock should be worth less than par; held, that this was an independent contract and valid.

The stock at the time specified being worthless, and the railroad company insolvent, held, that the plaintiff is entitled to judgment, on demurrer to his complaint, unless defendants withdraw their demurrer and plead some good plea in bar.

Submitted Jan. 18, 1859. Decided Feb. 3, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit brought in the court below, by the appellant, to recover damages resulting from the breach of a certain guaranty in writing.

The court sustained a demurrer to the declaration and entered judgment for the defendants; whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **O. H. Smith** and **Jer. Smith**, for appellant:

We submit that the first count contains, in fact, two distinct agreements.

1. The stock should be worth par in three years from the date of the contract.

2. The railroad company would make up for any deficiency.

The first is, unquestionably, an absolute agreement. If it is, then an action can be maintained upon it alone, although the other guaranty should be adjudged a collateral undertaking, which we submit is not the case.

2 Story, Cont. p. 396, § 858; *Newman* v. *Newman*, 4 M. & S. 66; *Kerrison* v. *Cole*, 8 East. 231; *Van Dyck* v. *Van Buren*, 1 Johns. 362; 1 Pars. Cont. 480.

As they are both laid in the count, the breach of both assigned, a general demurrer, even if confined to the court, should have been overruled, even though no action would lie upon the second guaranty.

1 Chit. Pl. 703.

We maintain, however, that the second guaranty is also an independent and original guaranty on the part of the appellees. The conveyance of the land was a sufficient consideration.

10 Moore, 395; 3 Bing. 107; 8 Cush. 156; 15 Pa. 156.

Even were there some difference as to the construction, it should be construed, under the circumstances, against the grantor.

Lawrence v. *McCalmot*, 2 How. 450; *Mason* v. *Pritchard*, 12 East. 227; *Pugh* v. *Duke of Leeds*, Cowp. 714; Chit. on Cont. 80, 81; 1 Pars. Cont. 495.

The contract, even if made between the railroad company and the appellant, was valid in law; but whether it was or not, it is binding on the grantors.

Goodman v. *Chaise*, 1 B. & Ald. 297; *Lane* v. *Burghart*, 41 E. C. L. 848; *Maggs* v. *Ames*, 15 Eng. C. L. 47; *Redhead* v. *Cator*, 1 Stark. 14.

We submit that the demurrer to the first and second counts, which are substantially alike, should have been overruled. The third count is unquestionably good. It sets up an original and independent contract between the appellant and appellees, founded upon a sufficient consideration, and alleges performance on the part of the appellant and a violation by the appellees; and as the demurrer covered all the counts, if one is good, the demurrer should be overruled.

The following are the distinct points upon which we rely for the reversal of the judgment.

First. That the circuit court erred in sustaining the demurrer to the first and second counts, and each of them.

Second. That the court erred in sustaining the demurrer to the whole declaration, if there be one good count, or part good of a divisible count.

1 Chit. p. 665, ed. 1855, notes c (3) and authorities.

Third. The guaranty set out in the first and second counts, was an original undertaking of the appellees, and is binding in law. 4 M. & S. 66; 8 East, 231; 1 Johns. 362; 1 Pars. Cont. 480; 2 How. 450; 12 East, 227; Cowp. 714; Chit. Cont. 80, 81; 1 Pars. Cont. 495; 6 Eng. C. L. 32; 41 Eng. C. L. 843; 1 How. 187; 10 Pet. 493.

Fourth. The whole contract set out in the first and second counts being in writing, and founded upon a sufficient consideration, was obligatory upon the parties.

See 10 Moore, 395; 3 Bing. 107; 8 Cush. 159; 15 Pa. 156.

Fifth. Suppose the undertaking of the appellees to be collateral to a contract of the railroad company, the undertaking or guaranty is valid in law and binding on the appellants.

2 How. 426; 7 Cranch, 69; 10 Pet. 482; 7 Pet. 122; 10 Moore, 395; 3 Bing. 3, 107; 14 Ill. 237; 15 Pa. 27; 2 Story, Cont. 400, § 862, and authorities cited, ed. 1857; 17 Pet. 161; 5 B. & Ad. 1109; Mood & Al. 394.

Sixth. Neither the railroad company nor their guarantors can set up the illegality of their executed contract, either at law or in equity, without placing the parties *in statu quo.*

4 Blackf. 515; 5 Blackf. 441; 7 Blackf. 55; 8 Blackf. 409, 469; Adams' Eq. 191; 1 Story, Cont. 601, § 497, note 2, ed. 1857; Hill, Trust. 221, ed. 1857.

Seventh. The third count sets out an original, independent contract between the appellant and the appellees, founded upon a sufficient consideration, and, the facts being admitted by the general demurrer, raising no question as to the form, is valid in law, and the demurrer to the whole declaration should have been overruled.

1 Pars. Cont. 497, and authorities; 37 Eng. C. L. 120; 2 McLean, 103; 3 McLean, 387; 1 Story, Cont. 530, § 431; Story, Cont. 544, § 551.

Eighth. The undertaking of the appellees is valid and binding, whether an action could be maintained against the railroad company or not.

1 Burr. 371; 1 B. & Ald. 297; 15 Eng. C. L. 47; 1 Stark. 14, 19; 2 Eng. C. L. 16, 18.

We submit the case with confidence that the law is with us and, therefore, that it must be reversed.

No counsel appeared for the defendants in error.

Mr. Justice **Grier** delivered the opinion of the court:

The plaintiff's demand is founded on the following contract, dated August 17, 1853, signed by defendants, and set forth at length in the declaration:

286*] *"Whereas Henry Hill, of Delaware county, has proposed to convey to the Cincinnati, Newcastle, & Michigan Railroad Company a certain tract of land in Delaware county, containing three hundred and nine acres, for the consideration of six thousand one hundred dollars, to be paid in the capital stock of said company, at par, on the condition that Caleb Smith and other responsible persons will guaranty that the said stock shall be worth par in three years from the present date, and in default thereof, that the company shall make it up to par; and whereas the said Cincinnati, Newcastle, & Michigan Railroad Company have agreed by a resolution of their board of directors to accept said proposition: Now, we, the undersigned, in consideration of the premises, hereby guaranty to the said Henry Hill, that the said stock shall be worth par in three years from the date of this instrument; and if, at the expiration of that date, said stock shall not be worth par, we guaranty the said Henry Hill that the said Cincinnati, Newcastle, & Michigan Railroad Company shall make up to him or pay him whatever sum the said stock shall be worth less than par, so as to make the said stock worth par to said Henry Hill at that date."

The declaration is in proper form, and contains all the averments necessary to show a breach of this contract, and the consequent liability of defendants.

There was a general demurrer to the declaration, and judgment for the defendants.

As we have not been furnished with an argument on behalf of defendants, we are at a loss to discover on what grounds it is supposed that this judgment can be supported.

As the contract is in writing, signed by the parties to be charged, it cannot be affected by the statute of frauds; and although the term "guaranty" is usually applied to a collateral undertaking to pay the debt of another, yet when taken in connection with the other terms of the instrument, this is clearly an original, independent contract. If it had been under seal, the term "covenant" would have been the technical synonym for the word "guaranty" as here used.

It states that the plaintiff would not agree to sell his land *in exchange for stock, [*287 except on condition that defendants should guaranty that the stock in three years would be worth par, or should be made so by the corporation. For this consideration, defendants agree to make it so, or, in other words, to pay the difference between the cash value of the stock on that day and its nominal value.

On this condition and for this consideration, the plaintiff agreed to convey his land to the railroad company; and on the faith of the defendants' undertaking, he has conveyed it, and accepted, not money, but certain stock, which defendants have agreed to make equal to money by a certain day. The declaration avers, that at the time specified, the stock was wholly worthless and of no value, and the railroad company utterly insolvent, and unable to pay the difference; and that defendants, having full notice of these facts, refuse to comply with their contract.

There is no reason why this contract should be treated as void because of an illegal or immoral consideration. Its conditions require no previous suit to be instituted against any one as principal debtor. The declaration contains every necessary averment; a valid contract, a large consideration paid, and a breach of the contract by defendants; all set forth in proper and technical language.

The plaintiff is, therefore, entitled to judgment on the demurrer, unless the court below, in their discretion, shall permit the defendants, on payment of costs, to withdraw their demurrer, and plead some good defense in bar.

The judgment of the court below is reversed, and record remitted for further proceedings.

LESLIE COMBS, *Compt. & Appt.*,
v.
JOHN L. HODGE, Admr. of Andrew Hodge, Deceased, Wm. L. Hodge and James Love.

(See S. C. 21 How. 397-408.)

Admissions in pleadings—letter of agent, when no evidence of authority—rights of bona fide holder of bill of exchange—bills originating in fraud or illegality—taken out of the course of trade as overdue—instrument not negotiable, when unauthorized transfer of, does not impair rights of owner—Texas certificates—how transferred—collusion with agent.

The record in another suit, where the parties were different, and the petition and answer are signed by counsel, and not by the parties, cannot be resorted to for admissions of the respective parties.

Where there is no evidence of the existence of a power of attorney, except that contained in a letter of the agent, that statement, if admissible, is insufficient to establish the fact, the letter having been written after the agent had violated his obligation as a faithful agent, and in reply to reproaches of the plaintiffs.

The law merchant accords protection to a holder of a bill of exchange taken in the course of business for value, and without notice.

But this concession is a departure from the fundamental principle of property which does not permit one to transfer a better title than he has.

The party who claims the benefit of the exception to this principle must, in the case of bills of exchange that have originated in fraud or illegality, establish that he is not an accessory to the illegal or fraudulent design, but a holder for value.

If the bill is taken out of the course of trade, as overdue, or with notice, the rights of the holder are subject to the operation of the general rule.

When the instrument is one which by law is not negotiable, or the negotiability has been restricted by the parties, the rule of the law merchant has no application.

In such case the loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner.

A purchaser cannot safely draw any conclusion from the existence of an indorsement on such a paper that the holder is entitled to sell or discount it.

Nor can the holder write on such non-negotiable paper an assignment or guarantee not authorized by the indorser.

Certificates of the public debt of the republic of Texas which issued to a person or his assigns, were transferable by him or his attorney, only on the books of the commissioner of the state.

When the owner did not direct their sale, and they were not sold on his account, if there had been a power of attorney to the agent selling, containing an authority to sell, the circumstances imposed upon the defendant the necessity of showing there was no collusion with the agent.

Argued Jan. 12, 1859. Decided Feb. 3, 1859.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The bill in this case was filed in the court below, by the appellant, to two certificates for a portion of the public debt of the Republic of Texas.

The court below having dismissed the bill, the complainants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **S. S. Baxter, J. H. Bradley,** and **J. J. Crittenden,** for appellant:

I. This is a proceeding in the nature of a bill of interpleader, the Treasury of the United States being the stakeholder. *Clark* v. *Clark*, 17 How. 321.

In such a controversy, the parties stand on their respective, legal, and equitable rights.

II. The appellant is the creditor of Texas, holding the legal title to this scrip, which can pass only in the manner prescribed by the law of Texas, and apparent on the face of the scrip.

Menard v. *Shaw*, 5 Tex. 334.

The distinction between stocks passing by delivery or assignment, except in a particular mode, and the effect of their assignment in any other mode, is well established.

Union Bank v. *Laird*, 2 Wheat. 390; *Black* v. *Zacherie*, 3 How. 513; *Glynn* v. *Baker*, 13 East, 509; *Gorgier* v. *Mieville*, 3 B. & C. 45; 10 Eng. C. L. 16; *Atty.-Gen.* v. *Dimond*, 1 Cromp. & J. 356, 70; *Atty.-Gen.* v. *Hope*, 1 Cromp. M. & R. 530; *Atty.-Gen.* v. *Bouwens*, 4 Mees. & W. 171; Smith's L. C. 250, and note; Story, Confl. L. § 383, and notes.

III. The legal title being in Combs, the appellees have shown no equity in themselves.

(*a*) The authority to Love was special and limited, to collect the money. The bonds themselves were not assignable, and could be transferred in one mode only.

This distinguishes the case from that of *Baldwin* v. *Ely*, 9 How. 580.

The purchaser from Love was bound to ascertain the extent of his authority, and if he did not he must abide the consequences.

Story, Agen., §§ 126-8 and notes; §§ 224-6, and notes, § 437.

(*b*) To establish an equity against Combs, in the absence of proof or direct authority, the defendants must show some conduct on the part of Combs by which they were misled. This they failed to do.

(*c*) The conduct of the purchaser gives rise to distrust as to the fairness of the transaction.

The counsel here reviewed the evidence in this point and claimed:

1. That there was no express authority, upon the bonds themselves, to Love to assign them.

2. That the title to the bond being in Combs, Love could only transfer it under a written authority, and was bound to have inquired after and examined that authority.

Story, Agen., 72, note 2.

IV. Had Love authority to sell?

1. It was argued below, that the power was conferred by the indorsement in blank.

2. That such authority is proved by complainant's Exhibit H, in which Love asserts he had a power of attorney.

As to the power implied from the indorsement:

There is an express limitation on the face of these bonds, upon their transferable character. It is not denied that, as between the original parties, an indorsement in blank, for a fair consideration, followed by delivery, would vest in the purchaser an equitable title, which would, upon satisfactory proof, enable him to compel the indorser, in a court of equity, to do everything necessary to effect a complete transfer of his interest. He could sue in his own name in equity alone. His title would be equitable. And it may be conceded that he had an assignable property in the bonds. But he could assign no more than his equity.

Turton v. *Benson*, I. P. Wms. 496; 2 Vern. 764; *Davies* v. *Austen*, 1 Ves. Jr. 247, and see

the cases collected in the note, Perk. ed. *Cator* v. *Burke*, 1 Bro. Ch. 434; *Davies* v. *Austen* and notes, 3 Bro. Ch. 179; *Scott* v. *Shreeve*, 12 Wheat. 605; and also 17 How. 615.

Undoubtedly these general principles are subject to certain exceptions; but there are none such in this case.

2. The statement contained in the letter of Love is introduced by the complainant, for the purpose of showing the pretenses under which it is supposed the defendant sets up title, and to negative such pretension.

The bill is sworn to, and emphatically states and reiterates, that complainant never gave any authority, in any form, to Love, to dispose of the bonds.

And it is a violent invasion of the rules of evidence to say, that when a complainant introduces, by way of exhibits in his bill, the unsworn statements of his defaulting agent as to transactions alleged to be fraudulent and sought to be set aside, and under oath negatives them, he shall be held bound by the very falsehoods he seeks to overthrow, and they shall be taken as proof that his sworn statements are false. The essence of the bill is, that the agent had fraudulently appropriated the bonds to his own use, under the pretense of an authority to sell; and it is to repudiate and discredit this pretended authority, that he makes him and his imputed assignee parties defendant, and seeks from them a discovery of the facts. The pretense in the letter is contradicted in terms, and charged to have been a fraud. To say, then, that it is evidence to prove the authority, is a solecism and a contradiction in terms of the plainest rules of chancery pleading. If this is out of the case, there is no scintilla of proof to give countenance to the pretense of an authority.

Finally, Combs having the legal title, the whole burden is on the appellees, to establish by satisfactory proof an equity which will draw to it the legal title.

Judson v. *Corcoran*, 17 How. 612.

Messrs. **Reverdy Johnson** and **Reverdy Johnson, Jr.**, for appellees.

Mr. Justice **Campbell** delivered the opinion of the court:

The plaintiff filed his bill to establish his claim to two certificates for a portion of the public debt of the republic of Texas, which had been issued to him in the year 1839, and which were transferable by him, or his attorney, or his representative, only, on the books of the stock commissioner of that state. He avers that these certificates with others were indorsed in blank by him and sent to the defendant (Love), in Texas, during the year 1840, with **404***] authority to receive an *anticipated partial payment, and to obtain other certificates of the same description for the residue. That he did not give to his agent any authority to sell them, or to dispose of them for his own use, and has done no act to defeat his own legal title to them. That Love did not collect any part of the debt, and has failed to return the two certificates in question. That for fifteen years he has been unable to discover who was in possession of them, and has but recently ascertained that they were held by one of the defendants under a claim of title from Love.

He attached to his bill a number of letters of Love, containing admissions of his receipt of the certificates, and of his agency for the plaintiff; and subsequently to the conversion by him of these, he wrote to the plaintiff in extenuation of his conduct, affirming that he had a power of attorney and letters from the plaintiff authorizing him to sell. That he would endeavor to replace the stock, or would give other stock of the same description, and insisted that the liberty he had taken was excusable.

The defendant (Hodge) answered to the bill that these certificates were claimed as the property of the decedent, Andrew Hodge. That he purchased them from Love, fairly and for their full value, and with a firm conviction that he was authorized by a power of attorney and the blank indorsement of the plaintiff, to dispose of them. The cause was heard upon the pleadings and a decree *pro confesso* against Love.

The record in the district court at New Orleans in the suit between Love and Hodge, appended to the bill, does not contain evidence applicable to this cause. The parties to that suit were different, and the petition and answer are signed by counsel, and not by the parties, and cannot be resorted to for admissions of the respective parties. *Boileau* v. *Ruttlin*, 2 Ex. 665. There is no evidence of the existence of a power of attorney from the plaintiff to Love, except that contained in the letter of Love before referred to. If that statement is at all admissible, it is insufficient to establish the fact. The letter was written in 1844, after Love had violated his obligation as a faithful agent, and in reply to reproaches of the plaintiff. In that *letter he promises to restore to the [***405** plaintiff these or other certificates. There is no evidence of any fulfillment of this promise. He has failed to produce a power of attorney, or any letters which authorize his sale to his codefendant. The witnesses of the contract between him and the decedent (Andrew Hodge) have not been examined. These circumstances raise a strong presumption against the verity of his statement, and deprive his letter of any probative force. The title of the defendant, therefore, depends upon the effect to be given to the indorsement of the certificates in blank by the plaintiff, and their deposit with Love. The question is, was he invested with such a title that a bona fide purchaser, having no notice of its infirmity, will be protected against a latent defect? The law merchant accords such protection to a holder of a bill of exchange taken in the course of business for value, and without notice; and legislation in Great Britain and some of the states of the Union has extended to the same class of persons a similar protection in other contracts.

But this concession is made for the security and convenience, if not to the necessities and wants, of commerce, and is not to be extended beyond them. It is a departure from the fundamental principle of property, which secures the title of the original owner against a wrongful disposition by another person, and which does not permit one to transfer a better title than he has. The party who claims the benefit of the exception to this principle must come within all the conditions on which it depends. In the case of bills of exchange that have originated

in fraud or illegality, the holder is bound to establish that he is not an accessory to the illegal or fraudulent design, but a holder for value. If the bill is taken out of the course of trade as overdue, or with notice, the rights of the holder are subjected to the operation of the general rule. In *Ashurst* v. *The Official Manager of the Bk. of Australia*, 37 Eng. L. & Eq. 195, Justice Erle says: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so called, and ordinary chattels, which are transferable by delivery, though the transferrer can only pass such title as he had. As to negotiable instruments, during their currency, delivery **406***] *to a bona fide holder for value gives a title, even though the transferrer should have acquired the instrument by theft; but after maturity the instrument becomes in effect a chattel only in the sense I have mentioned." When the instrument is one which by law is not negotiable, or when the negotiability has been restricted by the parties, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an indorsement on such a paper that the holder is entitled to sell or to discount it. *Bircleback* v. *Wilkins*, 10 Harris, 26; *Ames* v. *Drew*, 11 Foster, 475; *Symonds* v. *Atkinson*, 37 Eng. L. & Eq. 585; *Charnley* v. *Grundy*, 25 Eng. L. & Eq. 318. Nor can the holder write an assignment or guaranty not authorized by the indorser. 4 Duer, 45; 25 Eng. L. & Eq. 19; 6 Harris, 434. This doctrine has been applied to determine conflicting claims to the public securities which were not negotiable on their face, though the subject of frequent transfers.

The suit of *Tonkin* v. *Fuller*, 3 Doug. 300, was for four victualing bills drawn by commissioners of the victualing office on their treasurer, in favor of their creditor. These were sent to an agent with a power of attorney, "to receive money and give receipts and discharges," and who pledged them for an advance of money. Lord Mansfield said the only question is, who has the right of property in this bill? It must be the plaintiff's, unless he has done something to entitle another. It is deposited with the defendant by one who had it under a limited power of attorney. If the plaintiff had ever consented to the disposal of the bill, he would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretense.

Glyn v. *Baker*, 13 East, 509, was a suit for bonds of the East India Company, payable to their treasurer, and sold with his indorsement. LeBlanc, Justice, said:

"Here are persons intrusted with the securities of A and B, who part with the securities of A, and, when called on for them, give the securities of B. That difficulty can only be **407***] *met by assimilating such securities to cash, which, whether it has an earmark set upon it or not, if passed by the person intrusted with it to a bona fide holder for valuable consideration, without notice, cannot be recovered by the rightful owner; but how does the similitude hold?"

And Lord Ellenborough said, "any individual might as well make his bond negotiable."

The case of *Dunn* v. *Commercial Bank of Buffalo*, 11 Barb. 580, originated in the refusal of that bank to allow a transfer of stock on the books of the bank, which was transferable by the holder of the certificate or his representative.

The plaintiff had the certificate and a blank assignment, and a blank power of attorney, and claimed to make the transfer. The court denied that certificates of stock in reference to negotiability are placed on the same ground as bills of exchange, and declare that it is incumbent on a party claiming under such a transfer to prove the contract or consideration. In *Menard* v. *Shaw, Comptroller*, 5 Tex. 334, the supreme court of that state decide that the agency of the payee named in certificates like the present is indispensable to a legal transfer on the books of the state, and that a forced sale was, therefore, inoperative. The decision of *Baldwin* v. *Ely*, 9 How. 580, does not sanction the claim of the defendants.

The certificates which were the subject of controversy were issued, under an act of Congress, to a person or his assigns.

The ordinary form of assignment was a blank indorsement, and this had been recognized as sufficient at the Treasury of the United States, and in the ordinary traffic in the community.

The defendant proved that he had paid value for them. In the cases cited from Douglas and East, the judges stated that the existence of similar facts might give another aspect to the claim of the defendants in these cases. In the case before us, the certificates were transferable, in terms only, in a single mode.

There was no evidence that a transfer in any other form than that prescribed had ever been recognized.

We have considered this cause upon the assumption that the defendant was a holder for value.

*There is no statement in the answer [***406** of the consideration paid to Love for these certificates, nor of the time, place and circumstances of the contract between him and the defendant's testator. It appears that the plaintiff did not direct their sale or transfer, and that they were not disposed of on his account; and if there had been a power of attorney containing an authority to sell, the circumstances would have imposed upon the defendant the necessity of showing there was no collusion with Love. Upon the case as presented, the court is constrained to reverse the decree of the circuit court, dismissing the plaintiff's bill. But the case is presented in an unsatisfactory manner.

The transaction between Love and the decedent (Hodge) has not been exhibited to the court, although parties fully cognizant of it are before the court.

We have concluded to remand the cause to the Circuit Court, with directions to allow the parties to amend the pleadings, and to take testimony, if they should be so advised.

THOMAS MAGUIRE, Claimant of the Steamer Goliah, *Appt.*,
v.
STEPHEN CARD, *Libt.*

(See S. C. 21 How. 248-251.)

Admiralty jurisdiction—supplies for domestic vessel.

A proceeding *in rem*, to recover for coal furnished a steamer engaged in the business of navigation and trade exclusively within the state of California, is not the subject of admiralty jurisdiction.

It concerned the purely internal trade of a state. That commerce is necessarily left to regulation by state authority.

The 12th rule of the admiralty amended, so as to take from the district courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs, on the authority of a lien given by state laws.

Argued May 11, 1858. Held under advisement May 18, 1858. Decided Feb. 7, 1859.

APPEAL from the Circuit Court of the United States for the district of California. The libel in this case was filed in the district court of the United States for the northern district of California by the appellee, to recover the balance of an account for coal furnished the steamer Goliah.

The said court entered a decree in favor of the libelant for $2,830, with costs.

The circuit court of the United States for the district of California having affirmed this decree, the claimant of said steamer took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **M. Blair** for appellant.

Mr. **J. T. Doyle** for appellee.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the northern district of California, in admiralty.

The suit was a proceeding *in rem* against The Goliah, to recover the balance of an account for coal furnished the steamer while lying at the port of the city of Sacramento, in the months of October and November, 1855. The vessel, according to the averments in the libel and which 250*] are not denied in the record, *was engaged in the business of navigation and trade on the Sacramento river, exclusively within the state of California, and, of course, between ports and places of the same state. She was therefore engaged, at the time of the contract in question, in the purely internal commerce of the state, the contract relating exclusively to that commerce, and which does not in any way affect trade or commerce with other states.

The court has held, in the case of *Rufus Allen* v. *H. L. Newberry*, *ante*, 110, at this term, that a contract of affreightment between ports and places within the same state was not the subject of admiralty jurisdiction, as it concerned the purely internal trade of the state, and that the jurisdiction belonged to the courts of the state. That case occurred upon lake Michigan, within waters upon which the jurisdiction of the court was regulated by the act of Congress of the 26th February, 1845; but the restriction of the jurisdiction by that act was regarded by the court as but declaratory of the law, and that it existed independently of that statute.

The contract in that case, as we have said, was one of affreightment between ports of the same state; but we perceive no well-founded distinction between that and a contract for supplies furnished the vessel engaged in such a trade. They both concern exclusively the internal commerce of the state, and must be governed by the same principles.

There certainly can be no good reason given for extending the jurisdiction of the admiralty over this commerce. From the case of *Gibbons* v. *Ogden*, 9 Wheat. 194, down to the present time, it has been conceded by this court that, according to the true interpretation of the grant of the commercial power in the Constitution to Congress, it does not extend to or embrace the purely internal commerce of a state; and hence that commerce is necessarily left to the regulation under state authority. To subject it, therefore, to the jurisdiction in admiralty, would be exercising this jurisdiction simply in the enforcement of the municipal laws of the state, as these laws, under the conceded limitation of the commercial power, regulate the subject as completely as Congress does commerce "with foreign nations, and among the [*251 several states." We are speaking of that commerce which is completely internal, and which does not extend to or affect other states, or foreign nations.

We have at this term amended the 12th rule of the admiralty, so as to take from the district courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been assumed upon the authority of a lien given by state laws, it being conceded that no such lien existed according to the admiralty law, thereby correcting an error which had its origin in this court in the case of *The Gen. Smith*, 4 Wheat. 439, applied and enforced in the case of *Peyroux et al.* v. *Howard & Varion*, 7 Pet. 324, and afterwards partially corrected in the case of *The Steamboat New Orleans* v. *Phebus*, 11 Pet. 175, 184. In this last case, the court refused to enforce a lien for the master's wages, though it had been given by the local laws of the state of Louisiana, the same as in the case of supplies and repairs of the vessel. We have determined to leave all these liens depending upon state laws, and not arising out of the maritime contract, to be enforced by the state courts.

So in respect to the completely internal commerce of the states, which is the subject of regulation by their municipal laws; contracts growing out of it should be left to be dealt with by its own tribunals.

For these reasons, we think the decree of the court below should be reversed, and the cause remitted, with directions to dismiss the libel.

Dissenting, Mr. Justice **Wayne**.

NOTE.—*Admiralty jurisdiction to enforce liens given by state laws*—see note, 21 C. C. A. 21.

THE UNITED STATES, *Appt.*,
v.
JOHN A. SUTTER.

(See S. C. 21 How. 170–184.)

Sutter's claim—exemplification of record, evidence — surplus — Mexican law—forfeiture—claim of persons interested, may be in name of original claimant.

A claim for eleven leagues of land granted to Sutter by Alvarado, governor of California, 18th of June, 1841, sustained.

An exemplification of a record is admissible, as evidence of the same dignity as the grant itself.

The nonproduction of the original given to the party cannot furnish much cause for suspicion.

The petition for the surplus, or *sobrante*, implies there was an existing and operative grant, which the authorities recognized and respected.

The Mexican law of 1828 authorizes the political chief to grant lands to an *empresario* who may wish to colonize.

But the grant shall not be definitely valid without the previous approbation of the supreme government, to which the *espediente*, with such report as the departmental assembly may think fit to make, shall be communicated.

No law of the United States authorizes this court to pronounce forfeiture for any act or omission since the date of the treaty of Guadalupe Hidalgo.

The evidence fails to establish the grant purporting to be issued by Micheltorena at Santa Barbara, the 5th February 1845, and submitted to the board of commissioners in March, 1853.

Requisites of a Mexican grant, considered.

It is competent to persons interested in the claim, to employ the name of the original claimant in proceedings to establish the grant.

Argued Jan. 7, 1859. Decided Feb. 14, 1859.

APPEAL from the District Court of the United States for the District of California.

This case arose upon a petition filed before the board of land commissioners, in California, by the appellee, for the confirmation of a claim to 33 square leagues of land in the valley of the Sacramento river.

The said board of land commissioners entered a decree confirming the claim of the petitioner.

This decree, on appeal, having been affirmed by the district court of the United States for the northern district of California, the United States took an appeal to this court.

A further statement of the case appears in opinion of the court.

Messrs. **Black**, *Atty. Gen.*, and **Hull** for appellants.

Messrs. **Howard, Crittenden, Butler,** and **Walker** for appellee.

Mr. Justice **Campbell** delivered the opinion of the court:

This cause comes to this court by appeal from a decree of the district court of the United 172*] States for the northern district of *California, which affirms a sentence of the board of commissioners to settle private land claims in that state, in favor of the appellee, upon a claim to 33 square leagues of land in the valley of the Sacramento river. The record shows that the claimant, a native of Switzerland, immigrated to the department of California about the year 1839, was naturalized as a citizen of Mexico, and with the leave of the government formed a settlement near the junction of the Sacramento and American rivers, which he designated New Helvetia. The country at the time was uninhabited, except by bands of warlike Indians, who made frequent depredatory incursions upon the undefended settlements to the south and east of this place. In two or three years after his arrival, the claimant was commissioned by the governor of California to guard the northern frontier and to represent the government in affording security and protection to its inhabitants against the invasion of the Indians and marauding bands of hunters and trappers, who occasionally visited the valley for plunder. In the year 1841 he commenced the erection of a fort at New Helvetia, at his own expense. It was surrounded by a high wall, and was defended by cannon. Within this fort there were dwelling-houses for his servants and workmen, and workshops for the manufacture of various articles of necessity. There was a gristmill, tannery, and distillery attached to the establishment. A number of Indians were domesticated by him, and contributed to cultivate his fields of grain, and to defend the settlement from more savage tribes. He was possessed of several thousands of horses and neat cattle, which were under the care of his servants. There were collected at different times from twenty to fifty families, and there were in the course of years some hundreds of persons connected with this settlement. He is described as having been hospitable and generous to strangers, and the governors of California bear testimony to the vigor with which he performed the duties of his civil and military commission.

In March, 1852, he placed before the board of commissioners a claim for 11 leagues of land, to include his place at New Helvetia, and extending thence north, which were granted to him by Juan B. Alvarado, governor of *California, 18th of June, 1841. [*173

In March, 1853, he amended his petition and claimed an additional quantity of 22 leagues, which were granted to him and his son, John A. Sutter, the 5th of February, 1845, by Micheltorena, the governor of California; this being the surplus (*sobrante*) contained within the limits from which his first grant was to be fulfilled. The *espediente* submitted to the board, with the grant of Alvarado, and as a part of it, represents that he is in possession of New Helvetia, and that his enterprise there had the sanction of the government, and had been prosperous; that he had associated with him industrious families; and that, besides the advantage to himself, he had awakened industry in others, and had also, by the strength of his company, formed a strong barrier against the savage Indians. He asks to enlarge his establishment, by introducing twelve families, and for this purpose solicits a grant of 11 leagues at his establishment of New Helvetia, from the governor, together with his powerful influence before the supreme government of the nation, that its approbation might be given. The governor recognizes the truth of the statements in the *espediente*, and declares that he has been sufficiently informed that the land is vacant and suitable for the purpose of the grantee. He grants to the applicant, "for him and his settlers, the said land, called New Helvetia, subject to the approbation of the supreme government and of the departmental

assembly," and subject to four conditions. The third and fourth relate to the boundaries of the land and the consummation of the title, and are as follows: "3d. The land of which donation is made to him is of the extent of 11 *sitios de ganado mayor*, as exhibited in the sketch annexed to the proceedings, without including the lands overflown by the swelling and current of the rivers. It is bounded on the north by los Tres Picas (three summits) and the 39° 41′ 45″ north latitude; on the east by the borders of the Rio de las Plumas; on the south by the parallel 38° 49′ 32″ of north latitude; and on the west by the river Sacramento. 4th. When this property shall be confirmed unto him, he shall petition the proper judge to **174***] give him *possession of the land, in order that it may be measured, agreeably to ordinance, the surplus thereof remaining for the benefit of the nation, for convenient purposes. Therefore I order that this title being held as firm and valid, that the same be entered in the proper book, and that these proceedings be transmitted to the excellent departmental assembly."

The first inquiry in cases like this is, Has the authenticity of the grant been established? This was not questioned in the district court, but in this court the appellants have denounced, with much force, the evidence as insufficient to support it. The original, issued to the donee, was not produced either to the board of commissioners or the district court. To account for its nonproduction, two witnesses were examined, who say that a paper, purporting to be an original, and which had the appearance of authenticity, was in the possession of one of them, as the agent and attorney in fact of the claimant; that this paper was destroyed by fire, with the office in which both lived, in the fall of 1851. An affidavit of the claimant in another case is in the record, in which he says that the original is lost. Some months before this fire, this paper was recorded in the county registry of deeds, and the recording clerk affords some evidence to the genuineness of the paper. It is shown that it had been exhibited in controversies before courts of justice, and had been examined by adverse claimants and their counsel, and at other times by interested and inquiring parties.

A grant of the same date, for the same quantity of land, in the same locality, and issued by the same officer, was reported to the United States by William Carey Jones, Esq., their agent, as existing in the archives of California in 1850. In his intercourse with the officers of the California government, the claimant asserted his title to New Helvetia, and his assertion was admitted; and accurate accounts of his location and settlement, and the terms on which they were made, are to be found in historical and descriptive works published under the authority of foreign states, upon the testimony of their agents, who visited California prior to 1845. Frémont, 246; 1 *Duflot de Moufras Explor. de l'Oregon and des Callas*, 457. **175***] *Besides this consistent testimony, there is produced from the archives a draught of a grant corresponding to that produced from the county records, except in respect to the signatures.

The governor, Alvarado, testifies that this draught was prepared by him, and from it the original that issued to Sutter was prepared by the secretary, and that the draught was deposited by his directions, and is now there. The fact that his name is not attached to this draught does not impair its authority under the circumstances of this case. *Spencer* v. *Lapsley*, 20 How. 264.

We agree that the rule of law which requires the best evidence within the power or control of the party to be produced should not be relaxed, and that the court should be satisfied that the better evidence has not been willfully destroyed nor voluntarily withheld. But the rule on the subject does not exact that the loss or destruction of the document of evidence should be proved beyond all possibility of a mistake. It only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant. In every well regulated government, the deeds of its officers, conveying parts of the public domain, are registered or enrolled, to furnish permanent evidence to its grantees of the origin of their title. An exemplification of such a record is admissible, as evidence of the same dignity as the grant itself. *Patterson* v. *Wynn*, 5 Pet. 233; *U. S.* v. *Davenport*, 15 How. 1. This rule exists in states which have adopted the civil law. In those states, the deed is preserved in the archives, and copies are given as authentic acts—that is, acts which have a certain and accredited author, and merit confidence. The acts thus preserved are public instruments, and all doubts that arise upon the copies that may be delivered are resolved by a reference to the protocol from which the copies are taken, and without which they have no authority. 1 White Recop. 297; *Owings* v. *Hull*, 9 Pet. 607.

When, therefore, a protocol is found in the archives, the nonproduction of the original given to the party cannot furnish much cause for suspicion or alarm. The map to which *the grant refers, and which properly [*176 forms a part of it, is not produced from the archives. The testimony of the witnesses is, that there was a map accompanying the original, and was burned with it. An engineer or surveyor (Vioget), who prepared maps for the claimant, testifies that, in January, 1841, he made duplicate maps for the claimant of the establishment at New Helvetia, and surveyed 11 leagues at that place; and that, in 1843, he traced a copy from one of these, and that copy is produced and filed with the petition. It is a fair conclusion, from all the evidence, that these maps of Vioget were presented to the governor, and form the basis of the grant, and make a part of it.

The secretary, Jimeno, who was examined in reference to an application of the appellee for an enlargement of his establishment, by the donation of the *sobrante*, says that a map accompanied the petition, and exhibited the land desired; that he made a favorable report upon the petition. The petition for the surplus, or *sobrante*, implies there was an existing and operative grant, which the authorities recognized and respected. With this map, we have no difficulty in locating the grant so as to include New Helvetia. Without it, the question would be, whether the general description of New

Helvetia should overrule the particular description by metes and bounds, contained in the third condition; for it is ascertained that the exact position of the line of latitude which determines the southern boundary lies twenty miles north of the principal establishment. But the map shows that the line of the southern boundary is south of New Helvetia, and is so related to natural objects represented on it as to be easily determined. Vioget accounts for the error in the designation of the line by the imperfection of the instruments, and proves that a starting corner was fixed, and the line traced on the ground. This is better evidence of the true location of the southern line, and conforms to the probabilities of the case. Upon the whole evidence, we find that the grant and map filed with the petition in 1852, before the board of commissioners, have been proved. The authenticity of the grant being ascertained, the question of its validity, as a colonization 177*] grant, under the *laws of 1824 and 1828, remains to be considered. To these laws, the authorities of California habitually refer as the source of their authority.

The law of 1828 authorizes the political chief to grant lands to an *empresario* who may wish to colonize; but that the grant shall not be definitely valid without the previous approbation of the supreme government, to which the *espedients*, with such report as the departmental assembly may think fit to make, shall be communicated. Before conceding lands, the chief was directed to make inquiries that the candidate was embraced by the laws, and that the land was suitable for colonization, and was not subject to any existing right.

The grant to the claimant recites that the governor had obtained the information necessary, and that the requirements of the law had been fulfilled.

No condition was imposed upon the claimant in respect to the distribution of the lands among the families to be introduced. The object of the grant, on the part of the authorities, seems to have been to secure the services of an efficient and competent officer, in a distant and exposed portion of the province, who would undertake to give repose and security to the settlements in that region; and this distribution of lands was confided to him as a trust, and a compensation for the performance of that duty.

The quantity of land was not greater than the colonization laws authorized an individual to hold, and the only care of the authorities was, that the consideration of the grant should be secured from the donee. The evidence is satisfactory that the expectations of the donors were entirely fulfilled. During the early administration of Alvarado and Micheltorena, the grantee seems to have had the favor of the political authorities, and in 1844 there was no objection opposed by them to the enlargement of his enterprise. He was referred to for information in business of the department, and in the civil commotions that preceded the overturn of the power of Micheltorena, he was the principal stay of his administration; and when called in question, subsequently, by the enemies of his chief, he said: "My establishment is sit- 178*] uated between the San Joaquin and *Sacramento rivers. It is the point which forms the frontier of the Mosebulos Indians, who are those who attack the *ranchos* and seize the horses. It is the road of transit from the interior. These reasons, not less than the great distance from my place to the other settlements, suggested to me the propriety of building my fort; and in order to do so, I obtained a license from the government of the country."

Subsequently to February, 1845, he seems not to have been molested by the government of Mexico, but remained the only representative of its power and authority in the valley of the Sacramento. There was no inconvenience felt by the failure to complete the grant, and there was no denunciation, by any one, of the land, for a breach of any condition. When the treaty of Guadalupe Hidalgo was ratified, he was a citizen of Mexico, in possession of the property comprehended in the grant, and is entitled to all the guarantees provided by that treaty for the Mexican population of California. He has submitted his claims to the tribunals appointed by the United States, within the term prescribed, and is ready to abide their action in reference to them. We know of no law of the United States which authorizes us to pronounce a sentence of forfeiture for any act or omission since the date of the treaty. Our opinion is that this grant is a valid claim under that treaty.

The grant purporting to be issued by Micheltorena at Santa Barbara, the 5th February, 1845, and submitted to the board of commissioners in March, 1853, remains to be considered.

The original of this grant was not produced. It is not in the list of grants reported to the government by Mr. Jones, nor is it found in the archives of California. It has not been placed upon the county records of Sacramento county, nor is there any evidence that it was ever produced in any of the controversies for the land included in it. There is no petition, or reference to the secretary, or compliance with any other formality prescribed by the law of 1828, preliminary to the issue of grants for lands. The record shows, that in 1843, or 1844, the claimant applied for the *sobrante* or surplus, and that his petition was referred to the secretary for further *information, [*179 and that he reported there was no objection; that the governor reserved the subject for consideration until he could visit the Sacramento valley, and that the papers were returned to the claimant.

In February, 1845, there existed a revolt against the government of Micheltorena, in which the principal inhabitants of California participated. Micheltorena abandoned his capital, and, on his way to Los Angeles, reached Santa Barbara, where the claimant joined him with a body of "foreign volunteers." The deposition of Castanada, the aid-de-camp of Micheltorena, has been taken. He says that the claimant presented a petition for a grant to himself and his son; that he (Castanada) drew the deed, and that it was executed by the governor, in his presence, at Santa Barbara; and that he believes that the paper presented is a true copy. One of the volunteers testifies that the governor made a speech to the volunteers, in which he said he had granted to Sutter all the lands he had claimed (or asked for), and that he had issued grants to all the applicants for lands who

had been licensed to settle in the valley of the Sacramento. He says, about two months after he saw a grant in the hands of Sutter, which Sutter informed him had been delivered at that time, and that he thinks the present copy corresponds with the one he then saw.

The two witnesses, who proved the loss of the other grant, testify that the original of this was destroyed at the same time with the other, and that the paper produced is a copy of the one destroyed.

This evidence is not entirely satisfactory to establish the execution of the grant. The two witnesses first named speak of a paper they had not seen since 1845, and one of them was not familiar with the language in which it is written. One of the other witnesses is largely interested as a grantee of the claimant in the issue of this suit, and the fourth immigrated to California after the treaty, was not conversant with the Spanish language, and derived much of his impressions from the parties who claimed title under Sutter, and of whom he was the attorney.

But we are not disposed to place the decision 180*] of the cause *upon the deficiency of the evidence of the execution of the paper, and therefore do not pronounce absolutely upon it.

The decisions of the court show that they have been disposed to interpret liberally the measures of the Mexican authorities in California, and to view with indulgence the acts and modes of dealing of the inhabitants, having reference to the laws of distribution and settlement of the public domain. The circumstances in which the governor was placed required that his power and discretion should not be circumscribed by narrow limits. In a remote province of the Mexican Republic, he was almost the only representative of the general and common will of the nation, and he was habitually in collision, sometimes in violent collision, with provincial feelings, sentiments and interests. At the time this grant purports to have been made, he was engaged in a civil war, which, after having been smothered for a time, had burst forth with increased violence. Within two or three weeks from the date of the grant, the war was terminated by the agreement of Micheltorena to abandon the country. He never returned to the capital, except to prepare for his departure. The laws of Mexico for the colonization and settlement of the public domain, embody a comprehensive and liberal policy, and the arrangements for their execution denote care and circumspection on the part of their authors in securing their faithful administration. They authorize the governor (*politicos gefes*) to grant lands to those who may ask for them, for the purpose of cultivating and inhabiting them. They require that every person soliciting for lands shall address the governor a petition, expressing his name, country, and profession, the number, description, religion, and other circumstances of his condition, and describing as distinctly as possible, by means of a map, the land asked for; that the governor shall obtain the necessary information whether the petition embraces the requisite conditions required by the law as to the person and land, and, if necessary, that the municipal authorities might be consulted whether there be an objection to making the grant or not; that the grants made to private families or persons shall not be held to be definitely valid without the previous consent of the departmental assembly, *and, in case of their dis- [*181 sent, that it should be referred to the supreme government. The definitive grant being made, a document signed by the governor shall be given, wherein it must be stated that said grant is made in conformity with the provisions of the laws in virtue whereof possession shall be given, and that the necessary record shall be kept, in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded quarterly to the supreme government.

The office of political chief of a state or province has long existed in Spain (whence it was derived by Mexico), and his duties are defined with precision in the works on the administrative law of that monarchy. The authoritative acts of this officer assume the form of ordinances and regulations, or of decrees and judgments. The former relate to the concerns of the department, and may issue spontaneously, while the latter always proceed upon a petition. There are scarcely any formulas prescribed for these acts. But there exist certain rules, consecrated by usage, sanctioned by reason, and required by justice, some of which have received the assent of the legislator, and others are official regulations.

The administration has need of information, and hence the political chief may consult with subordinate authorities and corporations in all business in which exact information is required of local facts and circumstances, and he is bound to hear the suggestions of the deputations and provincial assemblies when the law requires it—a rigorous condition, a compliance with which should appear in the recitals of the disposing part, and the inserting of the customary formulas, that the act may not be contested for excess of power. Finally, all the acts of the political chief shall be authenticated by his signature, and it concerns the good order of the administration that they should be inserted in a special record. Colmeiro derecho Admin. §§ 285, 286.

Assuming the statements of the witnesses Castanada and Ford to be accurate, it can hardly be contended that the issue of this grant was an act of civil administration, or had *any reference to the law of colonization [*182 and settlement. At a distance from the capital, in the prosecution of an intestine war against a band of insurgents, surrounded by a body of foreign volunteers, in whose fidelity his safety depends, the governor promises to dispose of the public domain as a compensation for service, or as an inducement to loyalty. In a few days this governor is defeated, vacates his post, and his troops are disbanded.

The hostile government that succeeded to that of Micheltorena have not recognized the legality of the deeds of the deposed chief, nor did the claimant (so far as we are informed) attempt to obtain any sanction to his claim, or to introduce the evidence in his possession among the archives of the department, without which a perfect title could never have been obtained. On the contrary, the record shows that he was a captive in the hands of the enemies of Michel-

torena, and was released, after humble apologies for his adherence to the unfortunate chief, and protestations that in future he would be loyal to the existing authorities. He kept his grant concealed apparently as a dangerous secret, until an entire change in the political constitution of the country took place. In our opinion, this was not a valid claim at the date of the treaty of Guadalupe Hidalgo, and is not entitled to recognition from the United States.

It appears from the deeds in the record that the claimant has conveyed nearly all of his estate in the land included in the two grants, and objection is taken to the form of the suit. It is contended that the claim should have been preferred by the grantees of the claimant. We admit the force of the argument in favor of the objection, and that the dormant interests of persons not parties on the record may frequently disturb the course of justice.

But the contrary practice was sanctioned in *Percheman's Case*, 7 Pet., and has been followed since. It is competent to persons interested in the claim to employ the name of the original claimant. *United States* v. *Percheman*, 7 Pet. 51; *United States* v. *Patterson*, 15 How. 10.

The decree of the District Court is affirmed, 183*] *in so far as it *relates to the grant bearing date the 18th of June, 1841,* and executed by Juan B. Alvarado; *and is reversed in so far as it relates to the grant purporting to have been* executed by Micheltorena, at Santa Barbara, the 5th of February, 1845; *and the cause is remitted to the District Court for further proceedings* in respect to the location of the grant of Alvarado, within the limits set forth in the grant and the accompanying map on file in the case.

Mr. Justice **Clifford**, dissenting:

I respectfully dissent from so much of the opinion of the court as affirms that a proper legal foundation was laid at the trial for the introduction of parol evidence to establish the existence and authenticity of the Alvarado grant. When a concession of land is made by the government to an individual under Mexican laws, as in this case, a duplicate copy of the title paper is required in all cases to be filed in the proper tribunal for registry; and unless that is done, it is difficult to see how a legal registry can be made. That duplicate copy is in the nature of an original paper, and, after registry, becomes the foundation of all the subsequent proceedings of the government to perfect the grant in the donee. It was the duty of the purchaser in this case, in the absence of any original grant, to produce that duplicate copy, if in existence; and if not, then to account for its loss. According to the draught presented as a copy, proved by parol evidence, the grant was made subject to the approval of the supreme government and of the departmental assembly. It has never been decided that a grant issued by a subordinate officer, subject to the approval of the supreme government, was valid without such approval; and, in my judgment, the doctrine cannot be maintained without subverting the essential principles on which every well-regulated government rests. This grant was never approved, either by the supreme government or the departmental assembly. Under the circumstances disclosed in the record, I *cannot concur that it is the duty of the United States, under the treaty, to disturb the possession of the settlers, while it appears that there is better evidence to establish the right of the donee, if any be had, to the land described in his concession. On the proofs exhibited, I am of the opinion that the decree of the district court should be wholly reversed. [*184

I fully concur in the above opinion.

P. V. Daniel.

CHAS. BELCHER & CO., *Plffs. in Err.*,

v.

GEORGE C. LAWRASON, Collector of the Port of New Orleans.

(See S. C. 21 How. 251-257.)

Duty on goods imported by manufacturer — goods purchased, or procured otherwise than by purchase — construction of acts — undervaluation.

The 17th section of the act of August 30, 1842, applies in the appraisal of merchandise imported by the manufacturer.

The regulations of the acts of 1823 and 1832, as to goods procured otherwise than by purchase, were left untouched by the 16th section of the act of 1842.

The 17th section applies to every class of importations—goods purchased, or procured otherwise than by purchase.

While the act of 1842 remained in force, it subjected all importations to the penalty of fifty per centum in case of undervaluation.

The act of 3d March, 1857, obliterates the distinction between goods purchased or procured otherwise than by purchase, and imposes upon the latter the twenty per centum upon the appraised value, for undervaluation, the same as in case of goods purchased.

Argued Jan. 26, 1859. Decided Feb. 14, 1859.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This suit was brought in the court below, by the plaintiffs in error, to recover from the collector of the port of New Orleans the sum of $6,159.20, with interest, amount of penal and additional duties levied and paid under protest on various invoices of sugar and molasses, imported from Cuba, having been there manufactured by themselves.

The court below decided that the importers were not liable for the 20 per cent exacted, but were liable, under the 17th section of the act of 1842, to a penalty of 50 per cent on the duty, which reduced the amount by $1,539.80, whereupon the plaintiffs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **J. P. Benjamin** and **Reverdy Johnson**, for plaintiffs in error:

It is contended, on behalf of the plaintiff, that the court below erred—

1. In determining that the merchandise in question was liable to penal duty under the act of August, 1842.

2. In enforcing the penalty in the present suit, by deducting it from the amount of plaintiff's demand, even if it were true that act of August, 1842, did apply to his merchandise.

Before entering, however, into an argument on these points, it may be proper to make the preliminary remark that the exaction of the penal duty of 20 per cent on the invoice value of the importation, under the 8th section of the tariff act of 1846, was clearly illegal.

Greely v. *Thompson*, 10 How. 226; *Christ* v. *Maxwell*, 3 Blatchf. 129; *Thompson* v. *Maxwell*, 2 Blatchf. 385; *Durand* v. *Lawrence*, 2 Blatchf. 396; *Barnard* v. *Morton*, 1 Curt. C. C. 404.

The counsel then quoted the tariff act of August, 1842 (5 Stat. at L. 563), and argued that the provisions in §§ 16 and 17 were not applicable to importations by manufacturers.

Counsel also argued that there was evident error in protecting the penalty prescribed in the act of 1842.

The collector never claimed from us any penalty under that law. The penalty exacted was a penalty of 20 per cent on the appraised value of the merchandise. None other was asked. That penalty was paid under protest, and under the act of February, 1845, we have the right to recover it back.

Mr. **J. S. Black,** *Atty. Gen.*, for the defendant in error.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the eastern district of Louisiana.

The suit was brought in the court below to recover back from the collector of the port of New Orleans an excess of duties paid by the plaintiffs. The goods upon which the duties were imposed were certain invoices of molasses and sugars, imported from Matanzas, in the **254***] island of Cuba, in the year *1852. They were imported by the manufacturer, and, on an appraisal of the value at the customs in New Orleans, the appraised value exceeded the invoice value upwards of 10 per centum; whereupon the collector imposed an additional duty of 20 per centum upon the appraised value, under the 8th section of the act of 1846, which was paid under protest.

The court below held that this additional duty was improperly imposed, under the act of 30th July, 1846, as the 8th section of that act applied only to merchandise purchased in the foreign market, and did not embrace goods imported by the manufacturer. The court further held, that the several shipments were subject to the increased duty imposed under the 17th section of the act of August 30, 1842; and allowed the plaintiff to recover the excess over and beyond the amount chargeable under this last section.

The principal question in the case is whether or not the 17th section of the act of 1842 applies in the appraisal of merchandise imported by the manufacturer.

The act of Congress of March 1, 1823, recognized a distinction between goods imported which were purchased by the owner in the foreign market, and goods imported by the manufacturer himself, and prescribed separate and distinct oaths to be taken before the collector (§ 4). That act also prescribed, as a rule for the appraisal of the goods, that to the actual cost if the same have been actually purchased, or the actual if the same shall have been procured otherwise than by purchase, at the time and place when and where purchased, or otherwise procured, etc., shall be added all charges, etc., (§ 5).

The act of Congress of July 14, 1832, preserved the same distinction as in the act of 1823, in respect to goods imported which had been purchased, and goods procured otherwise than by purchase (§ 15, §§ 7 and 8).

The 16th section of the act of 1842, like the 7th section of the act of 1832, prescribed the rule for the appraisal of goods imported which had been purchased in the foreign market, but omitted any provision in respect to goods imported which had been procured otherwise than by purchase, leaving this class *of im- [*255 portations to the rule as prescribed in the acts of 1823, § 5, and 1832, § 15, which was not repealed, as no provision in that act was inconsistent with this rule. The repealing clause of that act is as follows: "And that all provisions of any former law inconsistent with this act shall be, and the same are hereby, repealed." The regulations, therefore, of the acts of 1823 and 1832, in respect to the time and place when and where goods, procured otherwise than by purchase, were left untouched by the 16th section of the act of 1842.

Then, as it regards the 17th section. That is general, and applies to every class of importations—goods purchased, or procured otherwise than by purchase. It regulates the mode and manner of the appraisement. The appraisers may call before them, and examine upon oath, the owner, importer, consignee, or any other person, touching any matter deemed material in ascertaining the true market value or wholesale price of any merchandise imported; may call for letters, accounts, or invoices, relating to the valuation. It imposes a forfeiture of $100 for any neglect or refusal to attend before the appraisers and give evidence; makes false swearing before them perjury; and if the person be the owner, importer, or consignee, forfeits also the merchandise; requires that the evidence thus taken shall be filed in the collector's office, for future use; provides for an appeal, on the part of the owner, importer, or consignee, to merchant appraisers, in case of dissatisfaction at the appraisal by the permanent appraisers; makes the appraisal by the permanent or merchant appraisers, as the case may be, final and conclusive; and then closes with a proviso, that, in all cases where the actual value thus appraised and ascertained shall exceed, by 10 per centum, the invoice value, then, in addition to the duty imposed by law, there shall be levied and collected on the goods 50 per centum of the duty upon the appraised value. See, also, act of Congress, March 3, 1851.

As we have said, this section applies to all classes of importations, and regulates the mode and manner by which the appraisal shall be conducted by the appraisers, giving to the owner, importer, etc., the right of reappraisal by merchant *appraisers, in case of [*256 dissatisfaction. It embraces not only importations of goods purchased, referred to in the 16th section of the act, but importations procured otherwise than by purchase, as provided for in the acts of 1823 and 1832; and while this act of 1842 remained in full force, it sub-

jected all importations to the penalty of 50 per centum in case of undervaluation.

Then came the act of 30th July, 1846, the 8th section of which changed this penalty or increased duty, in case of undervaluation, to 20 per centum on the appraised value, as it respected goods imported which had been purchased, leaving the regulations in respect to goods imported by the manufacturers as they existed under the former laws.

This act, like the act of 1842, repealed only such enactments of former laws as were repugnant to its provisions (§ 11). The 8th section, not including the manufacturer, left the importation subject to the 17th section of the act of 1842.

The act of 3d March, 1857, obliterates this distinction between goods purchased or procured otherwise than by purchase, and imposes upon the latter the 20 per centum upon the appraised value, for undervaluation, the same as in case of goods purchased. Sess. Laws 1857, p. 199, Lit. & Bro. ed.

It has been argued that, admitting the goods were properly subject to the 50 per centum increased duty, under the 17th section of the act of 1842, inasmuch as this was not imposed by the collector, but the higher increased duty, under the 8th section of the act of 1846, the court below erred in charging the shipments in question with the former duty.

But the answer to this objection is that the law imposes the increased duty in case of undervaluation, and not the collector. It is true he is the agent of the government to collect it, as he is in collecting the ordinary rate of duties, but in no other sense or character. The law declares, in the case contemplated by the act, and which existed upon the proofs before the court, that, in addition to the ordinary duty, there shall be levied and collected, etc., 50 per centum, etc. No demand of the collector was necessary to create the liability. That 257*] *arose, as matter of law, upon the facts disclosed in the record, and it was the duty of the court to enforce it; and hence the excess over this increased duty, arising under the 17th section, constituted the just amount which the plaintiffs were entitled to recover.

Judgment of the court below affirmed.

JACOB B. BROWN, Jacob Nisswaner, Fontaine Beckham, John C. Unseld, and George W. Moler, *Plffs. in Err.*,

v.

BENJAMIN HUGER.

(See S. C. 21 How. 305-322.)

Patent, how interpreted — construction of, is for the court — proof of its subjects, proper —natural or permanent objects control course and distance — where boundary is a river.

A patent for land must itself be taken as evidence of its meaning; it must be interpreted as a whole; its various provisions in connection with each other, and the legal deductions drawn therefrom must be conformable with the scope and purpose of the entire document.

This construction and these deductions are within the exclusive province of the court.

Proof of the existence and character of the objects or subjects to which it is applicable, is proper.

In ascertaining the boundaries of surveys or patents, the universal rule is, that wherever natural or permanent objects are embraced in the calls of either, these have absolute control; and both course and distance must yield to their influence.

Where a line is described as running in a certain direction to a river, and thence up or down with the river, those words imply that the line is to follow the river according to its meanderings and turnings, and in water-courses not navigable must be "*ad medium filum aquæ.*"

Argued Jan. 20, 1859. Decided Feb. 14, 1859.

IN ERROR to the Circuit Court of the United States for the Western District of Virginia.

The history of the case, and a very full statement of the facts, appear in the opinion of the court.

Messrs. **Reverdy Johnson** and **Henry Winter Davis**, for plaintiffs in error:

The court withdrew from the jury all questions touching the proof of the patent and the particular boundaries thereof, though the defendant's case consisted in showing the boundaries, in the only copy of the patent produced, to be erroneous; and the patent itself appeared to have issued irregularly and without a precedent survey for the patentee.

Barclay v. *Howell*, 6 Pet. 498, 508, 511.

The court withdrew from the jury the question, whether the 4th point of the defendant's patent being in fact near and not on the river, was, under all the circumstances of the locality and survey, on or near the river.

Barclay, v. *Howell*, 6 Pet. 498, 508, 511.

It must be for the jury to say, whether *near* means *on* the river, or is only a general description of the locality of the point, which is itself the real point contemplated by the patent.

Messrs. **Hull & Mason** for defendant in error.

Mr. **J. S. Black**, *Atty. Gen.*, for the United States:

The claim set up by the plaintiff in this case is null, for three reasons, each of which is conclusive:

1. It is contended, on the part of defendant, that by the calls of this patent, in construction of law, the two rivers, Potomac and Shenandoah, are to be taken as the boundaries in question.

See *Starr* v. *Child*, 20 Wend. 156; *Trustees of Kingston* v. *Lowe*, 12 Johns. 252; *Mayhew* v. *Norton*, 17 Pick. 357; *Harramond* v. *McGlaughon*, Taylor, N. C. 136; *Rogers* v. *Mabe*, 4 Dev. 180; *Hartsfield* v. *Westbrook*, 1 Hayw. N. C. 258; *Cockrell* v. *McQuin*, 4 Mon. 61; *Bruce* v. *Taylor*, 2 J. J. Marsh. 160; *McCullock* v. *Aten*, 2 Ohio, 308; *Newsom* v. *Pryor*, 7 Wheat. 7, 10; *French* v. *Bankhead*, 11 Gratt. 155; Ang. Water-courses, p. 25, §§ 28-30.

2. The Brown patent is void under the Revised Code of Virginia (tit. 32, § 36, p. 484 of Code published in 1849), by which it is enacted that "no entry on any lands which have been settled for twenty years prior to the date of such entry, and upon which taxes have been paid at any time within the said twenty years,

NOTE.—*Natural objects or needle; which govern, in the survey of lands*—see note to Newsom v. Pryor, 5 L. ed. U. S. 382.

shall be valid, and any title which the commonwealth may have thereto is hereby relinquished."

See also *Tichanal* v. *Roe*, 2 Rob. Va. 288.

3. The Brown patent is void under the 37th section of title 32, same book, page 485, which is as follows:

The register of the Land Office shall not receive into his office any plat and copy of survey, which evidently comprehends the rights of any other than him for whom such survey is made, notwithstanding any deductions or reservations. Every such survey shall be void. Counsel said that the present case was distinguished from that of *Mitchell* v. *Harmony*, 13 How. 115; *Meigs* v. *McClung*, 9 Cranch, 11; *Hill* v. *The United States*, 9 How. 388; *United States* v. *McLemore*, 4 How. 286; *Wilcox* v. *Jackson*, 13 Pet. 516.

Mr. Justice **Daniel** delivered the opinion of the court:

This was an action of ejectment instituted by the plaintiffs in error against the defendant, in the circuit court of the county of Jefferson, in the state of Virginia.

The *locus in quo* being held and occupied by the defendant as an officer of the United States, and in virtue of their right and authority, the suit was, under the act of Congress of 1789, removed, upon petition, to the circuit court of the United States for the western district of Virginia, within which district the property in dispute is situated. The claim of the plaintiffs is founded on a patent from the lieutenant governor of Virginia, granted to Jacob Brown and Jacob Nisswaner, dated July 29, 1851, and granted in virtue of a Land-Office Treasury warrant for the location of waste and unappropriated lands. This patent, according to the vari- [*309 ous courses and *distances therein set forth, purports to grant the quantity of 39 acres and 2 roods. Beckham, Unseld, and Moler, three of the plaintiffs, derived their title directly from the patentees above named, as was shown by conveyances from the latter, which were read in evidence. The plaintiffs also introduced a survey plot and report, made by A. Trotter, surveyor, in pursuance of an order of court in this cause; and relied upon the same, with other evidence, to show that the land granted by the patent of 1851 was correctly laid down and described in the survey, and that the defendant was in the possession of the land claimed at the commencement of the plaintiff's action.

The defendant, holding the premises as the agent and under the authority of the United States, defended the right to the possession as held by him, upon the following proofs, being certified copies from the records of the land office of the state of Virginia, by S. A. Parker, the register of that office. First. An entry in the office of the lord proprietor of the Northern Neck of the state of Virginia (within which portion of the state the land in contest is situated), in the following words, *viz.:* "1750, April 4. Surveyed. James Nickols, of Frederick county, Virginia, entered about two hundred acres of waste and ungranted land at the mouth of the Shenandoah river." And an order from Lord Fairfax to Guy Broadwater, in the words and figures following, *viz.:*

"To Mr. Guy Broadwater:

Whereas James Nickols hath informed that there are about two hundred acres of waste and ungranted land where he now lives, and desiring a warrant to survey ye same, in order to obtain a deed, being ready to pay ye composition and office charges: These are therefore to empower you, ye said ——, to survey ye said waste land, provided this be ye first warrant that hath issued for ye land; and you are to make a just and accurate survey thereof, describing the course and distance per pole; also ye cuttings and boundings of the several persons' lands adjoining; and where you cannot join to any known lines, you are to make ye breadth of ye tract to bear at least *ye [*310 proportion of one third of ye length, as ye law of Virginia directs; you are also to insert ye name of ye pilote and chain carryers made use of and employed; a plat of which said survey, with this warrant, you are to give into this office any time before —— day of ——, next ensuing. Given under my hand and seal of ye proprietor's office, this —— day of ——, in ye twenty —— year of his majesty King George ye second reign. Fairfax."

Second. And a plat and certificate of survey by said Broadwater, in the words and figures following, *viz.:*

"By virtue of a warrant from ye proprietor's office, dated the 4th of April, 1750, granted to James Nickols one certain parcel or tract of land situated and lying in Frederick county: Beginning at A, a *sick*amore standing upon ye edge of Shenandoah, extending down ye said river S. 55 E. 44 poles to B.; thence N. 66 E. 72 poles to C., a *sick*amore standing upon ye pitch of ye point of Shenandoah; thence up Potomac N. 48 W. 200 poles to D., a chestnu*tt* tree standing near Potomac river, side opposi*tt* to a small is*l*eland; thence west 105 poles to E, a white oak; thence S. 140 poles to F. a red oak; thence east 150 poles to ye beginning, containing 125 acres, surveyed by me.

"Guy Broadwater."

"Joseph Cantnell, } Chain carriers.
"Joseph Nickols, }

"Indorsed: Deed issued 25th April, 1751."

An official certificate from S. H. Parker, register of the Virginia land office, dated Richmond, June 27, 1854, in the following words:

"I, S. H. Parker, register of the land office of Virginia, do hereby certify that it does not appear that any grant has been issued on the survey made by James Nickols for 125 acres of land in Frederick county to any person except Robert Harper, to whom a grant issued on the 25th day of April, 1751, which date agrees with the date on Nickols' survey. And I further certify that I can find no survey of Robert Harper for 125 acres on file in this office."

*Third. A grant from the lord propri- [*311 etor of the Northern Neck, in the following words:

"The Right Honorable Thomas Lord Fairfax, Baron of Cameron, in that part of Great Britain called Scotland, proprietor of the Northern Neck of Virginia:

"To all to whom this present writing shall come, sends greeting:

"Know ye, that for good causes, for and in consideration of the composition to me paid, and for the annual rent hereafter received, I have given, granted and confirmed, and by these presents, for me, my heirs and assigns, do give, grant and confirm unto Robert Harper, of the county of Frederick, a certain tract of waste and ungranted lands in the said county, at the mouth of Shenandoah river, and is bounded as by a survey thereof made by Guy Broadwater, as followeth: Beginning at a sycamore standing on the edge of Shenandoah river, and extending thence down the said river N. 48° W., 200 N. 66 E., seventy-two poles to a sycamore standing at the point, and thence up Potomac river N. 48° W., two hundred poles to a chestnut tree standing near Potomac, opposite to a small island; thence W. one hundred and five poles to a white oak; thence south one hundred and forty poles to a red oak; thence east one hundred and fifty poles to the beginning, containing one hundred and twenty-five acres, together with all rights, members, and appurtenances thereunto belonging, royal mines excepted, and a full third part of all lead, copper, tin, coals, iron mines, and iron ore, that shall be found thereon:

"To have and to hold the said one hundred and twenty-five acres of land, together with all rights, profits, and benefits to the same belonging, or in anywise appertaining, except before excepted to him, the said Robert Harper, his heirs and assigns, forever.

"Given at my office in the county of Fairfax, within my said proprietary, under my hand and seal, dated this 25th day of April, in the 24th year of our sovereign lord, George the Second by the Grace of God, of Great Britain, France and Ireland, king, defender of the faith, etc., A. D. 1751.

"(Signed) Fairfax."

312*] *Fourth. The defendant offered in evidence the last will of Robert Harper, deceased, the grantee of the lord proprietor, with proof of the probate and recording of that last will in the court of Berkley county, on the 13th of October, 1782. By the 1st clause of the will disposing of his property, the testator devised to his nephew, Robert Griffith, "one moiety or half of his ferry survey, to form a straight direct line to run along the two fences on the east side, or that side next to the ferry, the one fence lying on the north, and the other on the south, side of the road leading from the ferry to Winchester; the sides of the above-mentioned fences to be a director, or to show where each end of the division line shall terminate. The end of the line leading to the Potomac to terminate as soon as it strikes that river; the end leading to Shenandoah to keep a straight line till it likewise strikes said river, and to contain and include the island opposite where the said line strikes; then to run in my (said Harper's) line, adjoining Sample's line, to continue with said line and to include ninety acres of a new survey; thence to continue its course till where the dividing line shall strike the Potomac river, including therewith the saw mill and grist mill of the testator." By the survey and report of Trotter, this line, denominated Sample's line, is one of the courses delineated upon the survey as a boundary to a tract of land conveyed by one Gershom Keys to John Sample, on the 9th of June, 1763, and this line is its southern termination, runs to the margin of the Shenandoah river, and near to Harper's house, as delineated on the plat, and to the grist and saw mill situated upon that river.

By the next disposition in his will, the testator devised to his niece, Sarah Harper, his ferry and ferry house on Potomac river, and all the remainder of his ferry survey, not before devised to Robert Griffith, and all his estate in and right and title to the Maryland shore of the said ferry, and to ten acres of land upon what is called the Big Island in the Potomac river adjoining the ferry aforesaid.

The defendant also gave in evidence the plat and report of survey made as aforesaid in this case by Trotter, and evidence tending to prove that the beginning corner of Harper's patent *was actually on the bank of the Shenan- [*313 doah river, as at A on the map; and that the third corner of said patent was at or near the junction of the Shenandoah and Potomac rivers; and that the next corner of the patent, at the distance of two hundred poles up the Potomac river, was near the bank of said river at the point G or 18 on the plat; and that the general course of the said two rivers was as laid down in the said plat in relation to the four said first lines of Harper's patent. Upon a comparison of the survey made by Broadwater by order of the lord proprietor with the copy of the patent from the land office, there will be perceived this disagreement between these two documents with regard to the first call in the location of the land. In the survey as well as in the patent, the beginning is stated to be at a sycamore tree standing on the edge of Shenandoah river, and extending thence down the river to a sycamore standing, says the patent, at the point, and according to the survey, at the pitch of the point of Shenandoah, thence up the Potomac, etc. But whilst the first course in the survey in approaching the point or the junction of the two rivers is S. E., the same course is represented in the grant as running N. W. This is a manifest error on the face of the grant, as the geographical knowledge of every one compels him to know, that the rivers Potomac and Shenandoah in approaching each other run in a south and east direction; and therefore, if this course in the grant ran northwest from the point of beginning, it would diverge more and more at every step from the Potomac, and could never reach the latter river. To correct this manifest error, if, indeed, proof be necessary in aid of the geography of the country, or of the sensible meaning of the patent itself, the defendant offered evidence to show that the original parchment patent had been lost; and further proof to show that this original parchment patent was in the years 1825 and 1827 in possession of Mrs. Catharine Wager, widow of John Wager, Jr., deceased, who was son of John Wager, Sr., who was the husband of Sarah Harper, the devisee of Robert Harper, the origi-

nal patentee. He further offered proof that the courses and distances had been copied from said original in the years 1825 and 1827, respec-
314*] tively, by the deputy-surveyor *of Jefferson county, where the lands lie, for the purpose of survey, and were used by him in a survey of the tract patented as aforesaid to Robert Harper, between the Wagers, who claimed under the said Robert Harper and the United States; and offered further proof that the said courses and distances had in 1816 or 1818 been copied from the same original patent by John Peacher, a witness in this cause, then the owner of land binding on the lines of Harper's patent, a copy of which courses and distances is as follows: "Beginning at a sycamore standing on the edge of the Shenandoah river, and extending thence down the said river S. 55 E. 44 poles, N. 66 E. 72 poles to a sycamore standing on the point; and thence up Potomac river N. 48 W. 200 poles to a chestnut tree standing near the Potomac, opposite a small island; thence W. 105 poles to a white oak, S. 140 poles to a red oak; thence E. 150 poles to the beginning."

The defendant then deduced title through conveyances from the devisees of Robert Harper to George Washington, President of the United States, and his successors, on behalf of the United States. One of those conveyances, bearing date on the 15th of June, 1796, from John Wager the elder, the husband, and John Wager, Margaret Wager, and Mary Wager, children of Sarah Harper, describing the land conveyed as "all that piece of land situated in the county of Berkley commonly known as the Harper's Ferry land, which was devised by the will of Robert Harper, bearing date on or about the 26th day of September, 1782, to his niece, Sarah Harper, and is bounded by the river Potomac on the outside, by the river Shenandoah on the other side, and by the line dividing it from the tract or parcel of land devised by the said Robert Harper to Robert Griffith on the other side." And in the conveyance from Robert Griffith, to devisee of Harper, dated on the 9th day of January, 1797, to Thomas Rutherford and others, the grantors of another portion of this land to George Washington for the United States, it is recited, "that whereas Robert Harper, late of the county of Berkley, and commonwealth of Virginia, was in his lifetime seised in fee of and in one certain tract of land situate, lying, and being at the conflu-
315*] ence of the Potomac *and Shenandoah rivers, in the county of Berkley, containing one hundred and twenty-five acres, for which he obtained a deed from the proprietor, etc.; and, being so seised, did by his last will devise unto his nephew, Robert Griffith the elder, one equal moiety or half of the above-described one hundred and twenty-five acres of land, comprehending a saw mill thereon, and an island in the Shenandoah opposite thereto." The defendant further proved that the United States had, between the years 1796 and 1800, erected and established on the land in controversy the necessary buildings for an armory and arsenal for the manufacture and repair of arms, and had held and occupied and used, for the purposes aforesaid, the land and buildings, from the years above mentioned to the present time. That the defendant is an officer in the military service of the United States, attached to the ordnance department, and as such was in charge and in possession of the land in controversy, with the buildings thereon, and the armory of the United States at Harper's Ferry, under an order from the ordnance department; and that the lands aforesaid had been in the like charge of his predecessors, under orders and appointments from the ordnance office or War Department of the United States, from May, 1829, to the period when the defendant took possession; and that, prior to the year 1829, as far back as the year 1800, the said lands and buildings were in like charge of other persons in the service of the United States at said armory.

Such being the state of the evidence, the defendant moved the court to give the jury the following instructions, *viz.*: "That the patent to Robert Harper, having its beginning corner on the Shenandoah river, and calling to extend thence down the river, by course and distance, to the point where it appears, from the survey made in this cause, the river Shenandoah unites with the Potomac; and from that point up the river Potomac, by course and distance, to a corner near the last named river, opposite to a small island. In construction of law, the two rivers are thereby made the boundaries of said patent, from said beginning on the Shenandoah to the last named corner on the Potomac; and if the jury believe, from *the evidence, [*316 that the lands claimed by the plaintiffs lay along the rivers Shenandoah and Potomac, within the lines of the patent to Robert Harper, extended as aforesaid to the two rivers, they must find for the defendant—the patent under which the plaintiff claims being junior to that of Harper's, under which the defendant claims —unless the plaintiffs should establish a title to the lands in controversy other than through their said patent."

On the same state of the evidence, the plaintiffs also moved the court to instruct the jury as follows: "That the question as to how the survey, on which this patent of Robert Harper was issued, was actually run, is in this case a question of fact for the jury; and if the jury believe that the line from the sycamore, at the point of confluence of the Shenandoah and Potomac rivers, to the chestnut tree, was actually run a straight line, then that straight line is the boundary of Robert Harper's patent. But the court gave the instruction asked for by the defendant, and refused to give the instruction asked for by the plaintiffs; to which opinions and action of the court—giving the defendant's instruction, and refusing the plaintiffs' instruction—the plaintiffs by counsel except, and their exceptions are here sealed by the court.

John W. Brockenbrough. [SEAL.]"

The correctness or incorrectness of the decision of the circuit court, in granting the prayer of the defendant, and in refusing that presented by the plaintiff, is the subject of inquiry in this case.

A striking peculiarity distinguishing this case is perceived in the fact that it discloses an effort, by means obtained at a cost comparatively nominal, to disturb and to destroy a possession of more than half a century in duration; a possession connected with public inter-

ests of primary magnitude; a possession acquired in return for a full and fair equivalent given, and of a notoriety as extensive as the limits of the nation.

Although the immunity created by lapse of time may not have been directly interposed for its protection, yet such an immunity as necessarily disclosed by the evidence adduced on 317*] *both sides of this controversy, certainly does not commend the pretensions of the plaintiffs upon considerations of either justice or policy. But beyond such general considerations, though in strict accordance with them, let us inquire whether, upon principles established and mandatory, and inseparable from the maintenance of social order and quiet, and of private right, this attempt of the plaintiffs should not be repelled.

The exceptions taken by the plaintiffs in error to the instructions of the circuit court, and alleged as causes of error here, are stated as follows:

First. That the court withdrew from the jury all questions touching the proof of the patent and the particular boundaries thereof, though the defendant's case consisted in showing the boundaries, in the only copy of the patent produced, to be erroneous, and the patent to have issued regularly, and without a precedent survey for the patentee.

Second. That the court withdrew from the jury the question whether the 4th point of the survey of the defendant's patent, being in fact *near* and not *on* the river, was, under all the circumstances of the survey, on or near the river; or whether the river or the right lines mentioned in the patent was the true boundary.

In examining this first objection, and the foundation on which it is made, it appears that the original entry for the land in controversy was in the name of James Nickols; that the order of survey from the lord proprietor to the surveyor, Broadwater, was for a survey upon that entry; and that the survey made and returned by Broadwater was upon that entry; but it equally appears that the patent issued by the lord proprietor refers to and adopts the survey of Broadwater with respect to its own date, the date of the warrant and the quantity of the land surveyed, and grants the land so surveyed to Robert Harper. From the records of the land office of Virginia, comprising the records of the proprietary, it is shown that on the survey made in the name of James Nickols for one hundred and twenty-five acres of land in Frederick county, a patent was granted by the lord proprietor to Robert Harper on the 25th day of April, 1751, which date corresponds 318*] with that indorsed upon Nickols' *survey. It is not, therefore, perceived upon what ground the regularity of the proceedings anterior to the patent to Harper, or the authority to issue it, can be assailed. It does not appear that any exception to either was taken in the court below, and therefore, if at any time available, it is not allowable here.

With regard to the second part of this objection, that which claims for the jury the construction of the patent, we remark that the patent itself must be taken as evidence of its meaning; that, like other written instruments, it must be interpreted as a whole, its various provisions be taken as far as practicable in connection with each other, and the legal deductions drawn therefrom must be conformable with the scope and purpose of the entire document. This construction and these deductions we hold to be within the exclusive province of the court. The patent itself could not be altered by evidence *aliunde;* but proof, as to the existence and character of the objects or subjects to which it was applicable, was regular and even necessary to give it effect.

In ascertaining the boundaries of surveys or patents, the universal rule is this: that wherever natural or permanent objects are embraced in the calls of either, these have absolute control, and both course and distance must yield to their influence.

Upon recurrence to the survey by Broadwater, from the beginning at A, a sycamore standing on the edge of Shenandoah (a point admitted by all the parties to be the beginning in Harper's Ferry tract), the survey calls for a course extending down the said river S. 55 E. 44 poles to B; thence N. 66 E. 72 poles to C, a sycamore standing on the pitch of the point of Shenandoah; thence up Potomac N. 48 W. 200 poles to D, a chestnut tree standing near the Potomac river side, opposite a small island; thence W. 195 poles to E, a white oak; thence S. 140 poles to F, a red oak; thence E. 150 poles to the beginning. The patent from the lord proprietor, granting the land to Harper at the mouth of the Shenandoah river, professes to make the grant, and to give the boundaries of the land and the quantity thereof according to the survey by Broadwater, and commences the description, as taken from that survey, as follows: beginning at a sycamore standing on the edge of Shenandoah river, *and extend- [*319 ing thence down the said river. At this point in the description are interposed the letters and figures (N. 48° W. 200 N.) It is evident that these letters and figures have been interpolated in this place by an error; perhaps in recording the patent. This seems to follow from the fact that these letters and figures, as thus placed, have no sensible meaning. N. 48° W. 200 N. mean nothing; they point to no object, and neither are they connected with any distance. Immediately following these letters and figures are the several descriptive calls of the patent, corresponding with the courses and distances and objects contained in the survey which it had referred to and adopted. The fact of this interpolation is also shown by the circumstance that farther on in the description, both in the survey and patent, of the courses and distances bordering on the Potomac, there is given, commencing at the point or confluence of the two rivers, the course of N. 48° W. 200 poles to a chestnut tree standing on the Potomac opposite a small island, which part of the description was doubtless wrested from its proper position, and transferred to another in which it could convey no intelligible meaning, and from which it should be expunged as absurd and of no effect. It is proper here to observe that neither in the survey nor the patent for the Harper's Ferry tract is there a course, or a distance, or a station, which is inconsistent with or in opposition to a river boundary; but on either side of that tract facing the river a riparian or river boundary is obviously intended. Thus, at the Shenandoah, the commencing point is at a tree

on the edge of the river; thence down the river to a point of the Shenandoah (meaning the river, of course, as there was no other object bearing that name); at this point is the confluence of the two rivers. Thence the course is up the Potomac N. 200 poles to a chestnut tree standing, in the language of the survey, "near Potomac river side," and in that of the patent "near Potomac."

The question then propounded by the prayers to the court below was a question of law arising upon the construction of the two patents —the one from the state of Virginia in 1851, the other from Lord Fairfax in 1750.

If, as is contended by the defendant, the calls 320*] in the patent *to Robert Harper, and in the survey on which it purports to be founded, extended to the rivers Shenandoah and Potomac, such a construction must be conclusive of this controversy; it leaves no question to be determined by the jury as to the running of an artificial line; it fully sustains the decision of the circuit court upon the prayers respectively offered by the parties.

The citation from the treatise by Angell on watercourses fully declares the rule to be, that where a line is described as running in a certain direction to a river, and thence up or down with the river, those words imply that the line is to follow the river according to its meanderings and turnings, and in watercourses not navigable must be "*ad medium filum aquæ.*" Upon a question of boundary in the case of *Jackson* v. *Low*, in the 12th of Johnson's Reports, 255, in ejectment, the court, in construing a provision in a deed in these words: "leading to the creek, and thence up the same to the southwest corner of a lot," etc., say "there can be no doubt but this lot must follow the creek upon one of its banks or through the middle. This description can never be satisfied by a straight line. The terms 'up the same' necessarily imply that it is to follow the creek according to its windings and turnings, and that must be the middle or center of it.

In the case of *Mayhew* v. *Norton*, 17 Pick. 357, a grantor had conveyed land to be bounded by the harbor of Edgartown. The supreme court of Massachusetts decided that the flats in front of the lots conveyed passed by the deeds, because they were in the harbor, although the quantity of land conveyed and the length of the lines would have been satisfied by applying them to the upland alone. In the case of *Cockerell* v. *McQuinn*, 4 T. B. Mon. 62, the circuit court, in ejectment, had instructed the jury upon a question of boundary that the following calls in the patent: "thence from the fourth course down the river these several courses should be construed by the jury as a call to run down the river bounding thereon, with its meanders," etc. The Supreme Court, to whom the cause was carried by writ of error, says: "In cases of boundary which depend upon the swearing of witnesses, it would no doubt be in-321*] competent *for the court, by any sort of instructions that might be given, to withdraw from the jury a decision upon the weight of the testimony and the facts which the testimony conduces to establish." But the case under consideration is not one of that sort. The question for our consideration involves no inquiry into the testimony of witnesses; but, on the contrary, in the absence of all parol evidence as to marked lines, presents for the determination of the court the construction of the calls for boundary mentioned in the patent, and surely none will pretend that the legal construction of a patent is not a matter proper for the decision of a court. If, in the first branch of the instructions, the court was correct in supposing that the call in the patent to run down the river these several courses, etc., should be construed as a call to run down the river, it was unquestionably correct to instruct the jury that the north fork between the fourth corner of the patent and the beginning formed part of the boundary; and that in the first branch of the instruction the court gave a correct construction of the calls of the patent, we apprehend there can be no ground for reasonable doubt.

In the case of *Newsom* v. *Pryor*, 7 Wheat. 10, it is laid down by this court as a rule for the construction of surveys and grants, that the most material and certain calls must control those that are less material and certain. A call for a natural object, as a river, a known stream, or a spring, or even a marked tree, shall control both course and distance.

The recent decision of *French* v. *Bankhead*, in the 11th of Gratt. 136, decided by the supreme court of Virginia, within which state are the lands embraced in this controversy, has an important bearing upon the cause, as it shows the interpretation, by the highest tribunal of that state, of grants made by her with reference to lines running to watercourses, and of the effect of watercourses upon such boundaries. In the case just mentioned it was ruled that the water boundary, though run by course and distance, would be controlled by the actual course of the shore, and would pass the right to the property of low-water mark.

Upon the reasoning hereinbefore declared, and upon the authorities cited, to which others might be added, we are of the *opinion [*322 that the patent from the state of Virginia, of the date of July 29, 1851, was unwarranted and illegal, as having embraced within it lands which were not waste and unappropriated, but which had been previously granted by competent authority, and long in the possession of the patentee and those claiming title under him. We are further of the opinion that the construction of the circuit court in relation to the character and effect of the elder and junior grants of the land in controversy was correct, *and that its decision should therefore be, as it is hereby affirmed, with costs.*

THE UNITED STATES, *Plff. in Err.*, *v.* THE CITY BANK OF COLUMBUS.

(See S. C. 21 How. 356-366.)

Cashier of bank, when cannot create agency for bank—authority of.

A letter written by the cashier of a bank, that the bearer was authorized to contract, on behalf of the bank, for the transfer of money from the east to the south or west for the government does not come within his duties or authority as cashier, and does not bind the bank.

The ordinary duties of cashiers of banks do not

comprehend a contract which involves the payment of money, made by a cashier, without an express delegation of power from a board of directors to do so unless it has been loaned in the usual way.

Nor can a cashier create an agency for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary.

Argued Jan. 27, 1859. Decided Feb. 14, 1859.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This action was brought in the court below by the plaintiffs in error, to recover the sum of $100,000. The trial of the cause in the said court having resulted in a verdict and judgment in favor of the defendant, the plaintiffs sued out this writ of error.

The facts of the case are more fully stated by the court.

Mr. **J. S. Black,** *Atty. Gen.*, and *Mr.* **Hull** for the plaintiffs in error.

Mr. **Henry Stanberry,** for defendant in error:

The first inquiry is as to the power of the cashier, in virtue of his office, to make such a contract as the one in question, or rather to authorize another to make it.

The powers and duties of a bank cashier have been more than once considered and defined by this court.

In *Pleckner* v. *Bank of the U. S.* 8 Wheat. 360, the powers of a cashier are very fully stated, and it is said that he is intrusted with the funds and securities; that he is authorized to receive and pay debts; to draw checks on other banks, and indorse the negotiable securities. In *Bank of U. S.* v. *Dunn*, 6 Pet. 59, the court says: "The agreement was not made with those persons who have power to bind the bank in such cases. It is not the duty of the president or cashier to make such contracts, nor have they power to bind the bank except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money."

See, also, *Kirk* v. *Bell*, 12 Eng. L. & Eq. 389; *Hoyt* v. *Thompson*, 5 N. Y. 332.

It is stated in the record that the city bank is a corporation formed under the bank act of Ohio of 1845.

Ohio Stats. vol. XLIII. p. 24.

The 49th section of the act provides that "the affairs of every company formed and organized to carry on the business of banking under the provisions of this act, shall be managed by not less than five nor by more than nine, directors."

See, also, the 56th and 67th sections of the same act, and the case of *Bank of Augusta* v. *Earle*, 13 Pet. 587.

Upon these authorities and this carefully guarded charter, it is impossible to maintain that such a contract as we have here was within the power of the cashier.

In the first place, it would be a matter of grave consideration and very proper for the deliberate judgment of the board of directors, to enter into any pecuniary liability to the United States, subjecting the bank, it might be, to the serious consequences which attach, on the footing of priority of warrants from the Treasury Department, for delinquency in meeting an engagement touching the public money. So, too the magnitude of the sum, the distant point of payment, the uncertainties and fluctuations in the rates of exchange, the place of making the contract, the place of its performance both without the state in which the bank was situated, the danger of violating the charter, and the amount of debt incurred, all these considerations demand the supervision of a managing element of the corporation.

2. The provisions of the charter do not enlarge the usual powers incidental to the office. As to the by-law, it specifically limits the powers of the cashier to the transaction of "the ordinary business of the bank," and carefully excludes "any discount negotiations or contract."

3. The only effect of the letter of the cashier being copied into the letter book would be, to raise a presumption of knowledge on the part of the directors; but as it was proved that it was not the usage of bank directors to inspect the letter book no such presumption is raised.

4. The knowledge of Miner, one of the directors, does not bind the bank in a matter which requires the knowledge and sanction of the board.

5. It may be argued that the letter of Moodie purports to be a certificate that Miner was duly authorized by the bank; and as the cashier is the certifying officer of the acts of the board, the bank is estopped from denying the truth of this certificate.

But this letter contains no certificate of an authority given by the board; but if it did, the bank would not be bound. The principal is not liable, where the agent clothes his unauthorized act with a false representation of authority.

This subject is well discussed in *The Mechanics' Bank* v. *The N. Y. & N. H. R. Co.* 13 N. Y. 636.

There was no error in the charge of the court whether we consider the authority of the cashier as depending on the nature of his office, or the provisions of the charter.

This cashier had no power to constitute the agency of Miner, or to bind the bank in the premises.

Mr. Justice **Wayne** delivered the opinion of the court:

The only question arising on this record is, whether the court erred in so much of the charge to the jury as is set out in the bill of exceptions. Objections were taken in the course of the trial to testimony, but no exceptions were taken to the rulings of the court upon them. The declaration in the case contained two counts—one of them alleging that a contract had been made between the City Bank of Columbus and the United States, by which the bank agreed, on the 1st November, 1856, to transfer $100,000 of the public money from New York to New Orleans by the 1st of January, 1851, free of charge; and the other account for money had and received by the bank for the use of the United States.

The charge given by the court was confined to the first count. The bill of exceptions sets out the following evidence, which was introduced by the United States to show a contract with the bank.

The following letter was written by the cashier of the bank.

City Bank of Columbus
Columbus, Ohio, 26th October, 1850.

Sir: The bearer, Colonel William Miner, a director of this bank, is authorized, on behalf of this institution, to make proposals for the purchase of United States stocks to the amount of one hundred thousand dollars. He is also authorized, if consistent with the rules of the Treasury Department, to contract, on behalf of this institution, for the transfer of money from the east to the south or west, for the government.

I have the honor to be, sir, your obedient servant, Thomas Moodie, Cashier.

Hon. Thomas Corwin,
Secretary of the Treasury, Washington city.

This letter was presented by Mr. Miner to Mr. Corwin on the 1st of November, 1850. On the same day, Mr. Corwin wrote to Mr. Miner the following letter.

Treasury Department, November 1, 1850.

361*] *Sir: Your proposition of this date, to transfer $100,000 from New York or Philadelphia to New Orleans, by the first January next, free of charge to the department, is accepted. You will receive herewith a transfer draft on the assistant treasurer at New York, in favor of the assistant treasurer at New Orleans, for $100,000, with the authority indorsed to make the payment at New York to you.

I am, very respectfully,
Thomas Corwin, Secretary.

This was followed by an undertaking for the transfer of $100,000 for the government from New York to New Orleans:

Washington city, November 1, 1850.

This will certify that I have contracted with the United States Treasury, as the agent of the City Bank of Columbus, to transfer $100,000 from New York to New Orleans, to be deposited in the Treasury at the latter named city by the first day of January, 1851, free of charge. I have, in pursuance of said contract, this day received a draft in my own hand for one hundred thousand dollars on the United States Treasury at New York city, which is to be accounted for in said contract.

William Miner.

Miner received the draft, and cashed it in person on the 2d November, 1850; but what he did with it no one knows, or this record does not show. It is certain that it was not repaid in New Orleans according to the contract; and there are no proofs on this record which can raise a presumption that the Bank of Columbus ever received a dollar of it. There is proof that Miner was all that time a director of the bank, and that Moodie, who gave him the letter to the secretary of the treasury, was the cashier, and that he signed his name to the letter as cashier, and that the letter had been copied into the letter book of the bank. A by-law of the bank was also put in proof, to show that it might be inferred from it that he had authority, as cashier, to empower Mr. Miner, as a director 362*] of *the bank, to enter into such a contract as he had made with the secretary of the treasury. The by-law is: "A committee of two shall be appointed every six months to advise with the president and cashier. In their absence, all the ordinary business of the bank may be done by the president and cashier; and if either of them be not present, then by the other alone; but any discount, negotiation or contract, whether made by the board or committee, is to be done by the consent of all present."

It was also shown that there had not been a meeting of the directors in either July or August, 1850. That there had been a meeting on the 21st September, 1850, and another November 4th, 1850, nine days before the cashier gave his letter to Miner, and three days after the date of Miner's contract, to transfer the money from New York to New Orleans. The minutes of the bank, as kept by the cashier, of the meetings of the directors, do not show any intention upon the part of the directors to enter into a contract for the purpose of buying stock of the United States, or for the transmission of the money of the United States from the East to the South or West, as Moodie expresses it in his letter; or that after the negotiation of Miner, and his receiving the money from the assistant treasurer in New York, that the directors or president of the bank had any knowledge of the transaction until after Miner's default to pay the amount at New Orleans. Moodie testifies that he wrote the letter of the 26th of October, 1850, for Miner to negotiate with the secretary of the treasury, without the knowledge of the president or any of the directors of the bank, except Miner himself; and that the fact that such a letter had been written was not communicated by him to any of the directors until January after, though he had caused a copy of it to be put in the letter book. All of the directors, at the time of the transaction, have sworn that Moodie had not been authorized by the board or by any of themselves to constitute Miner such agent; that they had no knowledge of Moodie's letter, and that they never sanctioned the same. And there is other testimony in the case, that Moodie, as cashier, had not the power to depute Miner for any such purpose, and that it *would not have [*363 been done but by a resolution of the board of directors. Upon this evidence, and some other which it is not material to notice, the court charged the jury. After they had retired, and consulted for some time, they came into court and asked for further instructions, and the court gave them the following charge in reference to the contract set out in the first count of the declaration: "That if they should find that the letter written by Moodie was his own act, and had been given without the knowledge or authority of the board of directors, or any of them individually, except Miner, and that the agency of Miner was not constituted by or known to the board of directors, or the directors individually, or any of them except Miner, but was the act of the cashier alone; and if they should find that Moodie had no power as cashier, except such as belonged to the office of cashier generally, or such as are given by the charter or by the by-law or other law or usage of the said bank, that the defendant was not concluded by that letter, and is not bound by the contract made by Miner, without some subse-

quent ratification of the same, though the secretary had, in contracting with Miner, relied upon it as the act of the bank."

To this charge the plaintiff excepted, and, on account of that exception alone, the case has been brought to this court by writ of error. In our opinion, no charge could have been more comprehensive of the merits of the case, more precise in its application to the particulars of the testimony introduced by the plaintiff and the defendant, or more expressive of what the law is upon such a state of facts. It is all that the litigants could have expected, and is liberal to both. It is also in coincidence with the views generally entertained of the powers and duties of the cashiers of banks, by those most familiar with the management and business of banks, and perfectly so with such as have been expressed by this court in previous reported cases. In *Fleckner* v. *The Bank of the United States*, 8 Wheat. 338, 356, 357, this court said, the charter authorizes the president and directors to appoint a cashier and other officers of the bank, and gives the president and directors, or a majority of them, full power and authority 364*] to make all such rules and *regulations for the government of the affairs and conducting the business of said bank, as shall not be contrary to the act of incorporation. It contains no regulations as to the duties of cashiers; with the directors it would rest to fix the duties of cashier or other officers. Whether they have made any regulation upon this subject, does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed prima facie evidence that they fell within the scope of his duty. In the case of *Bank of the United States* v. *Dunn*, 6 Pet. 51, the court would not permit the president and cashier of the bank to bind it by their agreement with the indorser of a promissory note, that he should not be liable on his indorsement. It said it is not the duty of the cashier and president to make such contracts, nor have they power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which they may think proper in loaning money. The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business.

The term "ordinary business," with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the *usual and custo- [*365 mary way. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary. The case of *Kirk* v. *Bell*, 71 Eng. C. L. Rep. 389, and that of *Hoyt* v. *Thompson*, 5 N. Y. 320, were very appropriately cited by the counsel of the appellee, in this connection; and we think the safe rule in all instances of acts done by the officers of corporate companies, or by those who have the management of their business, from which contracts are alleged to have been made, is, to test that fact by an inquiry into the corporate ability which has been given them and to their subordinate officers, or which the directors of the company can confer upon the latter to act for them. Such was the view of this court when it decided, in the case of *The Bank of the United States* v. *Dunn*, 6 Pet. 51, that a release given by its president and cashier to the indorser of a promissory note of his liability upon it, did not bind the bank, neither nor both having any authority to make contracts of that kind. The case before us is one in which a cashier acts alone, and in which he testifies that he did so without any consultation with the president or directors of the company, and of which they had no information from him of the transaction until after the failure of Miner to pay the money in New Orleans. The act under which the City Bank of Columbus became a corporation does not, in any part of it, give any power to a cashier to act independently of the directors. No specific power is given to the directors to appoint a cashier. In the general power given to the directors to appoint officers to do the ordinary business of the bank, they have an authority to appoint a cashier, and such an appointment is a limitation of that officer's executive function in doing the business of the bank. It cannot be pretended that the directors, as a whole, or any one of them, except Miner, consented to the cashier's designation of Miner for any such purpose as was concluded between them, to induce the secretary to believe that Miner was the agent of the bank, either to buy stock of the United States or enter into *contracts for the [*366 transmission of money, free of charge, to those posts where the United States should designate it to be put. Such a power in the secretary of the treasury is a necessary one for the transaction of the business of the government, pervading, as it does, every part of the country. The exercise of it, however, requires great care and caution in the selection of agents for such a purpose and no authority short of the most certain should be taken to establish the representative character of any one for a private company or corporation to enter into such a contract with the secretary.

The United States, as plaintiff in this action, has failed to establish the contract which it alleges in its declaration had been made with the City Bank of Columbus, for the transmission of money: *and we direct the judgment, given in the court below, to be affirmed.*

FRANCIS MARTIN, Administrator of Dennis T. Donovan, Deceased, *Plff. in Err.*,
v.
CHRISTIAN IHMSEN.

(See S. C. 21 How. 394-397.)

In Louisiana, assignee of account may sue in his own name—novelty in practice—proceedings in state court, when interruption to prescription.

In Louisiana, by the rule of the civil law, the equitable owner of an account can sustain suit in his own name; and assignments to prove his title may be received in evidence.

Where the district judge refused to sign and seal a bill of exceptions six months after trial, but signed a bill of exceptions taken to his decision refusing to sign one; this is a novelty in practice which requires no notice.

The proceedings in the fourth district court were an interruption of the prescription pleaded within the 3484th and 3485th sections of the Civil Code of Louisiana.

Argued Jan. 25, 1859. Decided Feb. 14, 1859.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This case arose on a petition filed in the court below, by the defendant in error, to recover the balance of accounts alleged to be due from the defendant below to the firm of Owen & Ihmsen.

The case was tried without a jury, and resulted in a judgment in favor of the petitioner for $20,148.50, with interest and costs; whereupon the defendant brought the case here on a writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **R. H. Gillet**, for plaintiff in error:

1. The evidence of Richards concerning plaintiff's accounts was illegal, and ought to be rejected.

Church v. *Hubbart*, 2 Cranch, 187; *Smith* v. *Carrington*, 4 Cranch, 62; *McLanahan* v. *Universal Ins. Co.* 1 Pet. 170; *Arthurs* v. *Hart*, 17 How. 6.

2. The papers purporting to be an assignment of the demand in question from C. and F. R. Lorenz and J. J. Gray to the plaintiff were improperly admitted in evidence.

(*a*) No such transfer was alleged in the petition.

(*b*) The laws of Pennsylvania did not authorize the administrators of Frederick Lorenz to sell and convey a demand contracted in Louisiana against a resident there, so as to authorize the purchaser to sue in the latter state.

Dixon v. *Ramsay*, 3 Cranch, 319; *Kerr* v. *Moon*, 9 Wheat. 565; *Vaughan* v. *Northrup*, 15 Pet. 1; *Fenwick* v. *Sears*, 1 Cranch, 259.

3. There is no sufficient evidence that Owen and Ihmsen ever assigned the demand in question to Frederick Lorenz.

La. Code, arts. 1758, 1759, 1792, 2413, 2414.

4. The court erred in refusing to prepare and report a statement of the facts proved in this cause.

U. S. v. *King*, 7 How. 833, 844; La. Code Pr. 602, 603; *Weems* v. *George*, 13 How. 190.

5. The demand in question was barred by the statute of limitations.

La. Sess. Laws, pp. 90, 91, 5th March, 1852; the act of March 14, 1848; *Bank of Alabama* v. *Dalton*, 9 How. 522.

Mr. **J. P. Benjamin**, for defendant in error:

The allegation in the petition, that the plaintiff below was "transferee of Frederick Lorenz, who was transferee of Owen and Ihmsen," was sufficient under the practice of Louisiana.

McGrew v. *Browder*, 2 Mart. N. S. 17; *Ory* v. *Winter*, 4 Mart. N. S. 280; *Childress* v. *Davis*, 15 La. 492.

The objection that "it did not appear that by the laws of Pennsylvania the administrator had the right to make such transfer," is evidently an objection not to the admissibility, but to the effect of the instrument.

The next objection was, that the transfer from Owen and Ihmsen to Lorenz "was not signed by Lorenz, nor was there any proof that he had accepted the transfer."

We know of no rule of law which requires the assignment of a debt to be signed by the assignee. The refusal of the district judge to prepare a statement of facts after judgment cannot constitute error in the judgment so as to justify its reversal.

As to the plea of prescription:

1. The court below was satisfied, upon the proof, that plaintiff in error owed the whole amount, which he was condemned to pay.

2. The defendant in error had furnished satisfactory proof of his title to the debt.

3. The prescription was interrupted by a litigation, which was pending between the parties shortly before the present suit was instituted.

Mr. Justice **Grier** delivered the opinion of the court:

Donovan was defendant below in an action for a balance of accounts, claimed as due by him to the firm of Owen & Ihmsen. This claim had been transferred by that firm to one Frederick Lorenz, and, after his death, transferred to Ihmsen, the plaintiff below.

The cause was tried, by consent of parties, without the intervention of a jury; consequently, the exceptions to the admission of testimony are irregular, and need not be particularly noticed. Besides, we can see no good ground of objection to the evidence of confessions and admissions of a party, consisting of accounts rendered in a former controversy on the same subject, before arbitrators. The award itself was not received by the court as evidence of the amount of debt due, because it had been set aside for some irregularity.

The objections to the admission of the paper showing the transfers of the account were equally without foundation. By the law of Pennsylvania, where these transfers were made, Ihmsen would have an equitable interest in the account; but in that state the mere equitable assignee of an account would not sue in his own name, such chose in action not being assignable at common law. There the suit would have been brought in the name of Owen & Ihmsen, the original

creditors, for the use of Lorenz, Ihmsen, or any person holding the equitable right to the account. But in Louisiana, where, by the rule of the civil law, there is no such distinction between the legal and equitable title, Ihmsen, as 396*] equitable owner, could *sustain the suit in his own name, and the assignments admitted to prove his title were properly received.

This case was tried at April term, 1856. The president judge has reported his finding of the facts, and his judgment thereon. Some six months afterward, the defendants below made up a statement of facts (to which the plaintiff refused his assent) and presented it to the district judge, and demanded that he should seal a bill of exceptions. This the judge properly refused to do, but signed a bill of exceptions taken to his decision refusing to sign one. This novelty in practice requires no further notice.

The only question of law arising on the facts of this case as reported by the court was on the plea of prescription. On this point, the court gave their opinion as follows:

"Without considering the questions whether the account in this case is an open account, within the meaning of the statute of Louisiana, or whether the statute operates upon demands that were subsisting at its date, our conclusion is, that the proceedings in the fourth district court, relative to the award, were an interruption of that prescription. There was a suit pending between the parties, the present defendant being the plaintiff, which embraced a portion of the matter of this controversy. It was competent to the defendants, by instituting a demand in reconvention, to bring up the whole of the controversy for a settlement in that suit; and if that had been done, a legal interruption would have resulted within the 3484th, 3485th sections of the Civil Code. *Driggs* v. *Morgan*, 10 Rob. 120. This was not formally done on the record, but the parties did, by consent, that which we are bound to consider as having an equivalent value.

"They came to an agreement that arbitrators selected by them should have the power to decide who was the creditor of the contesting parties, to settle finally ('without appeal') the amount due on either part, and that the attorney of either party might move for judgment on this award. It is clear, that had the arbitrators proceeded regularly, and a judgment been rendered upon it, that no exception could have been taken to the condition of the pleadings in the pending suit, or that there 397*] *had not been a demand in reconvention. The consent in the submission agreement implied a waiver of all pleadings of that nature, and was a release of all errors in the preliminary stages of the suit. Donovan appeared in the district court, and successfully resisted a motion for judgment upon the award rendered. But the Code does not require that a suit should be successfully prosecuted to operate as an interruption of prescription. Trop. de Pres. § 561; *Dunn* v. *Kinney*, 11 Rob. 249; *Badon* v. *Bakan*, 4 La. Ann. 468."

We see no error in this statement of the law, and consequently affirm the judgment, with costs.

THE UNITED STATES, *Appt.*, *v.* MICHAEL C. NYE.

(See S. C. 21 How. 408-412.)

Sutter's "general title"—not valid—abrogated—copy given after abdication of Micheltorena conferred no title.

Micheltorena, governor of California, while confined to his capital by forces of insurgents, who were determined to drive him from the country, issued a decree by which he conferred upon citizens who had solicited lands, the property of the lands designated in their respective applications, and who had obtained the favorable *informe* of said Sutter, authorizing Sutter to give them hereafter a copy thereof, to serve them for a formal title, to present to the government in order to extend the title in due form. Such decree was sent to Sutter to enable him to raise a military force to assist the governor, and was known as Sutter's "general title."

Held, that the decree had no signification except as an appeal to Sutter and the persons under his influence, to come to the governor's relief, and a promise to them that he would give them the land in case of their assistance so that he was successful:

Also held, that the power given Sutter was abrogated when Micheltorena was compelled to abdicate and leave the country.

And that a copy of such decree given by Sutter to claimant more than a year after the abdication of Micheltorena conferred no title to land.

Argued Jan. 17, 1859. Decided Feb. 14, 1859.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by the appellee, for the confirmation of a claim for four leagues of land.

The said commissioners entered a decree of confirming said claim. The district court of the United States for the northern district of California, having affirmed this decree, on appeal, the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **J. S. Black**, *Atty. Gen.*, and *Mr.* **Hull** for the appellants.

Messrs. **C. Benham, H. H. Hawes,** and **A. Felch** for appellee.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellee claimed, before the board of commissioners for the settlement of land claims in California, four leagues of land, called "Wylly," situate on the Sacramento river and the Arroyo de los Venados. His evidence consists of a petition addressed to Micheltorena, Mexican governor of the department of Californias, in December, 1843, at Monterey, representing that he was a native of the United States; that he had resided in Mexico two years; that he had some horses and cattle, and desired to possess a suitable place for them. The governor referred this petition to the secretary, Jimeno, to obtain the proper information on the subject. The secretary referred the petition to Senor Sutter, commissioner (*encargado*) of the *frontier [*410 of the Sacramento. Sutter certifies on this reference, that the land is now unoccupied. His

certificate is dated 29th January, 1844. There is no evidence to show that these papers were returned to Micheltorena, or that he ever saw the certificate. They are produced by the claimant.

The remainder of his evidence consists of what is termed in the opinion of the board, "Sutter's general title," which bears date the 22d December, 1844, and is as follows:

"Manuel Micheltorena, Brigadier General of the Mexican Army, Adjutant General of The *Plana Mayor*, Governor, Commandant General, and Inspector of the Department of the Californias.

The supreme departmental government being unable, in consequence of its incessant occupations, to draw up, one by one, the respective title papers (*titulos*) for those citizens who have solicited lands, with *informe* in their favor of Mr. Augustus Sutter, captain and judge charged with the jurisdiction of New Helvetia and Sacramento:

In the name of the Mexican nation, I do by these letters confer upon them and their families the property of the lands designated in their respective applications (*instancias*) and maps (*disenos*), upon all and each one who have solicited (the same) and obtained the favorable *informe* of the aforesaid Mr. Sutter, up to the day of this date—so that nobody shall have power to question their right of property, a copy hereof, which Mr. Sutter shall hereafter give them, serving them for a formal title, with which they will present themselves to this government, in order to extend the same title in due form and on stamped paper.

And that it may remain firm and stable in all time, I give this document, which shall be recognized and respected by all the authorities, civil and military, of the Mexican nation, in this and the other departments, authenticated with the military and governmental seals in Monterey, this twenty-second day of December, one thousand eight hundred and forty-four.

Micheltorena.

I certify this is a copy.

New Helvetia, June 8th, 1846.

J. A. Sutter."

411*] *The circumstances under which this order was executed appear from a deposition of Sutter to be found in the record. He says: "That this document was delivered to him at his request. That the governor was blockaded at Monterey, and would not deliver titles to the American and other immigrants who were desirous of obtaining lands, and he (Sutter) advised him to give them titles at once: and that the governor had not time to do it in any other way. He never knew that the governor was blockaded until the courier came with the paper above referred to." He further testifies that the mode he had adopted in giving titles to individual settlers was, to deliver certified copies of this decree of Micheltorena to those who had rendered meritorious services to the country, and who applied to him. That Governor Micheltorena, at his request, made a speech to the soldiers, and promised lands to all those whom he (Sutter) should recommend as worthy to receive them. The general title was issued before the men marched from New Helvetia. He testifies that the lands were never measured, and there was no formal delivery of possession. There were no surveyors or means of measurement. We have examined with particularity the Mexican laws of colonization in the case of *The United States* v. *John A. Sutter*, at this term, and it is not necessary to do so in this case. It is evident that this "general title" had no reference to those laws, as none of their requirements were considered when it was made. It is questionable whether the previous application of the claimant was before the governor, or under the control of his subordinates, at its date. The general title was sent to Sutter, to enable him to raise a military force to assist the governor, who was confined to his capital by the forces of the insurgent chiefs, who had determined to expel him from the country. His ability to comply with the expectations it encouraged depended upon the success of his efforts to maintain his authority in the department, and to secure the sanction of the supreme government to the extraordinary measures he had adopted for that purpose. The decree has no signification except as an appeal to Sutter, and the persons under his influence, to come to his relief, and as a promise to them that he *would [*412 make a liberal distribution of land among them in case they should faithfully and successfully assist him in his extremity. But the issue of the war was fatal to Micheltorena, who was compelled to leave the country; and Sutter, his lieutenant and partisan, was made prisoner, and was required to abandon his chief, and to promise fidelity to his enemies. Whatever power was conferred upon Sutter was abrogated then, if not before. The execution of the power conferred, if any, in favor of this claimant, did not take place for more than a year after the abdication of Micheltorena.

The opinion of the court is, that the claim of the appellee is invalid, and the decree of the District Court is reversed, and the cause remanded, with directions to that court to dismiss the petition.

THE UNITED STATES, *Appt.*,

v.

NATHANIEL BASSETT.

(See S. C. 21 How. 412-414.)

Sutter's "general title," invalid—copy of, conferred no title.

The decision of United States v. Nye, *ante*, p. 135, affirmed.

The decree or promise of Micheltorena to Sutter and through Sutter to the foreign volunteers, did not confer a title to any part of the public domain, nor perfect any incipient possession into a vested interest. A copy of such "general title" given by Sutter nearly fifteen months after the defeat and abdication of Micheltorena, had no validity and conferred no title to land.

Argued Jan. 18, 1859. Decided Feb. 14, 1859.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners, in California, by the appellee, for the confirmation of a claim to four square leagues of land.

The board entered a decree confirming the claim. The district court of the United States for the northern district of California having affirmed this decree, on appeal, the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **J. S. Black,** *Atty. Gen.*, and *Mr.* **Hull** for appellant.

Messrs. **M. Blair** and **V. E. Howard** for appellee.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellee submitted to the board of commissioners appointed under the act of Congress 413*] of the 3d of March, 1851 *(9 Stat. at L. 632. ch. 41), to settle private land claims in California, a claim for four square leagues of land in the valley of the Sacramento river, called "Las Colussas," as the assignee of John Danbenbiss. His evidence consists of a petition of Danbenbiss to Micheltorena, governor of California, dated in July, 1844, in which he describes himself as a native of Germany, but naturalized in Mexico, where he had resided two years, and that he desired a grant of this land to devote himself to agriculture. The secretary, Jimeno, reported that the consideration of many petitions of the same nature had been postponed until after the governor had visited the country of the Sacramento and San Joaquin; and as he had no general map of the country to guide him in making grants, he suggested that this petition should be laid over with the others. The governor thereupon made an order that the petitioner might take possession, and deferred further action until he should visit the country; and returned the papers to the petitioner.

During the fall of 1844, a formidable insurrection against Micheltorena was maintained by some of the leading men in California, and in the month of December of that year he was beleaguered at Monterey. One of the principal grounds of complaint against him was an imputed disposition to strengthen the settlement of Sutter on the Sacramento by improvident grants to foreign emigrants.

While the governor was blockaded at Monterey, a courier was sent to Sutter, conveying the document known as Sutter's "general title," which is set out in the opinion of the court in the case of *The United States* v. *Michael C. Nye*, and by which Sutter was enabled to collect a body of "foreign volunteers," who went to the aid of the governor. Danbenbiss was one of those who accompanied Sutter.

The forces of the rival chiefs met at Coahuanga the latter part of February, 1845, and, after a bloodless battle, Micheltorena consented to abdicate his office in a short time, and to leave the country. In June, 1846, Sutter gave to the petitioner (Danbenbiss) a certified copy of the "general grant," which was produced to the board of commissioners as the complement to the other evidence of title in favor of Dan-
414*] benbiss. *None of these documents are to be found in the public archives. No trace of the evidence on which these titles depend is exhibited in any of the records of that state. The considerations on which they were made have no reference to the colonization laws of Mexico. The promises of Micheltorena to Sutter, and through Sutter to the foreign volunteers, did not confer a title to any part of the public domain, nor perfect any incipient pretension into a vested interest. The parties looked to the contingency of a suppression of the revolt and the maintenance of the power of the governor for the fulfilment of these promises. In this they were disappointed. The paper remained in the possession of Sutter for nearly fifteen months after the defeat and abdication of Micheltorena, before he gave a copy to Danbenbiss.

For these reasons, and others contained in the opinion of the court in the case of *The United States* v. *Nye*, it is the judgment of the court that the claim presented by the appellee is invalid.

The decree of the District Court of the United States for the Northern District of California is reversed, and the cause remanded to that court, with directions to that court to dismiss the petition.

JOHN PEMBERTON, Liquidator of the Merchants' Insurance Company, *Appt.*,
v.
EDWARD LOCKETT, James G. Berret, and Henry D. Johnson.

(See S. C. 21 How. 257-266.)

Construction of contract with attorneys to prosecute government claim.

An agreement by defendant to pay plaintiffs, his attorneys, one half of all moneys recovered for the value of slaves freed at Nassau, for their services in prosecuting such claim; held, to have reference to the solicitation of the claims before allowance by the government at Washington.

And held that the transfer of this claim to the commission appointed between Great Britain and the United States put an end to the agreement.

Argued Feb. 9, 1859. *Decided Feb. 21, 1859.*

APPEAL from the Circuit Court of the United States for the District of Columbia.

This suit was brought in the court below by the appellees, to recover as for a specific lien, certain compensation claimed for prosecuting an international reclamation.

The court below decreed that Pemberton should pay $14,230, less 5 per cent of the money awarded to him, together with interest thereon from June 20, 1855, and costs, to the complainant, one third part to each or to their solicitor, etc.

The facts of the case appear in the opinion of the court.

Messrs. **H. May, R. J. Brent,** and **Reverdy Johnson,** for the appellant:

The appellant maintains that the decree of the court below should be reversed for the following reasons:

1. That the said Pemberton had no power as liquidator to make said agreement to pay any part of said claim, or the fruits thereof, to the defendants in error.

La. Code, 2966, 2967.

An agent under general power cannot sell.

Steer v. *Ward*, 10 Mart. 679; *Adams* v. *Gainard*, 7 Mart. N. S. 246; *Hill* v. *Barlow*, 6

Rob. La. 142; *Cuny* v. *Robert*, 16 La. 175; *Smith* v. *McMicken*, 12 Rob. La. 653.

The decree of the court below binds the fund, as if a specific lien upon it was created by the contract. No equitable lien is shown.

2. The agreement was to compensate for services to be rendered in Washington city, and limited to that place. All the services claimed for, are said to have been rendered in London. The contract may be explained by "the circumstances of the transaction, so as to apply it to its proper subject-matter."

Bradley v. *Steamboat Co.* 13 Pet. 99.

3. It was a personal contract for the joint services of the appellees, and was expressly abandoned by two of them. It was, however, to be performed by all or none; the obligation was not several.

Pars. Cont. 11, 12; 4 Mart. 78; 2 Barn. & Ad. 307; *Sample* v. *Lamb*, 2 La. 275.

4. The agreement is void for maintenance.

4 Kent's Com. 449; *Thurston* v. *Percival*, 1 Pick. 415; *Wallace* v. *Loubat*, 2 Den. 607; *Berrien* v. *McLean*, 1 Hoffm. Ch. 421.

5. It was a contract against public policy. The executive departments of the government or the legislation of Congress ought not to be exposed to the influences of paid friends or agents. All that could be done at Washington to advance the appellant's claim, was to be done by the executive officers of the government.

Marshall v. *B. & O. R. Co.* 16 How. 314; 2 Story, Eq. §§ 293, 294; *Wildey* v. *Collier*, 7 Md. 279.

Nor could the services of defendant be performed at London.

10 Stat. at L. p. 99, art. 2.

6. The contract was not performed.

Two of them say they committed the management of it to the third, Johnson, and there is an utter failure of evidence to show that any or all of them together rendered any services whatever at Washington, "in the prosecution of said claim."

Story, Cont. 968.

The counsel further reviewed the evidence on this point and said: The consideration for this contract was partly executed and partly executory, as shown on its face. In such case the failure to perform the executory part of the consideration, is a default which prevents any recovery on the contract, because it is but one entire consideration.

1 Pars. Cont. 171, note; 2 Pars. Cont. 19, 172, and note.

7. If there was a performance of the contract, it was done only by said Johnson, and if the contract be apportioned, he only is entitled to compensation, and therefore the joint bill should be dismissed.

8. The decree is erroneous in requiring Pemberton to pay interest on the amount decreed, when he has not enjoyed the use of the money.

Messrs. **Jos. H. Bradley** and **John L. Hayes**, for appellees:

In the instrument in question, there is no limitation of time during which the services of complainants were to be rendered—no limitation of places where the services should be performed—no condition as to the mode in which the claim should be prosecuted. The sole condition of compensation was, that the complainants should "use their best exertions in the prosecution of said claim."

2. The appellant was authorized to execute the instrument in question. In his contract and elsewhere, he styles himself as liquidator, etc. As such, he has defended, and appealed this suit. If he was not authorized, his acts have been fraudulent and wrongful, and he cannot take advantage of his own wrong.

Fletcher v. *Peck*, 6 Cranch, 88.

3. This contract has not been rescinded, either by the acts of the parties, the operation of law, or a change of circumstances rendering it impossible to be carried into effect.

1st. It has not been rescinded by the acts of the parties. The rights of the appellees growing out of this contract could not be annulled, except by a mutual contract as final and definite as the one by which they acquired their rights. The two letters received from the appellant, one from Lockett and one from Johnson, have no effect in varying the original contract. They were never replied to by the appellant. There is nothing in Lockett's letter showing a disposition to relinquish his interest in the claim. There is no intimation from Mr. Berret of a disposition to decline or assign his interest. It is evident that Johnson had no such purpose, from the facts in evidence.

2d. The contract was not rescinded or annulled by any change of circumstances rendering it impossible to be carried into effect.

The appellees deny the allegation in the answer, that compensation was agreed upon in the event of a recovery of the claim against the United States. No such condition is expressed or implied in the contract. The appellees also deny the allegations in the answer, that the contract was entered into for services to be performed in Washington city, and that the provision in the convention allowing each government to name one person to attend the commissioners as agent on its behalf, "put an end to the contract, so that complainants had no longer any right to recover thereon." No such conditions are found in the agreement.

The most important work, the preparation of evidence, could only be done in the United States. The appellees were employed several weeks in obtaining testimony from the departments in Washington. The convention provided that the claim should be heard upon such evidence or information as shall be furnished by or on behalf of their respective governments.

Decisions of commission of claims, p. 9.

The appointment of an agent on behalf of the United States, did not dispense with the necessity for employing associate counsel. Such counsel were frequently associated with the agent of the United States.

Decisions of the commission, pp. 16, 18, 29, 41, etc.

There was no necessity for employing English counsel, as is alleged, as the case was not before an English court, but a joint commission.

4. The contract and agreement is not contrary to law.

1st. It is not void for champerty or maintenance.

Bayard v. *McLean*, 3 Del. 139, 217; 3 Cow. 646; 4 D. & E. 341.

Champerty and maintenance exist only in proceedings in suits at law.

4 Bl. Com. 135.

Moreover, there were no agreements here on the part of the alleged champertor, to carry on the parties' suit at his own expense.

2d. The agreement is not void as a contract to do an act inconsistent with public policy.

In the case of *Marshall* v. *The B. & O. R. Co.* 16 How. 314, cited on the other side, there was an understanding that the agent should use corrupt means and influence. Contracts, precisely analogous to the present one, have been sanctioned by this court.

Wylie v. *Coxe*, 15 How. 417.

5. The appellees rendered the services implied in the contract.

262*] *Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the District of Columbia.

The bill was filed in the court below, by the respondents, against the appellant, Pemberton, liquidator of the Merchants' Insurance Company, in the city of New Orleans, representing the interest of that company, which was insolvent, for the purpose of establishing a title to certain moneys in the possession of the government, which had been received under the convention between the United States and Great Britain, of the 8th of February, 1853. The money had been awarded by the umpire, under that convention, to the company, which had been subrogated to the rights of one of the claimants for compensation against Great Britain, in the case of *The Brig Creole*. The umpire allowed to the company $28,460. The complainants below set up, in their bill, a title to one half of this fund, as the agents and attorneys of Pemberton in the prosecution of the claim.

The right rests upon the following agreement, entered into between them and the defendant (Pemberton) at New Orleans, dated the 23d of December, 1851:

"For and in consideration of services rendered, and to be rendered, by James G. Berret, Henry D. Johnson, and E. Lockett, of Washington city, D. C., in the prosecution of our claims for the value of slaves freed at Nassau, N. P., which we had to pay for, we do hereby agree to allow to said Berret, Johnson, and Lockett, their heirs or assigns, one half of any or all such sums of money, principal, and interest, as may be recovered on account of our said losses, it being understood that the said Berret, Johnson, and Lockett are to use their best exertions in the prosecution of said claim, and that no allowance whatever, as expenses or compensation for their services, is to be made by us to the said Berret, Johnson, and Lockett, unless our said claim shall be allowed, in whole or in part. Witness our hand and seal, at New Orleans, this 23d day of December, in the year of our Lord, 1851."

The claims referred to in this agreement originated as far back as the year 1841, in con-**263***] sequence of the unwarrantable *interference of the public authorities at Nassau, in the Island of New Providence, one of the Bahama Islands, belonging to Great Britain, and liberating a cargo of slaves, who were on a voyage from Virginia to New Orleans, and who had mutinied, overcome the officer, and carried the vessel into that port.

The persons interested in the slaves, of which they were deprived by this interference, immediately appealed to their own government for redress. A correspondence was opened between this government and Great Britain on the subject, which continued down to the time of the convention already mentioned, of the 8th of February, 1853.

This convention provided for the appointment of a board of commissioners, one to be named by each government, and the two to appoint an umpire, to decide upon all claims in which a difference of opinion should occur.

The board sat in the city of London, and were bound, according to the terms of the convention, to receive and peruse all written documents or statements which might be presented to them, by or on behalf of their respective governments, in support of or in answer to any claim; and to hear, if required, one person on each side, in behalf of each government, as counsel or agent for such government, on each separate claim. Each government appointed an agent to represent it before the board; and, as we have said, the umpire allowed to the insurance company $28,460.

It is insisted, on behalf of the defendant (Pemberton), that this contract, entered into with complainants in 1851, had reference to the solicitation of claims before, and allowance by, the government at the city of Washington; that they were employed as gentlemen residing at that place, engaged in business of this character, and that the convention between the two governments, the appointment of a board of commissioners, and prosecution of the claims against Great Britain before it, under the authority of the United States, put an end to the contract. Although its terms are general, and open to some difficulty as to the real meaning and intent of the parties, we are inclined to concur in this view of it. We *think it [***264** could hardly have been within the contemplation of either of the parties, that the prosecution spoken of in the argument was a prosecution or solicitation of claims against the foreign government, or in a tribunal sitting there, and before which this government had taken upon itself the duty of the prosecution. We are satisfied these agents were under no obligation, according to the true intent of the agreement, to follow these claims to London, and prosecute them there; and if not, it is quite clear the transfer of them to the commission there put an end to the agreement. And this seems to have been the view taken of it by the parties themselves, as manifested by their conduct after the appointment of the commission.

By the 3d article of the convention, the claims were to be presented before the board within six months from the day of its first sitting, unless a good reason could be given for the delay. The board first met in London on the 15th of September, 1853; and on the 15th of October it adopted rules and regulations in respect to the proceedings before it, and, among others, required all claims to be presented within six months from the 15th of September, the day of its first sitting.

Now, the first step taken by these complainants in behalf of the claims of Pemberton, under the convention, was a letter written to him by Lockett, dated December 15, requesting that a power of attorney should be given to Johnson, to act for him before the commission. This was three months after the commencement of its sittings, and after half the period had expired within which the claims were required to be presented. It does not appear that this letter was answered by Pemberton.

The next step taken was a letter from Johnson himself, dated at Washington, 22d of March, 1854, in which he announces that he had prepared a memorial on behalf of the claims of the insurance company, and was ready to forward it to the commissioners, in London. This was seven days after the expiration of the six months.

In the meantime, Pemberton had employed agents residing in London to attend to his claims, and who, it appears, had the charge and management of the business until the close of the commission.

265*] *What is very material, also, in this letter of Johnson of the 22d of March, he there states, in respect to the situation of his two associates, as an inducement to Pemberton to give him, individually, the power of attorney—that Lockett is absent, and that Berret was unable to attend to the business, having been appointed postmaster of the city; and then proposes to conduct the business himself alone, for the compensation of twenty-five per centum of the money recovered, the half only of what is now claimed under the agreement of 1851. It does not appear that any answer was returned to this letter, doubtless for the reason that other agents had already been employed.

It is true that Johnson drew up the memorial to the commissioners, on behalf of Pemberton, as above mentioned, but without any authority from him, and swore to it, at Washington, on the 17th of April, 1854, in which he endeavored to explain the delay in presenting the claim; and forwarded the same from his country on the 29th of May following. But the subject had already been brought to the notice of the government agent, and before the board of commissioners, as early as the 23d of that month, by the agents of Pemberton in London. This memorial, therefore, was of no particular importance.

It appears from the report of the proceedings under the commission, and of its decisions, communicated to Congress by the President, 11th of August, 1856 (Senate Docs. vol. XV., 1855, 1856), that there were six separate claimants, besides Pemberton, for compensation arising out of the case of *The Creole*, and all depending, substantially, upon the same facts. And there were, also, the cases of *The Brig Enterprise* and *Schooner Hermosa*, involving principles similar to those upon which the reclamation depended in the case of *The Creole*. All the parties whose claims arise out of the case of *The Creole* were equally interested in furnishing the proofs upon which the general claim against the British government rested; and the three vessels were interested in common, as to the principles of international law that should govern the decision of the board of commissioners.

*The government agent and commis- [*266 sioners took this view of these several claims, and but one argument was made in all of them, and that in the case of *The Brig Enterprise*, and but one opinion delivered by the commissioners. As they disagreed, a second argument was made before the umpire.

The preparation of the claim of Pemberton, beyond the proofs of the interest of his company in the case of *The Creole*, was a very trifling matter; and even these proofs had been already furnished to this government, at the time the appeal was made there for redress. And as it respects the questions of international law involved in these cases, they had been the subject of repeated discussion between this government and Great Britain, and also in Congress, by some of the most distinguished statesmen and jurists of the country; and the preparation for the argument of the claim before the board of commissioners required little else than the labor of digesting and reproducing the principles and reasoning to be found in these discussions.

For the reasons above given we are satisfied the agreement and proofs in the case furnish no legal or just ground for a claim to the sum of money awarded by the court below, *and that the decree should be reversed, and the proceedings remitted with directions to enter a decree dismissing the bill.*

DICKERSON B. MOREHOUSE, *Plff. in Err.*,

v.

WILLIAM A. PHELPS.

(See S. C. 21 How. 294-305.)

Description of grantees in deed, what sufficient—in ejectment, plaintiff must show valid title, or defendant's possession will prevail—assignability of occupant claims under United States.

Where a patent from the United States grants, "unto the representatives of G. and M., and to their heirs," the said lot above described, to have and to hold, unto the said representatives, and their heirs and assigns, forever, as tenants in common, extrinsic proof was admitted showing who were such representatives.

The patents having been made for the benefit of those who obtained the certificate of pre-emption, and paid for the land, are technically accurate.

A plaintiff in ejectment, where defendant is in possession, must show a valid legal title to authorize a recovery of the land by him.

Where no such title is shown, defendant's possession is sufficient for his protection.

Up to the date of the entry and purchase, the title was in the United States; behind which date the courts can uphold no deed of conveyance of the public lands, unless Congress has authorized assignments of occupant claims to be made.

Argued Feb. 10, 1859. Decided Mar. 7, 1859.

IN ERROR to the Supreme Court of the State of Illinois.

This was an action of ejectment, originally commenced in the circuit court of Jo. Daviess county, Illinois, by William A. Phelps against Bradner Smith, to recover possession of a certain tract of land. After having been once remanded by the supreme court of the state of Illinois, judgment was rendered in the circuit court in favor of the plaintiff.

Subsequently this judgment was vacated and

NOTE.—*What title or interest will support ejectment*—see note, 18 L. R. A. 781.

a new trial ordered, and Dickerson B. Morehouse asked to be made defendant in the suit in the place of Smith, upon affidavit that he claimed the interest in the lot sued for in this case, as the administrator of one R. P. Guyard, and that as Dickerson B. Morehouse, he leased the same to the said defendant.

This motion was overruled, but Morehouse was permitted to come in as codefendant with the defendant, his tenant.

After various proceedings in the circuit court, judgment was again rendered for the plaintiff.

Morehouse appealed to the supreme court of the state of Illinois, by which court the judgment of the circuit court was affirmed.

The case is now brought here by writ of error.

Among other evidence, the plaintiff offered and read to the jury patents issued by the United States government to the legal representatives of Robert P. Guyard and Dickerson B. Morehouse, for lots 8 and 9, being the premises in question.

The date of these patents was Jan. 1, 1846. The basis of the claim of plaintiff below was a transfer from Guyard to himself, of which the following is a copy:

Mineral Point, Crawford County,
Michigan Territory,
Nov. 8, 1829.

To Captain J. C. Legate, Supt. U. S. Lead Mines.

Sir: I have this day sold, transferred, and set over, and by these presents do grant, bargain, sell, transfer, and set over unto William A. Phelps, his heirs and assigns, all my right, title, interest, or claim whatsoever in and to the three lots of ground I own in the town of Galena, Jo. Daviess county, state of Illinois, situated on the Wharf Row, the number not recollected, supposed to be either lots, 4, 5, and 6, or 5, 6, and 7, bounded as follows:

On the east by Fever river; on the west by Main street or a triangular square, and on the south by a lot granted to me in the spring of 1828, and sold by me to M. Denarett; and on the north, by a street, alley, or other lots.

The most southern of these three lots was granted by permit to myself in the spring of 1828; the other two adjoining were granted to John Ward and Nathaniel Johnson, one lot to each. and by them transferred to me, all of which is entered on record in the permit book.

Given under my hand and seal, this 8th of November, 1829.

R. P. Guyard. [Seal.]

Approved November 9, 1829.

The defendant, Morehouse, claimed in virtue of his own right and as administrator of Guyard.

A further statement of the case appears in the opinion of the court.

Messrs. **E. B. Washburne** and **Reverdy Johnson**, for plaintiff in error:

The Congress of the United States by an act approved Feb. 5, 1829, provided for the laying off of a town at and including Galena, Illinois, under the direction of the surveyor-general for the states of Illinois, Missouri, and the territory of Arkansas. The act further provided that the lots should be classed, etc., and previous to their sale, "each and every person or his, her, or their legal representative or representatives, who shall heretofore have obtained from the agent of the United States a permit to occupy any lot or lots in the said town of Galena, or who shall have actually occupied and improved any lot or lots in the said town, or within the tract of land hereby authorized to be laid off into lots, shall be permitted to purchase such lot or lots by paying therefor in cash," etc., being the certain amounts specified in the said acts according to the class in which the same fell.

It not being practicable to carry this act into effect, Congress, on the 2d day of July, 1836, passed an amendatory act, by which it was further provided, etc.

"That all acts and duties required to be done and performed by the surveyor of the states of Illinois and Missouri and the territory of Arkansas, under the act to which this is an amendment, shall be done and performed by a board of commissioners, of three in number, any two of whom shall form a quorum to do business; said commissioners to be appointed by the President of the United States, and shall, previous to their entering upon the discharge of their duties, take an oath or affirmation to perform the same faithfully and impartially."

And it was further enacted: "That the said commissioners shall also have power to hear evidence and determine all claims to lots of ground arising under the act to which this is an amendment; and for this purpose the said commissioners are authorized to administer all oaths that may be necessary, and reduce to writing all the evidence in support of claims to preemption presented for consideration; and when all the testimony shall have been heard and considered, the said commissioners shall file with the register and receiver of the land office at Galena, the testimony in the case, together with a certificate in favor of each person having the right of pre-emption; and upon making payment to the receiver at Galena for the lot or lots to which such person is entitled, the receiver shall grant a receipt therefor, and issue certificates of purchase to be transmitted to the General Land Office, as in other cases of the sale of public land."

While the board of commissioners constituted by the above act were sitting in the discharge of their duties, Dickerson B. Morehouse, for himself and as the administrator and legal representative of one Robert P. Guyard, went before the said board, and filed a claim to a preemption to the lots, the title to which is involved in this suit. He adduced before the said commissioners the requisite proofs to entitle him to an award of the pre-emption right for himself individually, and as the administrator of Guyard's estate. The said commissioners granted him the pre-emption right as claimed, and issued to him the proper duplicate certificate, which entitled him, under the instructions of the General Land Office, to go to the local land office and buy the lots from the government; all of which the said Morehouse did. For himself and as the administrator of Guyard, he paid the price fixed by law for the said lots into the local land office at Galena, and received the proper duplicate receiver's receipts therefor, and afterwards upon the surrender of the said receipts in accordance with the rule of the gen-

eral land office he received the patents for the said lots. For himself and as the administrator as aforesaid, he has retained the possession of the said lots since 1838, and paid taxes upon them up to this time.

The right of pre-emption to those lots was never claimed by Phelps or by any person for him, before the said commissioners, and neither Phelps nor any person for him, ever purchased the said lots from the local land office.

The question arising in this court upon the record is, who is the "legal representative" of Guyard as to the lots in dispute, within the meaning of the statutes of the United States. Phelps claims that he is, by virtue of the letter or instrument above set out; Morehouse claims that he is, as administrator of Guyard, he having made the claim to the lots before the board of commissioners, which claim was allowed, and, entered them at the land office. The supreme court of Illinois have held, that under these statutes Phelps is the "legal representative" of Guyard. This question is presented in the instructions asked for by the attorneys for Phelps, and given by the court below, and in the instructions asked for by the attorney of Morehouse and refused by the court below.

The construction of the statutes above referred to being drawn in question in this case, the supreme court of Illinois made the certificate as found in the record, page 62.

It is submitted that the term "legal representative," as used in the act of Feb. 5, 1829, clearly contemplates only those representatives who file their claims before the board of commissioners and have them allowed. If one be a "representative," and he does not prefer his claim as such for confirmation, he is not regarded.

In *Strother* v. *Lucas*, 12 Pet. 458, the confirmation was deemed to be made to the person who made and proved his "claim" before the board of commissioners. To the same point, see *Bissell* v. *Penrose*, 8 How. 337. Instructions and Opinions of Attorney General, part 2, pages, 747, 752, 1043; also, *Boone* v. *Moore*, 14 Mo. 424; 6 Pet. 772; 2 How. 284; 4 Gilman, 454; 12 Ill. 317; 15 Ill. 572; Land Laws, vol. III. 316; 2 Bay, 426-454; 16 How. 63.

Whatever right Phelps might have had, it was only an inchoate right, to be perfected by making his claim before the board of commissioners and procuring their award upon satisfactory proofs, and then following it up by a purchase from the land office. He could do these things or he could abandon his supposed right. He did so abandon it. On the other hand, Morehouse, as the administrator of Guyard, made the claim before the board of commissioners, adduced his proofs, received their award, and then perfected the title by entering the lots, the possession of which he retained to this day. Under these circumstances it is insisted that Morehouse, as the administrator of Guyard, is the "legal representative" of said Guyard, within the true intent and meaning of the act of Feb. 5, 1829, authorizing the laying off a town on Bear river, etc.

Mr. **M. Blair** for defendant in error.

302*] *Mr. Justice **Catron** delivered the opinion of the court:

Phelps recovered of Morehouse the undivided moiety of lots Nos. 8 and 9 in the town of Galena, in a state circuit court in Illinois, which judgment was affirmed in the supreme court of that state; and from this decision the cause is brought here on writ of error. We are now called on to re-examine the controversy to the extent that acts of Congress, and the proceedings of officers acting under the authority of the United States, are drawn in question.

Phelps claims, through a paper addressed to the agent of the United States superintending the lead mines at Fever river; and this paper his counsel assumes to be a deed that conveys lands. It bears date November 8, 1829, and is from Guyard to Phelps, for a moiety of the lots in dispute.

The courts of Illinois held it to be an effective conveyance of title, and that, by force thereof, Phelps became "the legal representative" of Guyard within the intent and true construction of the patents made to the representatives of Guyard and Morehouse.

The act of 1836 required that commissioners should hear and determine all claims to lots of which a preference of entry was sought, according to the act of 1829; they had power conferred on them to administer oaths and take evidence, and were directed to reduce it to writing, in support of claims to pre-emptions presented for consideration; and, when all the testimony was heard and considered, they were to file with the register and receiver the whole testimony in the case (that is, in all the instances), together with a certificate in favor of each person having the right of pre-emption; and on payment being made to the receiver by the person ascrtained to be entitled, the register was ordered to issue a certificate of purchase to him to whom the right of pre-emption had been adjudged; and the remaining lots were to be exposed to public sale.

It was the political power that was dealing with this property. Congress could award it either for a consideration, or confer it on any one that they desired should have it. The awards were made through a tribunal exercising the political power, and whose adjudications were conclusive of the right *to pur- [*303 chase; nor had the courts of justice any jurisdiction to interfere.

Phelps did not come forward and prefer a claim to have a pre-emption allowed, and if Morehouse had not acquired this right, the land would have been sold at auction. Phelps would have then stood in the situation of all others claiming preferences of entry throughout the public domain, who fail to prove up their claims before the register and receiver, and permit the land to be sold at the public sales. He abandoned his preference, and allowed it to be forfeited—even conceding its original validity.

2. If Phelps has a legal title, he took it by the terms of the patents. The patent for No. 9 recites, that the legal representatives of Robert P. Guyard and Dickerson B. Morehouse had deposited in the General Land Office the register's certificate at the land office at Galena, that full payment had been made, by said legal representatives above named, for lot No. 9 (the boundary of which is described), and which lot had been purchased by said representatives of Guyard and Morehouse; and, in consideration of the premises, the United States have given and

granted, and do give and grant, "unto the said representatives of Guyard and Morehouse, and to their heirs, the said lot above described; to have and to hold, unto the said representatives, and their heirs and assigns, forever, as tenants in common." The patent for lot No. 8 is in the same terms.

For the purpose of explaining who the grantees are, and that they were the purchasers, extrinsic proof was introduced in the state circuit court, to the end of establishing the fact that Morehouse, as administrator of Guyard, and on his own behalf, proved the joint occupancy of lots 8 and 9 before the commissioners appointed to grant certificates of pre-emption under the act of 1836; that Morehouse obtained certificates of pre-emption, filed them with the register, paid the purchase money to the receiver of the land office at Galena, took out his patent certificates, presented them at the General Land Office, and received the patents. The deed to Phelps was produced and recorded at Galena, June 18, 1847. Morehouse obtained his pre-emption certificates for lots Nos. 8 and 9, paid **304*]** his money *for them, and got his patent certificates February 20, 1838, and on the 1st day of January, 1846, the patents issued.

We feel confident, from the face of the patents, that they were made for the benefit of those who obtained the certificate of pre-emption, and paid for the land. Such, in our judgment, is the fair construction of the patents, and of the 2d section of the act of 1836, on which they are founded. The patents, throughout, refer to those who bring the claim before the board, obtain the right of entry, pay the purchase money, and enter the land.

It was the duty of Morehouse, as administrator of Guyard, to make payment for the moiety of the lots Nos. 8 and 9, on behalf of the estate of Guyard, out of the personal property in the administrator's hands. Revised Statutes of Illinois, title Wills, § 107, adopted in 1836.

And by the 98th and 99th sections of said title, the administrator was empowered to convert the lands into personal assets for the payment of debts; the personal estate having proved insufficient.

The capacity of Morehouse to cause the entry to be made, depends on state laws, with which we have no power to deal in the present writ of error, further than to ascertain from them that Morehouse was, in his capacity of administrator, "the legal representative" of Guyard; and such we think he was, and that the patents are technically accurate.

As Phelps was plaintiff in the ejection suit, and Morehouse in possession, it was imposed on Phelps to show a valid legal title to authorize a recovery of the land by him; and having no such title, Morehouse's possession was sufficient for his protection.

The decisions referred to on behalf of the defendant in error, where Spanish claims had been confirmed, and where the United States gave an additional sanction to an incipient title existing when we acquired Louisiana, do not apply. In those cases, titles which were undoubtedly private property, that could be alienated, and which descended, were examined, and their validity ascertained; and when found meritorious, ordered to be defined by survey, and a United States patent was *in most cases ordered to be issued. But this did not defeat outstanding interests in the land for which the patent issued; as was held in the case of *Stoddard* v. *Chambers*, 2 How. 284; *Bissell* v. *Penrose*, 8 How. 337; and *Landes* v. *Brant*, 10 How. 348. The patent covered the whole title; at least, from the time it was asserted before a board of commissioners appointed by Congress to investigate the claim: and the patent inured to the protection of alienees and heirs. The United States government was bound to protect existing interests in the lands acquired by the United States from France by the treaty of 1803. [*305

Here, however, a very different claim to the lands in the town of Galena is set up. The government was the absolute owner; Congress might have repealed the acts of 1829 and 1836, at any time before actual purchases were made by those claiming a preference to enter, and the lands have been sold at auction. Up to the date of the entry and purchase, the title was in the United States; behind which date the courts of justice can uphold no deed of conveyance of the public lands, unless Congress has authorized assignments of occupant claims to be made; and as the acts of 1829 and 1836 awarded the preference of entry to the claimant who applied and obtained the favorable decision of the board of commissioners, no inquiry can be made into the dealings between Phelps and Guyard.

It is ordered that the judgment of the Supreme Court of Illinois be reversed, and that the cause be remanded, to be proceeded in according to this opinion.

CHARLES BALLANCE, *Appt.*,
v.
ROBERT FORSYTH *et al.*

(See S. C. 21 How. 389, 390.)

Consent cannot confer jurisdiction—no jurisdiction without an appeal—withdrawal of transcript.

The consent of parties cannot give jurisdiction to this court, where the law does not give it.

Without an appeal taken in the district court, this court has no jurisdiction, and the consent of parties cannot cure the defect.

But if the plaintiff in error desires to supply the omission, and take an appeal in the district court, he has leave to withdraw the transcript now filed, and to use it upon his new appeal.

Motion filed Feb. 18, 1859. Decided Feb. 21, 1859.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

On motion to reinstate.

The case is stated by the court.

Messrs. **Charles Ballance**, in person, and **Reverdy Johnson** for appellant.

Mr. **Archibald Williams** for appellee.

NOTE.—*Jurisdiction of Federal courts not given by consent*—see note to Gov. of Georgia v. African Slaves, 7 L. ed. U. S. 73.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case was dismissed on the 20th of December last, because it did not appear that an appeal had been taken in the district court. A motion has now been made to reinstate the case, and, in support of that motion, a written agreement, signed by the counsel for the appellant and appellee, has been filed, consenting to reinstate the case, to waive all irregularities, and to try the case on the merits.

But the consent of parties cannot give **390*]** jurisdiction to this *court, where the law does not give it. And, without an appeal taken in the district court, this court has no jurisdiction, and the consent of parties cannot cure the defect. *The motion is, therefore, overruled.*

But if the plaintiff in error desires to supply the omission, and take an appeal in the district court, and bring his case legally before us, he has leave, in order to save expense, to withdraw the transcript now filed, and to use it upon his appeal, leaving a receipt for it with the clerk of this court.

372*] *THE NEW YORK AND LIVERPOOL UNITED STATES MAIL STEAMSHIP COMPANY, Claimants of the Steamship Pacific, her Tackle, etc., *Appts.*,

v.

OTIS P. RUMBALL, *Libt.*

(See S. C. 21 How. 372-386.)

Collision between steamer and brig — rule, where steamers meet sailing vessels—nautical rules—do not apply when collision is inevitable—where brig was not in fault, steamer liable.

Where, in a collision between a steamer and brig, the brig kept her course, without any change whatever, until the collision was inevitable, an error then committed by those in charge of her under such circumstances, if the vessel was otherwise without fault, would not impair her right to recover for the injuries occasioned by the collision.

As a general rule, sailing vessels, when approaching steamers, are required to keep their course, and the steamers are required to keep out of the way.

Those engaged in navigating vessels upon the seas are bound to observe the nautical rules, in the management of their vessels on approaching a point where there is danger of collision.

Such rules of navigation are obligatory upon vessels approaching each other, so long as the means and opportunity to avoid the danger remain.

They do not apply to a vessel after the approach is so near that the collision is inevitable.

When a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions to avoid a collision; and if this be not done, prima facie the steamer is chargeable with fault.

As the brig was run down and lost, and the evidence fails to satisfy the court that the brig was in fault, or the disaster inevitable, it necessarily follows that the collision was the result of fault on the part of the steamer, and that the steamer is answerable to the libelant for the damage.

Argued Feb. 7, 1859. Decided Feb. 21, 1859.

NOTE.—*Collision. Rights of steam and sailing vessels in reference to each other, and in passing and meeting*—see notes to 13 L. ed. U. S. 537; 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the district court of the United States for the southern district of New York, by the appellee, to recover damages resulting from a collision.

The said court entered a decree dismissing the libel. On appeal to the circuit court, this decree was reversed and a decree entered in favor of the libelant, for $7,107.16, with $412.82, costs; whereupon the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Clarkson N. Potter** and **Owen & Vose**, for appellant:

1. No considerable distance could exist between the vessels, as libelant claimed.

As to estimates of time and distance, see *The Europa*, 2 Law & Eq. 559; *The Iron Duke*, 2 W. Rob. 381; *The James Watt*, 2 W. Rob. 274; 1 Blatchf. 371.

2. The libelant has the burden of proof. To recover, he must make it appear that the steamer was in fault. When it appears that the sailing vessel stood her course, and that the steamer could have avoided her, then the law presumes the steamer should have done so. But such facts must appear, to raise the presumption.

On the question of responsibility, see 13 How. 109; *Barrett* v. *Williamson*, 4 McLean, 589; *The Delaware* v. *The Osprey*, 2 Wall. Jr. 268.

3. In any event, the damages were excessive. The libelant was only entitled to the actual damage caused by the collision, viz.: the cost of bringing the brig to port and repairing her.

The Catharine v. *Dickinson*, 17 How. 170.

Messrs. **B. D. Stillman** and **H. G. DeForest**, for appellees:

Conclusions on the facts and points of law.

The brig discharged her duty in all respects.

1st. A bright light was displayed when the steamer was first discovered.

2d. She kept her course close-hauled throughout.

3d. If her course was changed at all, it was just at the moment of collision, when the steamer had come so near as to discharge the brig from the consequences.

12 How. 443.

If any change of the brig's took place, it was in the right direction. It was justifiable to presume that the steamer would port her helm and pass to the right.

St. John v. *Paine*, 10 How. 585; *The Rose*, 2 W. Rob. 1.

The steamer did not discharge her duty.

The following rules apply to the present case:

"A vessel that has the wind free, etc., must get out of the way." "When vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere on her course, while that on the larboard tack should bear up or keep away before the wind." "The vessel on the larboard tack must give way, and the vessel on the starboard tack must hold on."

10 How. 581.

When a steamer meets a sailing vessel, the latter has the right to keep her course. It is the duty of the steamer to adopt such precautions as will avoid her.

10. How. 583.

And a steamer ought not, in wide water, to approach so near a sailing vessel as to create a hazard.

12 How. 461.

2. The steamer did not change her course quick enough. At the time the vessel struck, she had kept off no more than two points.

12 How. 461.

She had only one man at the wheel, which was an insufficient force with a ship of this size, and which may account in part for her tardy change of direction.

The Europa, 2 Eng. L. & Eq. 564.

3. The steamer was also in fault in not having sooner stopped her headway.

4. In attempting to cross the bow of the brig instead of keeping to the right by porting her helm, the steamer made herself responsible for all the consequences.

5. The steamer did not take proper precautionary measures to avoid the brig, and the decree of the court below should be affirmed.

St. John v. *Paine*, 10 How. 557, cases cited on page 581; *Newton* v. *Stebbins*, 10 How. 586; *The Traveler*, 2 Wm. Rob. 197; *The Genesee Chief*, 12 How. 461; *The James Watt*, 8 Jurist, 320; *The Rose*, 2 W. Rob. p. 1.

Mr. Justice **Clifford** delivered the opinion of the court:

This is an appeal in admiralty, from a decree of the circuit court of the United States for the southern district of New York, in a cause of collision, civil and maritime. It was commenced in the district court on the 24th day of September, 1851, by the appellee, in behalf of himself and the other owners of the brig Alfaretta. According to the case made in the libel, The Alfaretta sailed from Millbridge, in the state of Maine, on the 10th day of August, 1851, fully laden with lumber freight, and bound on a voyage to the port of New York. She was a tight, stanch, strong vessel of one hundred and sixty-three tons burden, and in every respect well manned, tackled, appareled, and appointed, with a competent master, and sufficient crew; and was totally wrecked by the collision which occurred on the 16th day of the same month, without any fault of her officers or crew, and while she was lawfully pursuing her voyage from the place of departure to her place of destination. At the time of the disaster she was fifteen or twenty miles off the southern shore of Long Island, sailing close-hauled on the wind, with her larboard tacks aboard, and all her sails set, and was heading about northwest by west. While sailing on that course, with a light wind from southwest by west, her master and crew discerned a light bearing from them about west half south, which they judged to be the light of a steamer; and the libelant, who was the master of The Alfaretta, immediately 375*] caused a light to be hoisted in *the forerigging of the brig. That vessel proved to be the steamship Pacific, and it is alleged that she had such a large number of lights that the libelant was not able to determine what direction she was steering, and kept his vessel on her course, without any deviation, until the collision took place. It occurred between eight and ten o'clock in the evening, as alleged in the libel, and about fifteen minutes after the light was placed in the forerigging of the brig, when the steamer, with great force and violence, ran into and struck the brig on her larboard bow, cutting her down to the water's edge, and carrying away her foremast, so that she filled in a few minutes and became a complete wreck.

On the 14th day of October following, the claimants of the steamer filed their answer to the allegations of the libel. Among other things not necessary to be noticed, they deny that the steamer had such a large number of lights at the time referred to, that the libelant was not able to determine what direction she was steering; and they also deny that the brig kept her course, without any deviation, until the collision occurred; or that the steamer ran into and struck the brig in the manner above stated. Their theory is, and they accordingly allege, that the steamer started from New York on the day of the collision, on her intended voyage to Liverpool, well manned and equipped for the voyage, and in every respect seaworthy; and that the lookout of the steamer, who was stationed at the forecastle, while she was proceeding on the voyage, between seven and eight o'clock in the evening, the weather being cloudy and the night dark, the wind southwest by south, and the steamer steering east half south, with her usual lights displayed, discovered the light of a vessel about two and a half points on the starboard bow of the steamer. Whereupon the helm of the steamer was immediately put to the starboard, and she at once swung off to east-northeast, and at or about the same time her engines were stopped. That vessel so discovered was the brig Alfaretta. She was close hauled on the wind at the time, and was steering to the westward, as the respondents allege, in a course nearly parallel to that of the steamer; but, instead of keeping her course, as she should have done, *she suddenly and un- [*376 expectedly put her helm to port, and kept off, and came with her bows on to the steamer, striking her a little forward of her starboard wheel, which passed over the bows of the brig, cutting her down and damaging the steamer to the amount of $2,000. And they explicitly allege, that if the brig had kept her course, and had not put her helm to port, the collision would have been avoided. This statement, derived from the pleadings, exhibits very fully the real nature of the controversy between the parties, and the grounds assumed on the one side and the other in the prosecution and defense of the suit. Testimony was taken on both sides, in the district court, and, after hearing, a decree was entered that the libel be dismissed, each party paying their own costs, and the libelant appealed to the circuit court. Both parties appeared by counsel in the circuit court, and, after a full hearing, it was ordered and adjudged that the decree of the district court dismissing the libel be in all things reversed, and that the libelant recover the damages sustained by reason of the collision, together with costs in both courts, and that the cause be referred to a commissioner to ascertain and report the damages. Additional testimony was taken before the commissioner, who reported

that the sum of $7,107.19 was due to the libelants, to which report the respondents excepted; and, after the hearing upon the exceptions, the report was confirmed by the court, and a decree entered that the libelant recover the sum reported with costs. Whereupon a final decree was entered, in pursuance of the report, and the respondents appealed to this court. Many of the facts and circumstances attending the disaster, as well as those which preceded it, are so fully proved that they cannot properly be regarded as the subject of dispute. As alleged in the libel, the collision took place in the open sea, on the 16th day of August, 1851, some fifteen or twenty miles off the southern shore of Long Island. It occurred a little past eight o'clock in the evening, after the officers in charge of the respective vessels had been fully apprised of the approaching danger, and under circumstances which make it manifest that it 377*] ought to have *been prevented. Both vessels had proper lights at the time, and competent and sufficient lookouts; and it is clearly proved that the duties of the lookouts were vigilantly and promptly performed. Lights had not been set on the brig when her lookout first discerned the light of the steamer from the forward part of the vessel. One had been prepared, however, and lighted by the steward, and was in the galley forward of the house on the deck, ready for that purpose. On seeing the light of the steamer, the lookout of the brig at once reported the fact to the master, who was then walking the deck, and he immediately caused the light, which was burning brightly, to be hoisted in the forerigging of the brig, and it was kept there, in full view of the approaching steamer, until the vessels came together. Coffin, who hoisted the light, and was the lookout on the brig, testifies that he tied the light just under the foreyard, and remained standing in the rigging, watching the light of the steamer as she approached, until she was so near that he had just time to descend to the deck and take a few steps aft when the vessels struck. He says it was about fifteen minutes after he reported the light of the steamer to the master of the brig that the collision occurred; and, in this particular, he is strongly confirmed by the mate of the steamer, who admits that the brig was about three miles distant when her light was reported to him, as the officer of the deck, by the lookout on the starboard bow of the steamer. At the time the light of the steamer was first seen by the lookout, the brig was sailing on a course of northwest by west, close-hauled on the wind, with her larboard tacks aboard, and all her sails set. She was converging towards the track of the steamer, and was going through the water only three or four miles an hour, the wind being light, and blowing from the southwest by west.

Several witnesses describe the character of the night as overcast, and some speak of it as cloudy, with intervening stars; but all agree that it was not unusually dark. They all concur in saying that the surface of the sea was smooth, and there was no haze or mist on the water: and the mate of the steamer testifies that objects could be seen without lights at the distance of three miles.

378*] *When the steamer discovered the brig, she had all her signal lights displayed, and was on a course of east half south, and was moving through the water at the rate of twelve or thirteen miles an hour, using all her sails as well as her engines. Her mate and lookout first saw the light of the brig, and they testify that the bearing of the light was some two and a half points off the starboard bow of the steamer. Their statements, however, do not entirely agree with the testimony of the master. He was in his room at the time, calculating the position of the steamer, and did not hear the light of the brig reported. While there, he heard the mate call out, "hard a-starboard," and instantly went up on to the paddle-box of the steamer.

His account of the bearing of the brig is not entirely clear, as given in the record, or very satisfactory. At first, he says he saw the brig two and a half to three points off the starboard bow of the steamer, but finally fixes it at two points; and adds, to the effect that she was not over one third of a mile distant. He admits, however, that the steamer was then swinging off rapidly towards Long Island shore; and of course, if the bearing was only two points when the master reached the paddle-box, it must have been much less than two and a half points at the time the light was first discovered, as the vessels were then three miles apart, and the order of the mate, to starboard the helm, had not then been given; and of course the steamer did not commence to swing off to port till after that order was given and executed.

According to the testimony of the mate, his first order, after seeing the light of the brig, was to starboard the helm, and then, he says, the vessel began to swing off; and it was not until after he left the position he then occupied, and went on to the paddle-box, that he gave the order, hard a-starboard. After that order was given, and the usual response received from the wheelsman, then he says, the master came by his side, and repeated the order, adding that "the vessel will be into us—stop her;" and the mate says that the steamer had then swung off about three points; and yet the master says that the bearing of the light of the brig was still two points off the starboard bow of the steamer.

*Statements so conflicting and uncer- [*379 tain do not furnish any definite elements which can safely be made the basis of a reliable mathematical calculation as to the precise bearing of the brig when her light was first seen, and are not entitled to much consideration in determining the question how the collision was produced.

Some uncertainty also exists as to the precise bearing of the steamer when her light was first discovered from the brig. It is stated in the libel as about west half south, and the testimony of the witnesses is equally indefinite. One witness estimates it at about three points off the larboard bow of the brig; another says it was about two points in the same direction; and a third witness says it was about west. Such indefinite statements cannot afford much aid in determining the principal question involved in this controversy.

Whatever may have been the precise position of the vessels with respect to each other at the

time the light of the steamer was first discovered by the lookout of the brig, it is certain that the course of the brig was converging towards the track of the steamer, and that they came together in the course of fifteen minutes after the light was reported to the master; and the brig was run down and lost. It was the starboard bow of the steamer which came in contact with the larboard bow of the brig, forward of the fore swifter, and slewed her round, carrying away her bowsprit, foremast, and main topmast, and cutting her down to the water's edge; and such was the headway of the steamer at the time, that she swept on for a considerable distance, without any apparent abatement of her speed, notwithstanding her engines were stopped and reversed just before the collision took place.

All the circumstances tend to show that the disaster might have been prevented, and that there was fault somewhere, for which the offending party ought to be held responsible. Both parties appear to have so understood the matter when they made up their pleadings, as well as in the subsequent conduct of the cause.

It is alleged in the libel that the brig kept her course after the light of the steamer was 380*] seen, without any deviation, until *the collision occurred. On the part of the respondents, that allegation in the libel is denied; and they allege that the brig, when her light was first seen, was steering to the westward, close-hauled on the wind, and in a course nearly parallel to the steamer; but instead of keeping her course, as she should have done, that she suddenly and unexpectedly put her helm up, kept off, and came with her bows on to the steamer.

Such is the issue, as made up by the parties in the pleadings, and it presents the principal question of fact to be determined by the court.

Our views upon the point cannot be stated in a manner which would be satisfactory to those interested, without some brief reference to the evidence on which they are based.

When the disaster occurred to the brig, her whole company, consisting of seven men, including the master and mate, were on the deck of the vessel, and witnessed the events. Four were examined as witnesses; and the mate testifies that it was the watch of the master, who, being the libelant and one of the owners of the vessel, was not examined. His watch commenced at eight o'clock in the evening, when the preceding watch closed. From six to eight o'clock the mate had charge of the deck, and he says that the course of the brig at sunset was northwest by west; that she was sailing close-hauled on the wind, and continued on the same course until eight o'clock, when he went below. He remained below until he heard a light reported, when he immediately went on deck, and at first saw only one light, but, as the vessel approached nearer, he saw more, and supposed it was a steamer; and he testifies positively that the brig did not change her course, after he went on deck, until the steamer struck her. On his return to the deck, he did not look at the compass, but says the brig was on the wind, with her larboard tacks aboard, and, in his judgment, was going the same course as when he went below.

Three of the seamen were also examined, and their testimony is equally full and explicit, and to the same effect. One of them was the lookout, who first discovered the light of the steamer, and reported it to the master; and the other two, on hearing his report, immediately went on deck, and remained *through- [*381 out, watching the light as it approached, and with every opportunity to see and observe whatever transpired on the deck of the vessel. Some one or more of them testifies that the master twice gave the order "to keep her full and by," as the steamer advanced, and they all concur that the brig did not change her course, and that no danger was apprehended until just before the collision took place. All must admit that they had ample means of knowledge upon the subject of their testimony; and if their statements are incorrect, they must have willfully perverted the truth, which is not to be presumed. Several witnesses, however, examined on the part of the respondents, testify that the brig did change her course before the vessels came together; and among the number is the mate of the steamer, who beyond doubt describes the events truly, as they appeared to him at the time of the occurrence.

His testimony, as it is exhibited in the record, furnishes conclusive evidence that the two vessels were very close together, if not in actual contact, when the supposed change of course was made, and presents some ground of inference that the jib-boom of the steamer, or the rigging connected with the bowsprit, as they swept over the stem of the brig, or pressed against her forerigging, may have produced the state of things which induced him to think that the brig had ported her helm. At first he said the change was made just before the collision, then immediately before it; but, upon further interrogation, he said it was before the jib-boom of the brig had touched the steamer, and finally added that the brig might have been twice the length of the ship off. All of his statements, however, are based upon the theory that the brig ran into the steamer, when it is satisfactorily shown that the real state of the case was the reverse. It was the bow of the steamer, near the catheads, which struck the jib-boom of the brig, and carried it away; and the evidence furnishes strong reasons to conclude that the brig had been partly slewed round just before that occurred. Be that as it may, it is certain from the evidence that the brig kept her course until just before the collision took place. When the mate of the steamer first saw her light, he says it was about three miles distant, and he admits that her direction then was *north of west, and that he [*382 did not notice any change of her course, except the one already mentioned, when the vessels were close together. When the master went up on to the paddle-box of the steamer, and repeated the order previously given by the mate to put the helm hard a-starboard, he says the brig was then sailing close-hauled on the wind, and that the two vessels were not more than a third of a mile apart. His account of the change of course is, that it was made after that order was given, and he says the brig instantly turned directly across the bows of the steamer, and came right into her, thus showing con-

clusively that the alleged change, however produced, was made at the moment of collision. These references to the testimony of the witnesses must suffice, and they are believed to be amply sufficient to show what the state of the evidence is, as it is exhibited in the record. One remark is applicable to all of the witnesses introduced by the respondents; and that is, they had not the same means of knowledge respecting the matter in dispute as the witnesses for the libelant possessed, who had charge of the brig, and governed her course; and in weighing the evidence, and determining its force and effect, that important consideration cannot be overlooked. It must be admitted that the witnesses on the part of the libelant speak from actual knowledge, and unless they have willfully stated what they know to be false, their statements must be correct. They were on the deck of the vessel, interested, so far as their personal safety was concerned, to observe everything that transpired as the steamer approached, and they cannot well be mistaken in respect to the matter under consideration.

Those on board the steamer appear in the record under very different circumstances. They only infer what they have affirmed as to what transpired on the deck of the brig, and at best their statements respecting the matters in question are of the nature of opinions, and it is not difficult to see that they may be in error. In the excitement and confusion of the moment, they may have mistaken what was occasioned by the momentum of the steamer or the pressure of her bowsprit or jib-boom upon the stem or forerigging of the brig, for a change of 383*] course *produced by an alteration of her helm. All the testimony tends to show that the two vessels came together at an obtuse angle, and there is much reason to think that the brig had been pressed out of her course before the bows of the vessels came together. At all events, such an inference from the evidence is far more reasonable than would be the conclusion that all the witnesses for the libelants have willfully perverted the truth. Other grounds of reconciling the testimony consistent with the integrity of all the witnesses might be suggested, but we think it unnecessary, as the evidence clearly shows that the brig kept her course, without any change whatever, until the peril was impending and the collision inevitable.

An error committed by those in charge of a vessel under such circumstances, if the vessel was otherwise without fault, would not impair her right to recover for the injuries occasioned by the collision, for the plain reason that those who produced the peril and put the vessel in that situation would be chargeable with the error, and must answer for the consequences.

Our conclusion, however, on this branch of the case, is, that the respondents have failed to support the allegation of the answer, that the brig changed her course after the light of the steamer was discovered, and that the evidence satisfactorily shows that she did not change her course in any sense which can be regarded as a fault. Sailing vessels, when approaching a steamer, are required to keep their course; and steamers, under such circumstances, as a general rule, are required to keep out of the way. Many considerations concur to show that all those engaged in navigating vessels upon the seas are bound to observe the nautical rules recognized and approved by the courts, in the management of their vessels, on approaching a point where there is danger of collision. Those rules were framed and are administered to prevent such disasters and to afford security to life and property exposed to such dangers; and public policy, as well as the best interest of all concerned, requires that they should be constantly and rigidly enforced in all cases to which they apply. Few cases can be imagined where it is more needful that they should be observed than when a steamer and a sailing vessel are approaching each other from opposite *directions, or on intersecting lines, [*384 for the obvious reason that the negligence of the one is liable to baffle the vigilance of the other; and if one of the vessels under such circumstances follows the rule, and the other omits to do so, or violates it, a collision is almost certain to follow.

Rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description, while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision. Sailing vessels approaching a steamer are required to keep their course on account of the correlative duty which is devolved upon the steamer to keep out of the way, in order that the steamer may know the position of the object to be avoided, and may not be led into error in her endeavor to comply with the requirement.

Under the rule that a steamer must keep out of the way, she must of necessity determine for herself and upon her own responsibility, independently of the sailing vessel, whether it is safer to go to the right or left, or to stop; and in order that she may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required in the admiralty jurisprudence of the United States that the sailing vessel shall keep her course, and allow the steamer to pass either on the right or left, or to adopt such measures of precaution as she may deem best suited to enable her to perform her duty and fulfill the requirement of the law to keep out of the way.

Repeated decisions of this court have affirmed the doctrine here laid down, and carried it out to its logical conclusion, and in so many instances that the question cannot any longer be regarded as open to dispute. Accordingly, it was held in the case of *The Steamer Oregon* v. *Rocca et al.* 18 How. 570, that *when a [*385 steamer approaches a sailing vessel, the steamer is required to exercise the necessary precautions to avoid a collision; and if this be not done, prima facie the steamer is chargeable with fault. That decision was founded upon

the rule previously established in *St. John* v. *Paine et al.* 10 How. 583, where the whole subject is elaborately considered, and the reasons of the rule fully explained. Similar views are also maintained in the case of *The Genesee Chief*, 12 How. 461, and in various other cases to the present time. Exceptional cases may be imagined in a crowded thoroughfare, where the rule would not be applicable, but those will be considered when they arise. Such precautions as are inculcated in the rule referred to are enjoined, as before remarked, to prevent collision and afford security to life and property; and in a case where the rule could not be followed without defeating the end for which it was established, or without producing the mischief which it was the design of the rule to avert, of course it would not be applicable, and in such a case a departure from it would be both justifiable and commendable. Extreme cases, such as are supposed, will rarely if ever occur, and in referring to them it must not be understood that the rule will be relaxed to any extent whatever in other cases to which it properly applies.

Applying these principles to the case under consideration, it is obvious what the result must be. It is not denied that the collision took place, and that the brig was run down and lost; and such being the fact, and the evidence exhibited failing to satisfy the court that the brig was in fault, or the disaster inevitable, it necessarily follows that the collision was the result of fault on the part of the steamer, and that the steamer is answerable to the libelant for the damage.

Our attention was also drawn, at the argument, to the amount of the damage as reported by the commissioner, and it was insisted that it is excessive. On that point it will be sufficient to say, that after a careful examination of the testimony before him, we see no ground to doubt that his duty was rightly performed.

The decree of the Circuit Court, therefore, is affirmed with costs.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* ASA CUTLER, John Underhill, Jr., and Arza Underhill, *Plffs. in Err.*,

v.

EDGAR C. DIBBLE, County Judge, etc.

(See S. C. 21 How. 366-371.)

New York act, for summary removal of persons from Indian lands, is not in conflict with act of Congress or treaty or Constitution of United States.

The New York statute respecting intrusions on Indian lands, which authorizes the summary removal of persons, other than Indians, who settle or reside upon lands belonging to or occupied by any nation or tribe of Indians, is not contrary to the Constitution of the United States, nor any act of Congress.

Unless such persons have, by the treaty of May 20, 1842, between the United States and the Seneca Indians, a right of entry into these lands, they can not allege that such summary removal by authority of the statutes of New York is in conflict with the treaty, or any rights secured to the purchasers under it.

This statute and the proceedings under it are not in conflict with the treaty in question, nor with any act of Congress, nor with the Constitution of the United States.

Argued Feb. 4, 1859. Decided Feb. 21, 1859.

IN ERROR to the Supreme Court of the State of New York.

The proceedings in this case were instituted before Edgar C. Dibble, county judge of Genesee county, by the district attorney, against the relators, under a statute of New York, passed March 31, 1821. The court decided against the relators, who thereupon removed the proceeding, by certiorari, to the supreme court, where said decision was affirmed. They then removed the cause to the court of appeals, where it was again affirmed, and the record remitted to the supreme court for execution of the judgment; whereupon the relators removed the cause, by writ of error, to this court, under the 25th section of the judiciary act.

A further statement of the case appears in the opinion of the court.

Messrs. **R. H. Gillet** and **Joshua L. Brown**, for the plaintiffs in error:

The law of New York of the 31st March, 1821, under which these proceedings were instituted, is repugnant to the Constitution and laws of the United States, and therefore null and void.

Act of March 30, 1802 (2 U. S. L. 139); Treaty of 1794 (7 U. S. L. 45, art. 2).

The scope and object of the act of New York in question, and the two above acts, are precisely the same. Congress had made provision for the exact case, and while that law remained in force, New York legislated upon the same identical subject. Both laws cannot stand. Two separate governments cannot have jurisdiction and control of the same subject at the same time. One law must yield to the other, and the Constitution of the United States, art. 6, determines which. The New York act of 1821, however, may be fairly presumed to have been intended to apply exclusively to certain other reservations, over which it was right and proper for the state to legislate. The reservations held by the Senecas, however, were within the Indian intercourse law of 1802, and the treaty of 1794. The question, whether a law like the one under consideration is valid, is well settled.

Golden v. *Prince*, 3 Wash. C. C. 314; *Sturges* v. *Crowninshield*, 4 Wheat. 122; *City of New York* v. *Miln*, 11 Pet. 102; *Fox* v. *Ohio*, 5 How. 410; *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Holmes* v. *Jennison*, 14 Pet. 540, 574; *North River Steamboat Company* v. *Livingston*, 3 Cow. 714; *The Passenger Cases*, 7 How. 283; *Worcester* v. *Georgia*, 6 Pet. 515.

The decision in this case rests mainly upon the Indian intercourse act of 1802, and it declares that a state law which interferes therewith is null and void.

2. If the act of 1821 was not invalid at the time of its enactment, it was superseded and annulled by the treaties of 1838 and 1842, so

NOTE.—*Jurisdiction of United States Supreme Court, where Federal question arises, or where is drawn in question statute, treaty, or Constitution of United States*—see note to Matthews v. Zane, 2 L. ed. U. S. 654; note to Martin v. Hunter, 4 L. ed. U. S. 97; and note to Williams v. Norris, 6 L. ed. U. S. 571.

far as it interferes with the right of Ogden and Fellows to enjoy the advantages secured to them under those treaties.

Fisher v. *Harnden*, 1 Paine's C. C. 55; *U. S.* v. *The Peggy*, 1 Cranch, 103; *Ware* v. *Hylton*, 3 Dall. 199; *Jackson* v. *Munson*, 3 Cai. 137; *The Bello Corrunes*, 6 Wheat, 152; *Gordon* v. *Kerr*, 1 Wash. C. C. 322; *Foster* v. *Neilson*, 2 Pet. 253; *Martin* v. *Hunter*, 1 Wheat. 304; *Carver* v. *Jackson*, 4 Pet. 1, 100; *Owings* v. *Norwood*, 5 Cranch, 344.

These cases fully settle the principle assumed on this point, that the subsequent treaty by the Federal government supersedes all repugnant state legislation upon the same subject. Under the treaty, these reservations ceased to be Indian lands, and those acquiring title to them under the treaty acquired the right of possession, which could not be controlled by any enactment of the state legislature. Consequently, when Dibble decided to expel the purchasers, or those holding under them, he acted without legal authority, and his decision must be reversed.

3. Under the treaties of 1838 and 1842, the legal title to the premises occupied by Cutler and the Underhills became vested in Ogden and Fellows, under whom they held, and they were authorized to continue in possession until ousted by a claimant showing a better title.

Messrs. **J. H. Martindale** and **Wakeman & Bryan**, for the defendant in error:

The statute in question (Session Laws of New York, 21, p. 183) is in the nature of a police regulation, to preserve the public peace and property. Clearly it is for the legislature of New York, when it does not exceed the prescribed limits of the Constitution of that state, or of the United States, to determine for itself the mode of entering upon and asserting title, however derived, to the lands within the jurisdiction and sovereignty of the state. It is not denied that the treaties in question are as authoritative as a law of Congress; but it is insisted that the rights of property vested in the Tonawandas by the laws of New York and the ancient treaties between them and the United States can no more be taken away from them by a law of Congress or a public treaty, without their consent, than the rights of property of any citizen whomsoever; that is, neither they nor any citizen can be deprived of rights of property vested in them, without due process of law.

Art. 5, Amendment to Constitution; *Murray* v. *Wooden*, 17 Wend. 531; 2 Pet. 657; 4 Hill, 140; 19 Wend. 676, 677.

Counsel then examined the title of the Tonawandas and of the Seneca Indians to their lands, and said: And now the question arises, will not the law take notice of these facts, this altered condition of the Indian tribes?

Having produced this separation of Senecas into distinct bands occupying widely separated reservations; having encouraged the adoption by them of the ideas of individual personal rights in their improvements, and thus secured their civilization; having invited their submission to our laws by deliberate treaty; having guaranteed to them their lands until they should choose to sell them, and surrendered them to the care and protection of New York; can the general government enter that state and apply to them and their property the maxims which regulate the conduct of civilized conquerors towards savages? Do these New York Indians hold their separate reservations and property by the sufferance and mercy of their conquerors, or are they under the protection of the Constitution and laws of the country?

The deed and treaty of May 20, 1842, are without effect, because they were procured without the consent and authority of the legislature of the state of New York.

Goodell v. *Jackson*, 20 Johns. 725.

The treaty of 1794 between the United States and the Six Nations conferred unlimited authority on the Senecas to sell their lands when they should choose to, the people of the United States having the right to purchase them. But what construction may be given to the treaty, or howsoever conclusive it may be deemed to be on the Tonawandas, the conditions precedent contained in it have not been complied with.

Blacksmith v. *Fellows*, 7 N. Y. 401.

Mr. Justice **Grier** delivered the opinion of the court:

This case is brought before us by a writ of error to the supreme court of New York, under the 25th section of the judiciary act. It had its origin in a proceeding before the county judge of Genesee county, instituted by the district attorney against Asa Cutler, John Underhill, and Arza Underhill, the relators, pursuant to the provisions of an act of assembly entitled "An Act Respecting Intrusion on Indian Lands," passed March 31, 1821.

This act made it unlawful for any persons other than Indians to settle and reside upon lands belonging to or occupied by any tribe of Indians, and declared void all contracts made by any Indians, whereby any other Indians should be permitted to reside on such lands; and if any persons should settle or reside on any such lands contrary to the act, it was made the duty of any judge of any county court where such lands were situated, on complaint made to him, and due proof of such residence or settlement, to issue his warrant, directed to the sheriff, commanding him to remove such persons.

*On notice to the relators of the insti- [*369
tution of this proceeding, they appeared before the judge and pleaded to his jurisdiction, on the ground that they had entered and occupied the lands, claiming title under a written instrument adversely to the Seneca Nation of Indians, and therefore, by the Constitution and laws of the state, they were entitled to a trial by jury, according to the course of the common law, and could not thus be removed by summary proceeding under this act.

This plea was overruled by the judge. The relators then pleaded that this tract of 12,800 acres, called the Tonawanda reservation, was not owned by the Seneca Indians; that by a treaty made with the United States on the 20th of May, 1842, the Seneca nation of Indians had, by indenture set forth in the treaty, conveyed to Thomas Ludlow Ogden and Joseph Fellows this tract of land, with others; that this grant was duly confirmed by the state of Massachusetts, pursuant to the provisions of the act of

cession made between that state and the state of New York, on the 16th of December, 1786; that the whole amount of the consideration stipulated by the treaty and deed had been paid by said Ogden and Fellows; and that relators were in possession under said Ogden and Fellows, and adversely to the Indians. They therefore denied the power and authority of the judge to determine their right to the lands in their possession, or to remove them, under the powers conferred by the act of assembly of New York.

After hearing the parties, the judge decided against the relators, who removed the proceedings by certiorari to the supreme court.

The record contains the testimony on both sides, and numerous documents concerning the treaty with the Seneca Indians, and also the subsequent proceedings by the officers of the government. It will not be necessary to a clear apprehension of our decision in this case to state them particularly, nor is it material to our inquiry whether the judge may have erred in his decision, that "the Seneca nation had not duly granted and conveyed the reserve in question to Ogden and Fellows."

The supreme court and the court of appeals of New York have decided "that the provisions 370*] of this act respecting intrusions *on Indian lands, which authorize the summary removal of persons, other than Indians, who settle or reside upon lands belonging to or occupied by any nation or tribe of Indians, are constitutional, and that a citizen who enters upon their land before their title has been extinguished, and they have removed, or have been removed by the act of the government, can acquire no such right of property or possession as is within the protection of the provisions of the Constitution which secure a trial by jury." They, therefore, affirmed the judgment of the county judge.

The only question which this court can be called on to decide is, whether this law is in conflict with the Constitution of the United States, or any treaty or act of Congress, and whether this proceeding under it has deprived the relators of property or rights secured to them by any treaty or act of Congress.

The statute in question is a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace. It is the dictate of a prudent and just policy. Notwithstanding the peculiar relation which these Indian Nations hold to the government of the United States, the state of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered. The act is, therefore, not contrary to the Constitution of the United States.

Nor is this statute in conflict with any act of Congress, as no law of Congress can be found which authorizes white men to intrude on the possessions of Indians.

Is it in conflict with rights acquired by Ogden and Fellows, under the treaty and contract making a part of it? If the treaty of 1842 had been executed; if the United States, in their character of sovereign guardian of this nation, had delivered up the possession to these purchasers, then this statute of New York, when applied to them, would clearly be in conflict with their rights acquired under the treaty. But, by the case, it is admitted that the Indians have not been removed by the *United States. The Tonawanda band [*371 is in peaceable possession of its reserve, and has hitherto refused to surrender it. Unless, therefore, these persons claiming under Ogden and Fellows have, by the treaty, a right of entry into these lands, and, as a consequence, to forcibly oust the possessors or turn them out by action of ejectment, they cannot allege that this summary removal by authority of the statute of New York is in conflict with the treaty, or any rights secured to the purchasers under it. This proceeding does not affect their title. The question of the validity of this treaty to bind the Tonawanda band is one to be decided, not by the courts, but by the political power which acted for and with the Indians. So far as the statute of New York is concerned, it only requires that the Indians be in possession; they are not bound to show that they are owners. They may invoke the aid of the statute against all white intruders, so long as they remain in the peaceable possession of their lands.

The relators cannot claim the protection of the treaty, unless they have a right of entry given them by it, before the Indians are removed by the government. This court has decided, in the case of *Fellows* v. *Blacksmith*, 19 How. 366, that this treaty has made no provision as to the mode or manner in which the removal of the Indians or the surrender of their reservations was to take place; that it can be carried into execution only by the authority or power of the government which was a party to it. The Indians are to be removed to their new homes by their guardians, the United States, and cannot be expelled by irregular force or violence of the individuals who claim to have purchased their lands, nor even by the intervention of the courts of justice. Until such removal and surrender of possession by the intervention of the government of the United States, the Indians and their possessions are protected, by the laws of New York, from the intrusion of their white neighbors.

We are of opinion, therefore, that this statute and the proceeding in this case are not in conflict with the treaty in question, or with any act of Congress, or with the Constitution of the United States.

The judgment of the Court of Appeals of New York is, therefore, affirmed with costs.

DANIEL POORMAN *et al., Plffs. in Err.,*

v.

WM. A. WOODWARD and Wm. C. Dusenberry, late Partners under the Firm of Woodward & Dusenberry.

(See S. C. 21 How. 266-275.)

Check, when money.

A check on a bank, payable at sight, to order, and indorsed in blank, and which an agent, to raise money on negotiable paper, took as money, and

which was presently paid to a bona fide holder by the cashier of the bank, is money.

The note or bill purchased by such check was sold for money; title passed to the purchaser, and the principal was bound by the contract of the agent.

Argued Feb. 7, 1859. Decided Feb. 21, 1859.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was an action of assumpsit brought in the court below, by the defendants in error, on a certain promissory note.

The trial below resulted in a verdict and judgment in favor of the plaintiffs for $4,473.76, with costs; whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **Henry Stanbery,** for plaintiffs in error:

We claim that the court erred. A certificate of deposit is in no sense cash or money; it is simply an acknowledgment of a debt, with a promise of payment. The transaction between Hood and Woodward & Dusenberry was simply the exchange of one form of negotiable security for another.

This was clearly a breach of trust, and a perversion of the authority to use the note for the loan of money.

We refer to the following cases:

Thorold v. *Smith,* 11 Mod. 71, 87; *Bartlett* v. *Pentland,* 10 B. & C. 758; *Atkins* v. *Owen,* 4 Ad. & E. 819; *Nightingale* v. *Devison,* 5 Burr. 2589.

Messrs. **N. H. Swayne** and **F. F. Marbury,** for defendants in error:

It will not do to narrow the question to the simple proposition stated in Mr. Stanbery's brief, *viz.*, whether the certificate is money. It is not necessary to affirm this, to show the transaction binding on all the parties, and the remedy within the count for money had and received. Hood, having authority to borrow money on this note, had authority to receive anything which, in the usual course of business, is treated as such, and will command it. If he got the money or its equivalent, the object of himself and his principals was attained, and it does not lie in their mouths, after having acquiesced in what was done, and realized the money on the certificate, to dispute their liability, because the money, in form, was not given to Hood at the precise time that he parted with the note.

The transaction was just the same, in legal contemplation and in substance, as if he had received the $6,000 in specie, or bank bills, or the check of Woodward & Dusenberry, and then deposited the amount with them, and taken their certificate of such deposit.

The certificate was of the deposit of so much money, and in fact it yielded in money, on presentation, the full sum of $6,000 expressed on its face.

The makers of the note lived in Ohio, where they wanted to use their funds, and for their convenience and accommodation, this negotiable certificate of deposit of cash, answering their purpose as cash, was granted.

The class of cases relied on by the plaintiff in error, such as *Bartlett* v. *Pentland,* 10 B. & C. 758; *Atkins* v. *Owen,* 4 Ad. & E. 819, merely hold that a naked agent authorized to receive payment, cannot do so by discharging a debt due from himself to the party to whom the payment should be made. See observations upon those cases, Dunlap's Paley, Agency, 284.

As to the first case cited by the learned counsel, can there be a doubt that, even in that age, if the servant or the master had in fact received the money on the goldsmith's note, the plaintiff in that case would have been estopped? So in the last case cited, if the defendant had converted the stock into money, is there any question that the action for money had and received would lie? The other two cases do not seem to be at all analogous.

The court had held in a more analogous case (*Tayloe* v. *Merchant's Fire Ins. Co.* 9 How. 402), that where the mode of payment is not prescribed, the agent may exercise a discretion.

The judgment should be affirmed, with costs.

In England, especially in the earlier cases, there was a strong disposition to limit the evidence under the money counts, to strict money transactions. Lord Holt strenuously resisted the then growing practice in trade, of treating banker's cash notes and promissory notes as negotiable, until they were made so by the statute of Anne. But the American authorities have liberalized the doctrine in this respect, to meet the expanded customs of commercial transactions, and have held those money securities which in the common course of business are treated as money, and even bills of exchange and promissory notes, proper evidence under the money counts. They have even gone farther, and sustained this action in cases where there was no negotiable money security received by the defendant, but where, in the nature of the transaction, he ought, in equity to respond for money received.

State Bank v. *Hurd,* 12 Mass. 172; *Ramsdell* v. *Soule,* 12 Pick. 126; *Cole* v. *Cushing,* 12 Pick. 48; *Grant* v. *Vaughan,* 3 Burr. 1516; *Pierce* v. *Crafts,* 12 Johns. 90; *Olcott* v. *Rathbone,* 5 Wend. 490; *Weston* v. *Penniman,* 1 Mas. 306; *Tuttle* v. *Mayo,* 7 Johns. 132; *Floyd* v. *Day,* 3 Mass. 403; *Clark* v. *Pinney,* 6 Cow. 297; *Bank of Kentucky* v. *Wister,* 2 Pet. 325; *Randall* v. *Rich,* 11 Mass. 494; *Emerson* v. *Cutts,* 12 Mass. 78.

If two be jointly concerned in merchandise to be sold for profit, and one takes and appropriates it to his own use, he is liable to the other for his proportion of the net profits in this form of action.

Stiles v. *Campbell,* 11 Mass. 321.

Where an attorney, on a judgment in favor of his client, purchased lands under the execution and paid by discharging the judgment, this action will lie.

Beardsley v. *Root,* 11 Johns. 464.

Property paid or used as money, will support the action for money had and received the same as if money itself had been paid and received.

Ainslie v. *Wilson,* 7 Cow. 662.

In *Pickard* v. *Bankes,* 13 East, 20, a stakeholder who had received Bankers' cash notes, and had wrongfully paid them over to the losing party, was held liable to the winner in an action for money had and received; and this upon the ground, that though the notes were

not money, yet being received as such, and so treated, he should not say they were not only paper and not money.

See, also, *Owenson* v. *Morse*, 7 T. R. 64.

A certificate of deposit is like a check on a banker, of which it is said (Chit. Bills, 323), "in practice they are taken as cash, and it has been decided that a banker in London receiving bills from his correspondent in the country, to whom they had been indorsed to present for payment, is not guilty of negligence in giving up such bills to the acceptor, upon receiving a check on a banker for the amount, although it turn out that such check is dishonored."

Russell v. *Hankey*, 6 T. R. 12.

If the agency of a stranger, for receiving payment for his principal will thus authorize the receipt of such securities, as money, why may not an agent, having a common interest with his principals, do the same thing?

In construing the authority conferred on Hood by the plaintiffs in error, we must look to the circumstances of the parties, their place of residence, their relations to the subject of the agency and to each other, their common interest in the transaction; and if Hood did what it may reasonably be supposed the others would have done, had they been present, it cannot be said that he exceeded his authority. And especially if, after it was done, they acquiesced by their silence and availed themselves of the benefits of the transaction, they must be presumed to have authorized it. If Hood treated the certificate as money, so did they; and shall they now be permitted to say that they will not be bound by their agreement to receive it as money?

In passing upon the transactions of men, the law treats the subject-matter, according to the usual understanding and usages prevailing where the transaction took place. In this view the certificate of deposit is money. It is so treated and dealt with in the common business of life.

Mr. Justice **Catron** delivered the opinion of the court:

Hood and nine others, including the defendants, made a note of hand in Ohio, dated October 24, 1849, for $15,000, payable to Woodward & Dusenberry, thirty days after date, at their office in New York.

For himself, and as the agent of the other makers, Hood applied to the payees, Woodward & Dusenberry, for an advance of money on the note, for the benefit of all the makers jointly. Woodward & Dusenberry agreed with Hood to advance, on a pledge of the note, as security, $6,000; and Hood requested them to give him their certificate of deposit for that sum, to the credit of John Ritchey, cashier, which was done; and Ritchey, as payee, indorsed the paper to Hood. It was subsequently presented for payment by bona fide holders, 274*] and *Woodward & Dusenberry paid the full amount thereof in cash.

At the time the certificate of deposit was given and indorsed by Ritchey, and the fifteen-thousand-dollar note delivered to Woodward & Dusenberry, they agreed with Hood that if he should return to them the certificate of deposit they would then surrender to him the note. The money advanced not having been refunded, except in part, this suit was brought in assumpsit to recover the balance.

In their answer to a bill of discovery, Woodward & Dusenberry admit they were advised by Hood that the $15,000 note "had been executed by himself and his friends, the other signers thereof, for the purpose of borrowing money thereon for the joint benefit of all of them;" also, "that at the time said note was delivered to the said Woodward & Dusenberry, they issued and delivered to said Hood, for the joint use and benefit of all the parties signing said note, as the respondent understood it, the certificate of deposit of said Woodward & Dusenberry for the sum of $6,000, by request of said Hood, made payable to the order of John Ritchey, Esq., cashier, at the office of said Woodward & Dusenberry in New York city, on the return of said certificate, and which said certificate was received by said Hood on behalf of himself and his associates as so much cash."

Upon this and other evidence in the case, the counsel for the defendants (now the plaintiffs in error) asked the court to instruct the jury, that if they should find, from the evidence, that Hood was only authorized to use the note to borrow money thereon for the joint benefit of himself and the other makers thereof, and that at the time the plaintiffs, Woodward & Dusenberry, received the same from Hood, and delivered to him the certificate of deposit, they had notice that Hood so held the note for the said purpose, then the plaintiffs were not entitled to recover of the defendants; which instruction the court refused to give, but did instruct the jury that the certificate of deposit so delivered to Hood was, in effect, money and came within the authority to borrow money. Exceptions *were taken to the refusal to give [*275 the charge asked for, and to the charge as given.

They claimed that the court erred, insisting that a certificate of deposit is, in no sense, cash or money; it is simply an acknowledgment of a debt, with a promise of payment; that the transaction between Hood and Woodward & Dusenberry was simply the exchange of one form of negotiable security for another; and that this was clearly a breach of trust, and a perversion of the authority to use the note for the loan of money. And they refer to the following authorities in support of this position: *Thorold* v. *Smith*, 11 Mod. 71, 87; *Bartlett* v. *Pentland*, 10 Barn. & C. 760; *Atkins* v. *Owen*, 4 Ad. & El. 819; *Nightingale* v. *Devisone*, 5 Burr. 2589. Here Woodward & Dusenberry had $6,000 in bank, or a broker's office, and the cashier gave a certificate to that effect, and promised to pay the money to the holder of the certificate who should present it. Hood could have taken out the money the next hour.

A certificate of this kind was a means of advance, that in all probability suited these borrowers, who resided in Ohio, quite as well as the gold or silver would have done. It was to the same effect as if Hood had received the money, and deposited the specie, subject to his own check on the cashier of the bank. This certificate was actually paid in cash to the agent of the parties to the note, for such the bona fide holder was.

To maintain, as we are asked in effect to do, that a check on a bank, payable at sight, to

order, and indorsed in blank, and which an agent, to raise money on negotiable paper, took as money, and which check was presently paid to a bona fide holder by the cashier of the bank, was not money; that the note or bill purchased was not sold for money; that no title passed to the purchaser; and that the principal was not bound by the contract of the agent, would be a startling doctrine in the marts of commerce of this country, where money is usually transferred by bank checks, and may be fairly presumed to change hands on the check being given.

We order that the judgment be affirmed.

JAMES D. PORTER *et al., Plffs. in Err.,*
v.
BUSHROD W. FOLEY.

(See S. C. 21 How. 393, 394.)

Writ of error returnable third Monday of January, is void — cannot be amended — transcript withdrawn.

A writ of error returnable on the third Monday in January cannot be supported, and does not bring the case before the court.

In such case as the court cannot exercise a power of amendment, they can do nothing more than dismiss for want of jurisdiction.

But the plaintiff may withdraw the transcript, and use it in connection with the proper process to bring the case here.

Motion filed Feb. 18, 1859. Decided Feb. 21, 1859.

IN ERROR to the Court of Appeals of the State of Kentucky.

On motion, by the plaintiff in error, to remand, with leave to amend the writ of error.

The case is stated by the court.

Mr. **T. Ewing** for plaintiff in error.

No counsel appeared for defendant in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The writ of error in this case was issued on the 27th day of December last, and made returnable on the third Monday in January, and the defendant in error cited to appear on that day.

It has already been decided at the present term, in the case of *Insurance Co. of the Valley of Virginia* v. *Mordecai*, that such writ of error cannot be supported, and does not bring the case before the court.

A motion has been made, on behalf of the plaintiff in error, to remand the case to the court below, with leave to amend the writ of error and citation. But, as the transcript stands, there is no case before us in which we can exercise a power of amendment. We can do nothing more than dismiss it for want of jurisdiction.

But if the plaintiff desires it, he may, in order to save expense, withdraw the transcript, and use it in connection with the proper and legal process to bring the case here; and if withdrawn, a receipt for it must be left with the clerk, *but as it now stands, it must be dismissed for want of jurisdiction.*

THE WHITE WATER VALLEY CANAL CO.,
Plffs. in Err.,
v.
HENRY VALLETTE *et al.*

(See S. C. 21 How. 414–426.)

Usury, when bonds not void for — fraud as to — agreement for mortgage or pledge, binding — where no loan, no usury — contingent profit, not power of corporation to make bonds — legislature may legalize.

Where appellee agreed to complete the canal of appellants for a certain amount of interest-bearing bonds of the company; held, that the bonds were not void for usury, although the amount of bonds was double the amount of money estimated as necessary to expend to complete the work, and although the bonds expressed that the principal sum thereby payable was a loan, the appellee having taken the risk of the contract on his own hands.

Where the appellee's proposal had been examined and adopted by appellant's board, and its conditions performed in good faith by the appellee, and the final settlement between the contracting parties was amicable; held, that there was no fraud or circumvention.

These facts are a bar to any relief from the contract on the ground of oppression.

A court of equity treats an agreement for a mortgage or pledge of bonds, or other property, as binding, and will give it effect according to the intention of the parties.

It is essential to usury in Indiana, that a certain gain, exceeding the legal rate of interest, should accrue to the lender as a consideration for the loan. Where there is no loan there can be no usury.

And where there is a loan, although the profit derived to the lender exceeds the legal rate, yet if that profit is contingent or uncertain, the contract, if bona fide and without any design to evade the statute, is not usurious.

A corporation, without special authority, may dispose of land, goods and chattels, or of any interest in the same, as it deems expedient; and in the course of their legitimate business may make a bond, mortgage, note, or draft; and also may make compositions with creditors, or an assignment for their benefit, except when restrained by law.

But, in January, 1845, the legislature of Indiana passed an act, that all the bonds which might be issued in accordance with the contract existing between the company and Vallette were legalized.

When the legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist on this objection.

(Mr. Chief Justice Taney, Mr. Justice McLean, and Mr. Justice Clifford, did not sit in this cause.)

Argued Feb. 1, 1859. Decided Feb. 21, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

The bill in this case was filed in the court below, by the defendant in error, to recover on certain bonds.

The court below, having entered a decree in favor of the complainant, the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **N. C. McLean** and **H. Stanbery**, for plaintiff in error:

We now proceed to cite some authorities in support of the principles involved, and which may be stated broadly as follows:

1. Corporations are strictly limited to the exercise of those powers which are expressly granted to them, or are necessarily incident, either to the purposes of their existence, or to the proper enjoyment of their express powers.

2. An express grant of a specific power in

one section of a charter, is a prohibition against the exercise of the same power by implication from the provisions of another section.

3. The express grant of a specific power is restrictive in its operation, and not only must the occasion for its exercise arise, but the method and manner of its execution must be strictly adhered to, according to the terms of the grant, or its exercise is a nullity.

4. A corporation may deny the validity of any contract which it may have entered into, without authority for so doing under its charter.

Beaty v. *Knowler*, 4 Pet. 164; *Head* v. *Providence Ins. Co.* 2 Cranch, 127; *Perrine* v. *Ches. & Del. Can. Co.* 9 How. 172; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Commissioners, etc.*, v. *Holcomb*, 7 Ohio, part 1, 232; *Bank of Chillicothe* v. *Swayne*, 8 Ohio, 252; *People* v. *Utica Ins. Co.* 15 Johns. 358; *N. Y. Fireman's Ins. Co.* v. *Ely*, 2 Cow. 678; *Id.*, 5 Conn. 560; *L. & F. Ins. Co.* v. *Mechanics' F. Ins. Co.* 7 Wend. 31; *The P. D. & M. Steam Nav. Co.* v. *Dandridge*, 8 G. & J. 248; *Farmers' Loan & Trust Co.* v. *Carroll*, 5 Barb. 613.

These bonds are peculiar in their character. The 18th section provides for the issue of bonds identical in form and security with these, but only for the payment of a loan previously negotiated. We may search in vain through every other portion of this charter, for any other authority for this issue; and the cases which I have cited, support most conclusively the principle, that the express grant of the power here excludes the idea of its existence under any other section by implication. If, however, the other view of the case is taken, that these bonds were issued to Vallette, in conformity with the provisions of the 18th section, for a loan of money, and the contract was used merely as a device to cover up the terms of the loan, usury is clear.

(Counsel here reviewed the evidence and proceeded.)

Will a court of equity lend its power to give priority to one creditor over all others, at least equally meritorious, simply because that creditor has, by falsehood, apparently, obtained the recognition of his priority as set forth in these bonds?

If the bonds were given in payment of a debt for work and labor in completing the canal, they are void for want of power to issue them for such purpose under the charter. If, on the other hand, the bonds were issued for a loan, as they purport upon their face, the usury is proved beyond the shadow of doubt, and the relief which they pray for, must be given to the company.

1 Rev. Stat. of Ind. p. 344.

We will not discuss the question whether this is or is not a loan of money. It is a matter of no importance.

I. Whatever be its name, the transaction is one which does not bring the case within the usury laws.

It is a contract to construct the canal at specified prices, and receive therefor payment in the bonds of the company.

The work, at the contract prices, amounted to $112,000. It was paid for in the bonds of the company, according to the contract.

Much better terms could have been got, if the company had had cash to pay. But in the exchange of work for bonds, it was the best that could be done.

There was no money passed between the parties in the transaction. Vallette did the work under a contract, and took a lien on the work, to secure the payment of his bonds.

It is in equity just what the contract of a builder would be, who should contract for a lien on the rents of the house which he should build, until paid.

And it would not interfere at all with the builder's equity, if he demanded a higher price, payable in bonds at a distant day, than if he were to be paid in cash. If we did but know how much it would have cost him to insure the claim, we might determine whether the contract was reasonable.

Until this matter is settled, as the agreement was made between parties entirely competent to contract, we must presume it to be so.

II. It is no matter whether this be a loan or not.

The corporation had a right, by its general powers, independently of the 18th section, to make this contract. It creates a lien that equity will enforce. The contract comes within the reason and spirit of the 18th section. If the company is thereby authorized to pledge the tolls, etc., of the canal, for the repayment of money borrowed to construct, it is also authorized to make the pledge for construction directly.

III. But the act of January 4, 1845, removes all possible difficulty, if there were any. After the contract was made and executed by Vallette, it sanctions the contract and makes valid all bonds which shall be issued in pursuance of it.

If the company had not the power already to issue these bonds, their issue after the act is an acceptance of it.

The following authorities were cited and quoted by the counsel:

Thompson v. *N. Y. & H. R. R. Co.* 3 Sand. Ch. 626; *James* v. *C. & H. R. R. Co.* 6 Am. Law Reg. 718; *Palmer* v. *Lawrence*, 3 Sandf. 162; *Steam Nav. Co.* v. *Weed*, 17 Barb. 378. See also Sedgwick, Const. p. 90; *Moss* v. *Rossie Lead M. Co.* 5 Hill, 137.

The case last cited will be found to contain a very full collection and able analysis of all the leading authorities upon this subject.

The bond gives to Vallette an equitable lien on all the real and personal property of the company, and it so declares in express terms.

4 McL. 192; *Williams* v. *Price*, 5 Munf. 528; 1 Freem. Mass. Ch. 574; *Dow* v. *Ker*, Speers. Ch. 413; *Read* v. *Simons*, 2 Desaus. 552; *Malcolm* v. *Scott*, 25 Eng. Ch. 39, 5 Paige, 641; 3 Paige, 77; 21 Eng. Law & Eq. 53.

The company had power to make this contract, not only by express language and authority of the charter, but also by being authorized to build the canal. The corporation has all the implied, necessary, and proper power to make such contracts as shall enable them to accomplish the great end of building the canal.

Sections 1, 4, 17, of Charter; *Planters' Bank* v. *Sharp*, 6 How. 322; *United States* v. *Robertson*, 5 Pet. 650; *Sturtevants* v. *The City of*

Alton, 3 McLean, 394; *Bank of Chillicothe* v. *Town of Chillicothe*, 7 Ohio, 2d part, 31, 1 B. Mon. 14, 8 Dana, 61, 6 Humph. 515; *McCulloch* v. *Maryland*, 4 Wheat. 413, 10 Wend. 343, 4 Hill, 445, 16 Johns. 52, 1 Cow. 513, 9 Paige Ch. 476, 21 Pick. 270, 14 Pa. 83; *Barry* v. *Exchange Co.* 1 Sand. Ch. 289; *Moss* v. *Oakley*, 2 Hill, 265.

It is not competent for a corporation to deny its power to make a contract, and particularly where its power is not limited by its charter, and no prohibition clause is contained in the charter, and no general prohibitory law exists.

Bank of Chillicothe v. *Town of Chillicothe*, 7 Ohio, 2d part, 31, *supra*.

On the question of usury, the counsel cited cases of *Andrews* v. *Pond*, 13 Pet. 78, 4 Pet. 123; *Andrews* v. *Russell*, 7 Blackf. 475, 8 Ind. 27.

The act of January 4, 1845, was valid and effectual to confirm the contracts and bonds, even had there been any previous doubt on the question.

Johnson v. *Bentley*, 16 Ohio, 100; *Lewis* v. *McElvain*, 16 Ohio. 356.

Moreover, it is folly to talk about the transaction being a loan of money or of goods. All the evidence in the case contradicts such a supposition. If the real transaction is a contract and not an agreement of borrowing and lending, it cannot be usurious.

2 Cowp. 771; Com. Us. 56; Hardin, 173; 9 Pet. 399, 401.

Counsel further cited on the question of usury:

Beete v. *Bidgood*, 7 B. & C. 453, 4 Hill, 228, 2 Sandf. Ch. 160; *Simpson* v. *Wiggin*, 3 Wood. & M. 419; *Floyer* v. *Edwards*, 1 Cowp. 112, 4 Hill, 235, 8 Conn. 518: *Lloyd* v. *Scott*, 4 Pet. 225; *Bank of U. S.* v. *Waggener*, 9 Pet. 401; *DeWolf* v. *Johnson*, 10 Wheat. 367, 4 Const. 374, 4 McL. 362.

Mr. Justice **Campbell** delivered the opinion of the court:

This controversy originated in a contract between the appellants and the appellee (Vallette), in which the latter agreed to complete that portion of the canal through the valley of White Water river that lies between the cities of Laurel and Cambridge, in Indiana.

In the year 1836, the state of Indiana pro-
420*] jected the improvement *of which this is a part, and prosecuted the work until 1842, at an expenditure of more than one million of dollars. In that year the appellants were incorporated, and the state surrendered the unfinished work to them, investing them with powers to continue it till its completion. In 1844 this corporation became embarrassed in their affairs, and were unable to negotiate loans upon the pledge of their property. Their resources were inadequate to the demands of their enterprise, and there was fear that it would be abandoned, or at least inconveniently postponed. In July, 1844, the president of the company applied to the appellee (Vallette) for assistance, and the result of their negotiation was, that the latter submitted a proposal to the company to supply materials and to complete at his expense the canal, according to the plan of the chief engineer, by the 1st of September, 1845. for one hundred and twenty-five bonds of the company, of $1,000 each, upon ten years' time, drawing interest at 7 per cent per annum, payable semiannually, he (Vallette) to pay in the paper of the company $500 as a bonus.

This proposal was accepted, and a detailed contract was drawn out and executed, embracing some modifications not material to this dispute. The appellee agreed to construct in a substantial and workmanlike manner the sections of the canal, under the directions of the chief engineer, and according to particular specifications. The engineer was to decide whether the work had been performed agreeably to contract and the instructions of the engineer; and payment was to be made upon his certificate of the work done at the end of every sixty days. The contract was punctually performed by the appellee to the satisfaction of the company, and upon a final settlement one hundred and sixteen bonds of $1,000 each were issued to him, one hundred and twelve bearing date the 1st of February, 1845, with interest at the rate of 7 per cent per annum, payable semiannually at New York, the principal to be paid at ten years from date. These bonds contain recitals and stipulations as follows: That the principal sum is the first and only loan created by the company under their charter for the completion of the canal; that the faith of the company and *their effects, real [*421 and personal, are pledged for the payment of the debt and interest; that these bonds shall have a preference over all debts to be thereafter contracted; that in default of the payment of interest, the holder of the bonds might enter into possession of the tolls, water rents, and other incomes of the company; and might apply to any court of the state (Federal or state) for the appointment of a receiver, and that the company would not appeal to any other court; that they would pay 10 per cent as liquidated damages on the amount of the interest thus collected. The interest on these bonds was paid until August, 1854, since when the corporation has been in default.

The appellees hold the one hundred and twelve bonds above described, and have filed this bill to enforce the covenants they contain by the appointment of a receiver. They allege that the company is insolvent; that its stock has no value, and that the canal is exposed to dilapidation and ruin, and they have no ability to remedy such disasters.

The defendants resist the demand of the appellees. They aver that the president of the company applied to Vallette for a loan of money: that Vallette was willing to advance the sum required, if he could make a profit of 100 per cent, and the president and directors were ready to concede this profit. That the contract was made between them as a device and contrivance to evade the laws of Indiana upon the subject of interest and usury, and that the contract between the parties in its essence and spirit was a loan of money at that exorbitant and usurious rate of interest. That the work was done by the company through the superintendence of their engineer, and that Vallette paid out the money to contractors merely to secure its appropriation to the improvement of the canal to strengthen his security. That the amount expended was but $56,000, and the estimates of the engineer prior to the making of the contract did not

exceed $65,000; and that the contract was arranged so that the profit of one hundred per cent might be realized.

They complain that the exactions of the appellee were exorbitant and oppressive. That 422*] the canal has been exposed to *disasters from heavy floods, and a debt has been created for reparations and improvements that is superior in dignity and merit to that of the appellee, and that he had waived his preference to induce them to make the advance.

In the absence of objections to the validity of these bonds, there can be no question concerning their legal operation and effect, or of the jurisdiction of a court of equity to enforce them. That court treats an agreement for a mortgage or pledge of bonds or other property, as binding, and will give it effect according to the intention of the contracting parties.

Duncan v. *The Company of Proprietors of the Manchester Waterworks*, 8 Price, 697; *Fector* v. *Philpott*, 12 Price, 197; *Seymour* v. *Canandaigua & N. F. R. Co.* 25 Barb. 284.

In *Fripp* v. *Chard Railway Company*, 21 Eng. L. & Eq. 53, the Vice-Chancellor decided that the court of chancery might appoint a receiver of the property of a corporation created by act of Parliament in favor of a mortgagee, although by the act a committee was constituted to whom all the powers of management were referred. And at the present term of this court a receiver for the tolls of a bridge erected by a corporation in Indiana was allowed by this court in favor of a judgment creditor, whose legal remedy had been exhausted. *Covington Drawbridge Co.* v. *Shepherd*, 21 How. 112, *infra*.

The question then arises whether the contract between these parties, as disclosed by the pleadings and proofs, is valid. It is essential to the nature of usury in Indiana, that a certain gain, exceeding the legal rate of interest, should accrue to the lender as a consideration for the loan. Where there is no loan there can be no usury. *State Bank* v. *Coquillard*, 6 Ind. 232.

And where there is a loan, although the profit derived to the lender exceeds the legal rate, yet if that profit is contingent or uncertain, the contract, if bona fide and without any design to evade the statute, is not usurious. *Cross* v. *Hepner*, 7 Ind. 357.

The testimony does not support the averment of the answer, that this contract involved a device or contrivance to elude the prohibition of the statute. The president of the corporation (Mr. Helm) testifies: "I know nothing of 423*] any such device or *arrangement; I thought it was all right; and there was none, so far as I know or believe, to evade the usury laws of Indiana; nor was there any device or arrangement to cover up a loan of money from Vallette to said company, as I know of no such loan." The testimony of the solicitor of the corporation Mr. Parker), who superintended all the negotiations, and drew the papers, is equally explicit. He says: "I am satisfied there was no device or management had or intended between said Vallette and the canal company, in the matter of this contract or otherwise, whatever, in this connection, to avoid any usury laws of the state of Indiana, or any other state. I never thought of such a thing myself, and never had an intimation of it from any other source; and had there been anything of the kind, I would certainly have known it, as I have said the whole matter in every shape it assumed was presented to me for my consideration. Vallette had all the risk of his contract on his own hands, until completed and taken off his hands by the company. And I have a strong impression in my own mind, that in one if not more instances he suffered by that risk in consequence of damage done his work, while in progress, by high waters." In the absence of simulation in the contract, the reason assigned in the last sentences, quoted from the testimony of this witness, is conclusive on the question of the usury. These witnesses are sustained by their fellow-members of the board. The recital in the bonds, that this was a loan is explained by the fact that the form of the bonds was settled after the work was finished, and with reference to their negotiability in New York, and the contract was regarded with favor by the corporation, and the payment of interest was made without exception for several years. It is admitted that the contract provided prices for the work done, far exceeding the cash estimates of the engineer. This, the witnesses say, was the natural consequence of the embarrassment of the company and their want of credit. But they prove that the proposal of Vallette was understood and considerably examined; that it was adopted by the board, with only one dissentient vote; that its conditions were performed in good faith by the appellee, and that the final settlement between the contracting parties was *ami- [*424 cable. There was on the part of the appellee no fraud or circumvention.

These facts oppose an insuperable bar to any relief from the contract on the ground of lesion or oppression. *Harrison* v. *Guest*, 35 Eng. L. & Eq. 487.

The remaining question for consideration is, whether it was competent for this corporation to execute such securities as these bonds in fulfillment of their covenants in a construction contract, fairly made and executed by the other party. The 1st section of the act of incorporation endows the corporate body with faculties for suits, contracts, and all other things legitimate for such company to do; and "all the powers and privileges in anywise necessary and expedient to carry into effect the proper business" of the association. The 17th section establishes the president and directors as the governing body, and that "their regular and efficient doings not inconsistent with this charter" "shall in all cases be deemed the doings of the company, and forever held valid as such."

The 18th section invests them with "full power to negotiate any loans that may be deemed expedient for carrying out all the objects contemplated by this act; and for the payment of such loans, agreeably to the terms agreed upon, said company shall bind themselves by their bonds, which bonds," etc., etc., etc., "shall be a valid lien upon all the stock and effects of said company in the order of their issue, and all the effects of the company, both real and personal, shall be deemed and taken as a pledge for the punctual payment of the interest on said bonds, and the ultimate re-

demption of the principal, agreeably to contract.

It is well settled that a corporation, without special authority, may dispose of land, goods, and chattels, or of any interest in the same, as it deems expedient, and in the course of their legitimate business may make a bond, mortgage, note, or draft; and also, may make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law.

Partridge v. *Badger*, 25 Barb. 146; *Barry* v. *Merchants' Ex. Co.* 1 Sandf. Ch. 280; *Beers* v. *Phœnix Glass Co.* 14 Barb. 358; *Dana* v. **425*]** *Bank of the U. S.* 5 W. & S. 223; **Frazier* v. *Willcox*, 4 Rob. 517; *U. S. Bank* v. *Huth*, 4 B. Mon. 423; *The State* v. *Bank of Md.* 6 Gill & J. 205; *Pierce* v. *Emery*, 32 N. H. 486.

But, in addition to the general powers of the corporation, in this instance there is "full power" (specially conferred) to negotiate any loan or loans that the company might deem expedient for carrying out any or all of the objects of the act. We should find great difficulty in deciding that the corporation was restrained by the laws concerning interest and usury, in view of the comprehensive language of the 18th section of the act. Those laws rest upon considerations of policy applicable, for the most part, to individuals engaged in their ordinary business; and the legislature might well conclude that a numerous body, engaged in a public enterprise, under the direction of an intelligent board, might be trusted with a plenary control of their property or credit, to accomplish the aim of the association.

If the rights of the appellees depended upon the act of corporation alone, it would be difficult to resist them. But, in January, 1845, the legislature of Indiana passed an act, that recites the corporation had entered into a contract with Vallette to complete the canal, and was to be paid in their bonds, drawing the legal interest in New York, and doubts were entertained as to the legality of the issue of these bonds; and thereupon it was enacted, that all the bonds which might be issued in accordance with the contract existing between the company and Vallette, were legalized. A large portion of the work specified in the contract was performed after this enactment, and the settlement under which these bonds were issued took place subsequently. This act implies that there was no illegality in the fact that bonds were employed as a medium of payment for supplies of materials for, or work and labor done upon, the canal.

The objection that a contract was illegal, and that no judgment can, therefore, be rendered upon it, is not allowed from any consideration of favor to those who allege it. The courts, from public considerations, refuse their aid to enforce obligations which contravene the laws **426*]** or policy of the state. When the *legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist on this objection. *Andrews* v. *Russell*, 7 Black. 475, 8 Ind. 27.

Upon a review of the whole case, it is the opinion of the court that the contract between these parties was made without fraud or surprise; that there is no illegality in the cause, or consideration; that the priority of payment has not been released or defeated; and that the relief sought is within the competency of a court of equity to allow.

Decree affirmed.

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*JOHN DOE, *ex dem.* FRANCIS A. DICKENS, *Plff. in Err.*, [*276
v.
ALONZO MAHANA.

(See S. C. 21 How. 276-283.)

School lots in donation tract, how selected—facts showing selection.

The act of March 18, 1818, granting one hundred thousand acres, called the donation tract, did not authorize the register to select the school lots in that tract.

The act of March 3, 1803, conferred that power on the Secretary of the Treasury.

The fact that they were not sold, nor offered for sale, and were claimed as school lands; that the trustees for the township took possession of them; the indorsement on the plat of the lots, of the word "school;" that this township had no school lands assigned to it, unless the lots referred to were assigned; were proper to be submitted to the jury, from which they might have presumed that the lots had been duly selected by the Secretary of the Treasury for school lots.

Argued Jan. 24, 1859. Decided Feb. 22, 1859.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was an action of ejectment brought in the court below, by the plaintiff in error, to recover 100 acre lot, No. 8, in the donation tract, Marietta district, Ohio.

The plaintiff, on the trial, gave in evidence a patent from the United States conveying said lands to Samuel A. H. Marks, in fee simple, and a regular chain of title from Marks to himself. The defendant claimed to hold the premises under a lease from the trustees of township 9, Range 11., in the county of Morgan, and in the district of lands subject to sale at Chillicothe, who leased them to him as school lands for the use of said township.

The trial below resulted in a verdict in favor of the plaintiff, with damages assessed at one cent, subject, however, to the opinion of the court on the law involved. The court having set aside the verdict and entered judgment for the defendant, the plaintiff sued out this writ of error.

The legislation of Congress under which the cause arises, as well as the precise point upon which the case turned in this court, appears in the opinion of the court.

Messrs. **S. F. Vinton** and **J. J. Coombs** for plaintiff in error.

Mr. **John E. Hanna** for the defendant in error.

Mr. Justice **Catron** delivered the opinion of the court:

By the act of 21st of April, 1792, there was granted to Rufus Putnam and others, known as the Ohio Company, one hundred thousand acres of land in the Marietta district, in the territory northwest of the Ohio river. The object of Congress and the grantees seems to have been to cause the country to be inhabited

by making donations, through the company, to actual male settlers, of one hundred acres each; and all of the tract not thus disposed of within five years from the date of the grant, reverted, by its terms, to the United States, as public lands. The ordinary laws for surveying by ranges, townships and sections did not apply to this tract, nor to the surplus that might revert, as ordinary surveys would have thrown the townships and sections into fractions, by the hundred-acre lots previously disposed of by the company.

By compact, the United States stipulated to give to the state of Ohio one thirty-sixth part of the public lands in that state, for the use of schools; and the 16th section of each township was the land thus contracted to be given, in cases where there were regular surveys in townships of six miles square; and, by the acts of April 30, 1802, and March 3, 1803 (§ 3), Congress further stipulates that the lands previously promised "for the use of schools, in lieu of such of the sections number sixteen as have been otherwise disposed of, shall be selected by the Secretary of the Treasury, out of the unappropriated reserved sections in the most contiguous townships."

By the act of March 18, 1818, Congress directed the lands in the Ohio Company's donation tract to be surveyed by the surveyor general, separating that conveyed to settlers, from that not conveyed, and belonging to the United States by reversion. This latter land he was to lay off into townships and sections, or into one hundred-acre lots, conforming them to the 279*] *plan observed by the company, when providing for actual settlers. And he was ordered to make returns of the surveys to the General Land Office and to the register of the land office at Marietta. The lands were laid off into one hundred-acre tracts, and these tracts the act orders to be sold, "with the exception of the usual proportion for the support of schools." By the President's proclamation, they were offered for sale on the first Monday in June, 1819. There was no reservation to the general order of sale, except of such lands as the Secretary should select, according to the power vested in him by the act of 1803, for the use of schools; and it is a fair presumption, that the register offered all the lands for sale that were not reserved. But the difficulty is, that for the lands in dispute there might have been no bidder when they were offered. That the Secretary had the power to reserve school lots, and to bind the United States and the townships to his selection, is very clear; and we think it is equally clear that the register of the Marietta district had no power to designate these school lots. As a subordin he could lawfully record the orders of the Secretary in this respect, but could do no binding act himself.

Six of the lots of one hundred acres each, lying in a body, and square form, together with lot No. 34, adjoining on the east, were not sold (including No. 8, the lot in dispute).

On the tract book found in the office of the register at Marietta, and by which the sales of 1819 were governed, the word "school" was written on the plot of each of the seven lots; but whether made as early as 1819, or afterwards, does not appear; nor, whether the then register (Wood) put the designation there by order of the Secretary.

It is admitted that school commissioners took possession of the land sued for in 1834, and had held it ever since by their lessee; and it is also admitted that township nine, range eleven, which claims the lots marked "school," is without school lands, unless the lots thus designated belong to it as such.

On the return made of the surveys to the General Land Office in 1818, there is no indication that a reservation of any land was made for township nine, range eleven.

*The manner in which the Secretary [*280 should authenticate his selections was not prescribed by Congress, and depends in this case on evidence not found of record. It must be proved by circumstances, and cannot be proved in any other way.

Another consideration is pressed on the court, on the part of the plaintiff, to overcome the fact that this designation is of no value, to wit: that the Secretary of the Treasury, by his letter of July 13, 1805, directed land equal to one section on the southern part of the donation tract to be laid off as compensation for section sixteen in township five, range ten, the school tract in township five having been otherwise appropriated; and hence it happened, as is alleged, that the register marked the lots in controversy "school." In 1805, the lots thus marked had not been surveyed, and each one hundred-acre lot is marked on the tract book of surveys returned in 1818; and as the trustees took the school land for township five, range ten, elsewhere, the argument has not much force.

It is also insisted that, in point of fact, the entire section No. 16, in township nine, range eleven, remained undisposed of by the Ohio Company, and was subject to be appropriated by the commissioners of the township for school purposes; and therefore no claim could be set up by them to lands elsewhere. The act of April 30th, 1802, § 7, provides that the 16th section of every township shall be granted to the inhabitants of the same for the use of schools. But, then, the 16th section is a designated portion of land that may result from an execution of the public surveys made by the United States, according to the rules and regulations Congress had made or might make. Until ranges were established, and the lands surveyed into townships or sections, no title to any definite land vested in the township. It had no authority to survey and ascertain the 16th section. This authority was reserved exclusively to the United States, and to be exercised as part of the political power. Now, as the 16th section of township nine, range eleven, never was legally ascertained, and as no other evidence could be heard to fix its identity than a survey approved by the department, established for the distribution and sale of the public lands, the assumption that the *land was [*281 unappropriated where the 16th section would have fallen, had a survey in fact been made of the township, amounts to nothing. Cases affecting school lands, in Ohio and elsewhere, come under the rule laid down in the noted case of General Green's grant of twenty-five thousand acres, in the military district of North Carolina (2 Wheat. 19). The legislature of

that state made the grant by an act of assembly; having made it, it reserved the power to locate the land by survey through its officers. The land being surveyed, and the survey returned and recorded in the proper land office, it was held by this court that the title attached to the land designated, on the obvious legal ground that the state of North Carolina was estopped to disavow its own act in defining by survey the precise land granted; and so, also, General Green and his heirs were estopped to call in question the validity of the definite location, the authority to locate by survey having been reserved by the granting power. So, here the granting power reserved the right to ascertain and identify the land granted to the schools. Until this was done, no title could be taken of any particular tract; and when the location was made by authority of the United States, each party was estopped to deny its binding force. It was, in fact, a title by mutual estoppel.

We now come to the precise case presented on the trial below. The jury were instructed:

1st. "That the proofs and legal presumptions sustaining the title of the defendant must have reference solely to, and be based upon, the act of Congress, approved March 18, 1818, entitled 'An Act Providing for the Sale of Certain Lands in the District of Marietta,' etc., in connection with the act of the 21st of April, 1792, granting to Rufus Putnam and others, as agents and trustees, one hundred thousand acres, called the donation tract; and that, in the absence of any express authority to any other officer to make the selection of school lands in said donation tract, by a fair construction of said act of 1818, the register of the land office at Marietta rightfully exercised such authority."

2d. "That all the evidence and admissions of 282*] facts in the *case raised a legal presumption that the said register of the land office at Marietta had exercised the authority so vested in him by said act of March 18, 1818, prior to the entry and patent under which the plaintiff claims title, by legally selecting the lands in controversy in this suit (with other lands) for the support of schools in said township nine, in range eleven, and it was, therefore, their duty to return a verdict for the defendant."

The first instruction assumes that the act of 1818 authorized the register to select the school lots in the donation tract; whereas the 3d section of the act of March 3, 1803, conferred the exclusive power on the Secretary of the Treasury, and therefore the instruction is erroneous.

The second instruction declares that the evidence and admissions of facts in the case raised a legal presumption "that said register had exercised the authority vested in him by the act of 1818, prior to the entry and patent under which the plaintiff claims title," etc.

As the register had no power to select, it could not be held that he had legally selected; nor did he make the entry on the tract book in due form, had he been instructed by the Secretary to record his selection.

The word "school," appearing on the tract book, has much significance; but, standing alone, it did not authorize the circuit court to presume, as matter of law, that the lands had been selected by order of the Secretary. If his letter to the register, directing him to make the selection, had been produced, and taken in connection with the designation, then we think the court would have been warranted in making the legal presumption.

The narrow point in this cause is, did the Secretary select the land in controversy (with other lots) for the use of schools. If he did, then the title of the United States was devested thereby, and the lands withdrawn from sale. There are numerous facts tending to prove that they were selected. 1st. They were not sold, nor is it at all probable that they were offered for sale, in 1819. If they are of good quality, and favorably situated, a jury may be satisfied that, had they been *offered to bidders [*283 at the public sale, they would have been purchased. 2d. They were claimed as school lands, selected for township nine, range eleven. 3d. The trustees for the township took possession of them, and leased them out as early as 1834; and their tenant is yet in possession and here sued. 4th. The indorsement, on the plot of the lots, of the word "school," indicates, to some extent, that they had been selected by the proper authority. What weight this may have, it will be proper to leave to the jury. 5th. That this township had no school lands assigned to it, unless the lots referred to were assigned.

These facts, with others, were proper to be submitted to the jury, from which they might have presumed that the lots had been duly selected.

In the language of the supreme court of Ohio, in the case of *Coombs & Ewing* v. *Lane*, 4 Ohio, 112—"Facts presumed are as effectually established as facts proved, where no presumption is allowed." That was a suit for the possession of this same land, and involved the same evidence this case does, and presented the same questions of law. But there, the cause was submitted to the circuit court on the law and the facts, without the intervention of a jury, and the supreme court was appealed to in order to reverse the opinion of the lower court, on a motion for a new trial. The state courts dealt with both facts and law; whereas, here, the jury must deal with the facts and presumptions, under the instructions of the court, as respects the law.

We order the judgment of the Circuit Court to be reversed, and remand the cause for another trial.

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*JOSEPH E. MONTGOMERY *et al.*, [*386
Claimants of the Steamer Republic, etc., *Appts.*,

v.

JOHN J. ANDERSON *et al.*

(See S. C. 21 How. 386–389.)

What is final decree—power of circuit court to remand case—defect of jurisdiction cannot be cured by amendment.

Where a steamboat was sold by the marshal, and the proceeds paid into the district court, which decreed that the sum claimed by the petitioners was due from the fund then in court, to the petitioners, but that, as the fund might not be sufficient to satisfy all claims that might be established against the

vessel, no order for the payment of the money would be made by the court until it should be further advised in the premises; held, that there was no final decree upon which an appeal would lie. The decree was not final, even as to the amount in controversy between the parties.

The circuit court, therefore, had no jurisdiction of the case, and their judgment, affirming the decree, was erroneous on that ground. The appeal ought to have been dismissed for want of jurisdiction.

But if the appeal had been regularly before the circuit court, it was not authorized to remand the case to the district court, to carry into execution its decisions.

As the defect of jurisdiction in the circuit court appeared upon the transcript, it could not be cured by an amendment in this court, because consent cannot give jurisdiction, nor legalize it when exercised without the authority at law.

Argued Feb. 11, 1859. Decided Feb. 28, 1859.

APPEAL from the Circuit Court of the United States for the District of Missouri.

On motion to dismiss.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **T. Polk** for appellants.

Mr. **J. H. Rankin** for appellees.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The appellees in this case filed a petition in the district court of the United States for the eastern district of Missouri, stating that they had, by the laws of Missouri, a lien on the steamboat Republic for $2,000, which they had loaned to the clerk of the boat to purchase supplies and necessaries, in order to enable her to proceed on a voyage from St. Louis to New Orleans; that the vessel, at the time the petition was filed, was under seizure in the district, in a case of admiralty and maritime jurisdiction, and had been ordered by the court to be sold; and the petitioners prayed that they might be permitted to intervene in their own interest, and be paid out of the proceeds when the steamboat was sold.

The appellants answered, stating that they **387***] were owners of *seven eighths of the vessel, and denying that the money was needed or used for supplies; and insisting that the boat is not liable for it, and that it is not a lien by the laws of Missouri.

The petition was filed on the 3d of June, 1857, and the vessel, it appears, was sold by the marshal, upon the seizure mentioned in the petition, and the sale reported and the proceeds paid into the registry of the court on the 23d of the same month. The proceeds amounted to $26,250. Further proceedings were had on the petition of the appellees, and testimony taken; and on the 7th of September, in the same year, the district court decreed that the sum claimed by the petitioner was due, with interest and costs, and a lien on The Republic, and referred the matter to the commissioner of the court to compute and report the amount due.

The commissioner accordingly made his report, stating the amount due for principal and interest on the sum loaned, to be $2,034. This report was confirmed by the court; and thereupon the court passed a decree, adjudging that there was due from the fund then in court, to the petitioners, the sum of $2,034, and to bear interest from that day; but that, inasmuch as some of the causes against The Republic had not then been determined, and the fund in court might not be sufficient to satisfy all of the claims that might be established against the vessel, no order for the payment of the money would be made by the court until it should be further advised in the premises.

The present appellants thereupon prayed an appeal to the circuit court for the district of Missouri, which was granted; and further proceedings took place in the circuit court, and further testimony was taken. And, at the October term, 1857, the decree of the district court was affirmed, and the case remanded to the district court to carry out this decree; and from this decree the appellants prayed an appeal to this court.

This is substantially the case, as it appears on the transcript from the circuit court. We do not now speak of the admissions filed here, which we shall presently notice. But, upon the transcript itself, it appears that there was no final decree in the district court, upon which an appeal would lie to the circuit court; no final disposition of the fund in the registry. *In- [**388** deed, it was not final even as to the amount in controversy between these parties; for the amount to be awarded to the appellees was made to depend upon the amount of other claims upon the fund, which were then depending before the district court. And, under the act of Congress, no appeal would lie from the district to the circuit court until there was a final decree upon the whole case—that is, not until all the claims on the money in the registry had been ascertained and adjusted, and the whole amount of the proceeds of the sale of the vessel distributed, by the decree, among the parties which the district court deemed to be entitled, according to their respective priorities and rights.

The circuit court, therefore, had no jurisdiction of the case, as it came before them; and their judgment, affirming the decree, was erroneous on that ground. The appeal ought to have been dismissed for want of jurisdiction. This point was directly decided in this court, in the case of *Mordecai* v. *Lindsay*, 19 How. 200.

But if the appeal had been regularly before the circuit court, it was not authorized to remand the case to the district court, to carry into execution its decisions. The appeal carries up the *res*, or money in the registry, of the district court, to the circuit court; and when the rights of the parties are adjudicated there, the court must carry into execution its own decree.

In order to cure these defects in the record, an agreement has been filed in this court, in which they admit that the whole fund has been finally disposed of by the circuit court among the claimants, with the exception of the sum in controversy between these parties. And they move to amend the record here according to this agreement.

But, in the case of *Mordecai* v. *Lindsay*, above referred to, a similar motion was made to amend the record here, upon a like agreement. But the court decided that, as the defect of jurisdiction in the circuit court appeared upon the transcript, it could not be cured by an amendment in this court, because

consent cannot give jurisdiction, nor legalize jurisdiction exercised without the authority at law. The rule laid down in that case must govern this.

389*] *The decree of the Circuit Court must, therefore, be reversed, and the case remanded to the court, with directions to dismiss the appeal for want of jurisdiction.*

The district court can then proceed to pass a final decree, if that has not been already done: and from that decree any party who may think himself aggrieved may appeal to the circuit court, and from the final decree of that court to this, where the sum in controversy is large enough to give jurisdiction to the respective courts upon such appeals.

This view of the subject makes it unnecessary to examine whether the amount in controversy between the parties in this appeal is over $2,000; for their respective rights have not been judicially decided upon in the circuit court, for want of jurisdiction, as above stated. when it acted upon the controversy.

JULIAN McCARTY and John Wynn, Administrators of Enoch McCarty, Deceased, *Plffs. in Err.*,

v.

GUERNSEY Y. ROOTS, Erastus P. Coe, and John H. Aydelotte.

(See S. C. 21 How. 432-441.)

Bills—and notes, negotiability of, after payment—accommodation indorsers—transfer, as collateral security—liability of trustee.

On payment of bill of exchange by the indorser, it does not cease to be assignable.

The various indorsers to an accommodation bill, where no consideration has passed as among themselves, are not, unless by special agreement, bound to pay in equal proportions as cosureties.

The fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt, does not impair his right to recover.

Where in action against trustee the averments in regard to the assignment nowhere show that the trustee had sufficient funds in his hands, after complying with the terms of the trust, to pay this bill, the pleadings are defective.

Argued Jan. 19, 1859. Decided Mar. 4, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit, brought in the court below by the appellees against Enoch McCarty, as indorsee of a bill of exchange. The defendant pleaded eight pleas in bar of the action, some of which were afterwards withdrawn. The plaintiffs demurred to each plea. The court sustained the demurrers and called a jury to assess plaintiffs' damages. The said jury assessed the damages at $5,284.50, and the court entered judgment accordingly, whereupon the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **O. H. Smith**, for the plaintiffs in error:

We submit the following legal propositions:

1. That a joint and cosurety cannot assign the bill, except to a bona fide holder, before due and without notice.

2. That an indorser's liability is only for the consideration money, which he received, and interest thereon as against such holders.

3. That a pledgee of an overdue bill takes it subject to all equities.

Vallette v. *Mason*, 1 Cart. Ind. 288.

4. That a party taking it for security for a prior debt, parts with nothing, and does not take it in course of trade, and is not a bona fide holder.

Coddington v. *Bay*, 20 Johns. 637; *Stalker* v. *McDonald*, 6 Hill, 93.

5. The bill was not negotiable in Holland's hands, with E. Tyner's name subsequent to his, still on it.

Beck v. *Robley*, 1 H. Bl. note 89; 3 Maule & S. 97; *Guild* v. *Eager*, 17 Mass. 615.

The counsel then reviewed the pleadings, especially the 7th and 8th pleas (see opinion of the court, page 439), contending that they were good. In support of this position, he cited *Stalker* v. *McDonald*, 6 Hill, 93; Byles, Bills, 114; 1 Litt. 290; *Cox* v. *Hodge*, 7 Blackf. 146; 8 Barn. & C. 345; 9 Barn. & C. 241; 18 Wend. 478; 4 Pike, 546; 15 Mass. 534; 2 Cai. Cas. 200; 21 Pick. 195; 9 Met. 511; 4 N. H. 221; 5 Den. 307; 12 N. Y. 466; 13 Ala. 422.

Our positions, as applicable to the several pleas, are distinctly these:

First. That as the bill was received by the appellees after it was due and dishonored, they took it with notice that it was subject to all prior equities between the parties.

Byles, Bills, 129, 130, and numerous authorities, tit. *Transfer*.

Second. That this case rests upon the same legal defense that could be set up in a suit between the indorsers of a bill, as to their equities, if the action had been brought by one of them after paying the bill against the defendant. The same authorities as above.

Third. That cosureties are liable to contribution as between themselves, after the payment of the bill.

Byles, Bills, 199; *Kemp* v. *Finden*, 12 M. & W. 421, and authorities cited to fourth position.

Fourth. That if one cosurety takes up the bill, he cannot maintain an action upon it against a cosurety, but may use it as evidence of the amount paid, in an action of assumpsit for money laid out and expended, in which he may recover in contribution the equitable *pro rata* proportion of the money he has actually paid from his cosurety.

Done v. *Whalley*, 17 L. J. Exch. 225; 2 Exch. 198; *Gale* v. *Walsh*, 5 T. R. 239; *Rogers* v. *Stephens*, 2 T. R. 713; *Orr* v. *Maginnis*, 7 East. 359.

Fifth. That although the indorsers are prima facie liable to each other in the order in which their names stand upon the bill, yet it lies in averment in the pleadings that they are cosureties, and parol proof is admissible as between them, to show the true state of their liability. The same principle applies in suits brought by an indorsee of the bill against a remote indorser, when the bill was taken after it was due and dishonored.

14 Ves. 170; Byles, Bills, 192, and note, ed. 1853; 9 Met. 511; 7 Cush. 404; 4 N. H. 221;

NOTE.—*Liability of stranger who indorses commercial paper before delivery*—see note, 18 L. R. A. 33.

5 Den. 307; 9 Ala. 949; 28 Me. 280; 34 Me. 549; 5 How. 278; 21 Pick. 195; 2 Seld. N. Y. 33; 2 Ired. 597; 18 Ohio, 441.

Sixth. That if the principal places funds or property in the hands of one cosurety sufficient to pay the bill in trust for that purpose, and such cosurety takes up the bill from the holder, he cannot sue his cosurety on the bill, nor for contribution, until he has exhausted the assets of the principal in his hands.

8 Pick. 155; 16 Ala. 455; 21 Ala. 779; Adams, Eq. ed. 1855.

Seventh. That time given by the holder to one cosurety for the payment of the bill to the prejudice of another cosurety, upon a contract binding upon the holder, without the assent of the other cosurety, discharges such other cosurety from liability upon the bill.

9 Conn. 261; 2 Wheat. 253; 2 Story, 416; 21 Wend. 108; 2 McLean, 111; 10 N. H. 359; 18 Conn. 361; 3 McLean, 74.

It is admitted that these authorities speak of principal and surety; but we maintain that the principles decided apply to the holder and a cosurety, the case before this court.

Eighth. That after a bill is taken up from the holder by a cosurety, it is no longer available in the hands of such cosurety, or his indorsee who takes it with notice after due and dishonored, so as to enable such cosurety taking up the bill, or such indorsee, to maintain an action on the bill against any other cosurety.

7 N. H. 202; 2 Ired. 417; 24 Me. 336.

Ninth. That a plea can only be demurred to specially for duplicity, in which case the demurrer must point out a duplicity specially; and if the plaintiff, instead of demurring, replies to the plea, his replication must answer so much of the plea as it assumes to answer; and if it assumes to answer the whole plea and only answers a part, it is bad on demurrer.

1 Chit. Pl. 228, 229; 1 Chit. Pl. 668, ed. 1855; 2 Johns. 433; 20 Pick. 356; 10 East. 79; 1 Saund. 100, note 1, tit. *Qualities of Replication;* 1 Chit. Pl. 643, and authorities, ed. 1855.

Tenth. It is no ground of even special demurrer, that a plea contains surplusage; the doctrine of *utile per inutile non vitiatur* (1 Chit. Pl. 547) applies.

It is important that the court should keep in mind that the bill of exchange in this case was received by the appellees after it was due and dishonored, and therefore subject to all the equities of prior parties.

Mr. **R. H. Gillet**, for defendant in error:

The only questions which this case present for the consideration of the court relate to the sufficiency of the pleas as a bar to the action, and of the replication as an answer to the 6th plea.

The 3d plea assumes that some of the parties to the bills in question sustain towards each other the relation of cosureties, but this is a mistake. The undertaking of sureties is a joint undertaking; but that of the parties to these bills, is separate and successive.

McDonald v. *Magruder*, 3 Pet. 470; *Wilson* v. *Stanton*, 6 Blackf. 507.

It is not sufficient in pleading to state that a certain relation exists between the parties; but the facts which create such relation must be stated.

1 Chit. Pl. 573; Gould Pl. 357.

As the plea in question simply assumes that Holland was one of the indorsers and cosureties, instead of stating the facts on which that assumption is based, it is bad under the rule, unless it can be maintained that upon the payment of a bill by an indorser, it ceases to be assignable; but the law is otherwise.

Callow v. *Lawrence*, 3 Maule & S. 95; *Hubbard* v. *Jackson*, 4 Bing. 390; *Graves* v. *Key*, 3 B. & Ad. 313.

The 5th plea is also bad. It is immaterial where the parties to the bills resided when they were made, or whether they were accommodation bills or bills drawn, accepted and indorsed in the regular course of business, as the plea admits that they were gotten up in order to enable the acceptor to borrow money thereon of the bank, at and by which they were discounted. The only statements in this plea which bear any resemblance to a valid defense, are the allegations that the bank at which the bills were discounted is still the holder and owner thereof, and that the indorsers were joint and cosureties thereof. The first of these allegations is negatived in a subsequent part of the plea, and the second disposed of by the notice which has been taken of the 3d plea.

The counsel then reviewed the 6th plea and the replication thereto, with reference principally to the facts in the case. The insufficiency of the 1st plea is apparent, from what has been said respecting the 3d.

The 8th plea commences with the allegation that the bill mentioned in the 1st and 2d counts of the declaration, are one and the same bill. It is for that cause bad, as amounting to the general issue.

1 Chit. Pl. 559.

Instead of stating the facts on which the defense rests, it sets forth evidence tending to prove those facts. It is therefore an arugmentative plea, and bad on special demurrer. It is also bad for repugnancy. Above all these and similar objections, stands the fact that the plea does not state facts sufficient to constitute a defense. It is a settled doctrine that the legal effect of a written instrument cannot be varied by proof of a contemporaneous parol agreement.

Wilson v. *Black*, 6 Blackf. 509; *Norton* v. *Coons*, 6 N. Y. 33.

But had there been a valid agreement made by and between the drawer and indorsers of the bill in question, that they, in the event of the failure of the acceptor should contribute equally in the payment of the bill, would that fact preclude a recovery in this case? On this point I refer the court to *Burrough* v. *Moss*, 10 B. & C. 558; *Whitehead* v. *Water*, 10 M. & W. 696; *Sturtevant* v. *Ford*, 4 M. & Gr. 101; *Hughes* v. *Large*, 2 Pa. 103.

Again, the 8th, and all the other pleas, profess to be an answer to the whole action, and as a matter of course are bad, unless they disclose a valid defense to the entire demand. On this point it is submitted, that although the drawer and indorsers may, by virtue of some agreement or understanding between them, bear towards each other the relation of cosureties, yet Holland, who took the bill up, held it as a valid security against the defendant for the sum due from him under such agreement, and that it is now held by the plaintiffs. But as

none of the pleas disclose the facts on which the assumption that the drawer and indorsers stand in that relation towards each other, the court cannot ascertain their rights and liabilities.

437*] *Mr. Justice **McLean** delivered the opinion of the court:

This is a writ of error to the district court of Indiana.

The action was brought on a bill of exchange for $4,500, dated October 16, 1854, drawn by Tyner and Childers, of Peru, Indiana, on Richard Tyner, of New York, and made payable to the defendant sixty days after date, at the office of Winslow Lanier, & Co., in the city of New York; which bill, at sight, was accepted by the drawee, and afterwards by the payee assigned to one Holland, who subsequently assigned it to Ezekiel Tyner, by whom it was afterwards assigned to the plaintiffs. Payment of the bill was refused at maturity, and it was protested for nonpayment. Due notice was given.

The defendant pleaded eight pleas in bar of the action; the first, second, and fourth being withdrawn, it is only necessary to notice the third, fifth, sixth, seventh, and eighth.

The third plea states that George Holland, who is one of the indorsers and cosureties thereof, before the commencement of this suit, on the 21st day of December, 1854, fully paid the bill to the Richmond branch of the State Bank of Indiana, who was then and there the holder and owner of the same; and that the plaintiffs received the same after they became due, and were so paid.

This plea assumes that one of the indorsers and cosureties paid the bill. In *McDonald* v. *Magruder*, 3 Pet. 470, and in *Wilson* v. *Stanton*, 6 Blackf. 507, the doctrine was laid down that cosureties are bound to contribute equally to the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive. The liabilities must arise from the indorsements, and not from a distinct agreement to pay the face of the bill jointly; the plea does not necessarily import a joint undertaking; the facts on which the joint liability is founded must be stated. On the payment of the bill by the indorser, it does not cease to be assignable.

The allegations in the fifth plea are not sufficient to bar the action. Several of the matters so stated have no direct bearing on the points made. The various parties to an accommodation bill, where no consideration has passed as among themselves, are not, unless by 438*] special agreement, bound to pay in *equal proportions as cosureties. The averments of the plea are defective in not stating there was an agreement between the drawers and indorsers of the bills of exchange to contribute equally in paying them.

Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt, impair the plaintiff's right to recover.

The sixth plea alleges that no consideration passed between said drawer, acceptor or indorsers, for said bills, and that the same remained in the hands of R. Tyner until negotiated by him to the Richmond Bank, for his benefit. And afterwards, and before said bill became due, to wit; on the 1st of October, 1854, R. Tyner, Tyner & Childers, and E. Tyner & Co. failed, and made a general assignment of their property, rights, etc., to Holland, Abner McCarty, and R. H. Tyner; and Holland accepted the trust, and became the active trustee; that the assignments were made for the debts and liabilities, first, to indemnify and save harmless Abner McCarty; second, to indemnify and save harmless Holland, said plaintiff, and N. D. Gallion, in proportion to their respective liabilities, and next for the payment of other debts and trusts. The property so assigned is averred to have been of the value of $150,000, and amply sufficient to pay the bills in suit, etc., and that Holland, on July 1, 1855, delivered said bills, indorsed in blank to said plaintiff, as collateral security for a pre-existing debt of Richard Tyner to said plaintiff, all of which was known to the plaintiff.

To this plea the plaintiff replied, that the said E. Tyner & Co. did not, each nor either of them, make an assignment of their property, rights, credits or effects, to the said Holland, McCarty, and Tyner, as stated in sixth plea of the defendant; but it is true that the said Richard Tyner, in 1854, made an assignment of said property, rights, and effects, to the said Holland, McCarty, and Tyner, and in trust: first, to indemnify and save harmless the said Abner McCarty as a creditor and surety of the said Richard Tyner; second, to indemnify and save harmless the said Holland, N. D. Gallion, Ezekiel Tyner, and the said plaintiff, as creditors and securities; but the plaintiff *says [*439 the property, rights, credits, and effects, so assigned to the said Holland, McCarty, and Richard H. Tyner, were and still are wholly insufficient in value to indemnify and save harmless the said McCarty as such creditor and surety, so that there are now no effects or money of the said R. Tyner from which the bill could be paid, or any part thereof.

This replication was demurred to, but it was sufficient, and the demurrer was properly overruled.

In the seventh plea, which was amended, an agreement is alleged between the bank and Holland, that if Holland would give his notes to the bank, bearing six per cent interest, with real and personal security, payable by instalments on the 1st day of January, 1856, 1857, and 1858, the bank would extend the times of payment as above stated, which was agreed to by Holland, the bank being then the holder of the bills; and that this was done without the consent or knowledge of defendant. And it is further alleged that the above bills were, after due, delivered to said plaintiff by said Holland, as collateral security for a pre-existing liability of said Holland, and for no other consideration.

To this plea there was a demurrer on the ground that there was no agreement between Holland, E. Tyner & Co., and the defendant, that on the failure of Richard Tyner to pay the bills of exchange, Holland, E. Tyner & Co., and the defendant, jointly, or in equal proportions, should pay them. There was no sufficient averment to this effect. The delivery of the bills to the plaintiff, as collateral security for a pre-existing debt, under the decision of *Swift* v. *Tyson*, 16 How. 1, was legal. The demurrer was properly sustained.

In his eighth plea, the defendant says that the bills of exchange, in the declaration mentioned, are one and the same identical bills, and not other or different; that defendant never indorsed but one bill of the amount and date stated. He further says, that the firm of Tyner & Childers consisted of Richard Tyner, James N. Tyner, and William Childers; and that of E. Tyner & Co., of Richard Tyner, and Ezekiel Tyner, and Childers, and that said R. Tyner drew said bill in the name of Tyner & Childers, and accepted the same in his own name, and **440*]** *indorsed the same in the name of E. Tyner & Co.; that each of the parties, with the said George Holland and this defendant, were at the time of drawing, accepting, and indorsing, citizens of Indiana; that the bill of exchange was discounted by the said bank, and the proceeds paid to Richard Tyner; that said indorsers were cosureties thereon; and it was understood the said defendants, the said George Holland and Ezekiel Tyner, were each to be cosureties, and liable to pay a *pro rata* share of said bill; and each of said parties have, since the indorsing of said bill, admitted a liability, with the others, in case of insolvency of prior parties, for whose benefit said bill was so made to contribute towards payment.

And the defendant further says, that before the bill became payable, the said Tyner & Childers, and the said R. Tyner and E. Tyner & Co., failed, and each of said firms made a general assignment of lands, goods, property, and effects, of the value of $1,000 to $5,000, to one H. J. Shirk; first, to pay depositors; second, debts for which A. McCarty and Holland were liable; and also for the payment of debts to plaintiffs, and liabilities to them, the said R. Tyner assigned property and effects, amounting in value to between $60,000 and $150,000, to Holland, McCarty, and R. Tyner, in trust: first, to indemnify and save harmless Abner McCarty; and second, this defendant and George Holland, the said plaintiffs, and N. D. Gallion, in proportion to their respective liabilities for him, and then for payment of other debts upon other trusts; and Holland became active for the execution of the trust, and took up of the Richmond Bank the bill of which it was holder, and by giving new notes of the said Holland for this and other debts of the said Tyner and Holland, and others, amounting to over $20,000, which sums were payable subsequently, with interest, and secured by mortgage on real estate conveyed by Holland to the bank, all of which was done without the consent or knowledge of the defendant.

And the defendant says that Holland, still being one of the trustees of said R. Tyner, and having property in his hands upon the trust aforesaid of greater value than the amount of the bills, afterwards, on the 1st of July, 1855, **441*]** at the county *aforesaid, delivered said bills to the plaintiffs, as collateral security for a pre-existing debt of the said R. Tyner, on which the said Holland was indorser. And the defendant says the moneys in said bills of exchange have not yet been paid by the said Holland, or anyone on his behalf. To this plea there was a demurrer.

This plea but reiterates in effect the same defenses which have already been disposed of in deciding upon the demurrers before noticed, and it is not perceived how any additional force can be given to them by being grouped together in one plea.

The fact that these parties were accommodation indorsers does not make them cosureties, bound to contribute equally to the payment of the bills, without a special agreement to that effect; and there is no sufficient averment that any such agreement existed.

The averments in regard to the assignment are also defective, for they nowhere show that Holland had, at any time, sufficient funds in his hands, after complying with the terms of the trust—*viz.*, to save Abner McCarty and others harmless—to pay this bill; and unless such a state of fact existed, there could be nothing in his hands made available for the bills.

If the fact should appear that these parties are bound to each other by a separate and distinct agreement, other than that which appears by the indorsements upon the bills, the plaintiff in error will have his remedy in an action of *indebitatus assumpsit* against the other parties to the bills. But we think the averments in the pleas noticed are wanting in precision, and do not bring the case within the rule of special agreements, which impose a joint obligation.

The demurrers are sustained, and the judgment is affirmed.

GEORGE KENDALL, Leander Ware, and George L. Jenckes, *Plffs. in Err.*,
v.
JOSEPH S. WINSOR.

(See S. C. 21 How. 322-331.)

Patent right — concealment of invention, effect of — reasonable delay — meaning of "not known or used"—inventor's intent, a question for jury.

Where the inventor designedly withholds his invention from the public, if, during such a concealment, an invention similar to or identical with his own should be made and patented, or brought into use without a patent, the latter cannot be inhibited nor restricted.

But a delay requisite for completing an invention, or a discreet and reasonable forbearance to proclaim the theory or operation of a discovery during its progress to completion, is proper.

The phrase "not known or used before the application for a patent" means, not known or used by others before the application.

The intent of an inventor with respect to an assertion or surrender of his rights, is an inquiry or conclusion of fact, and peculiarly within the province of the jury, upon the evidence submitted to them at the trial.

Argued Feb. 16, 1859. Decided Mar. 7, 1859.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

The history of the case and a statement of the facts involved, appear in the opinion of the court.

Mr. **T. A. Jenckes** for plaintiff in error.

Mr. **Charles M. Keller**, for defendant in error:

The question presented by the exceptions to

the ruling of the court below depends upon the construction of the 7th section of the act of March 3, 1839.

The counsel for defendants below assumed that the prior use or sale named in that section of the act, means any use or sale prior to the application for a patent, whether with or without the consent and allowance of the inventor. The learned court below gave a different construction to that act, and held in conformity with the ruling in *Pierson* v. *The Eagle Screw Co.* 3 Story, 402, that the use and sale therein named must be a use and sale with the consent and allowance of the inventor before his application for letters patent.

This construction is in strict conformity with the construction given to the act of 1793. *Mellus* v. *Silsbee*, 4 Mass. 108, 110; *Shaw* v. *Cooper*, 7 Pet. 292, 319, 320.

The act of March 3, 1839, is an act in addition to the act of 1836, and being engrafted thereon, should be construed by the provisions of the act of 1836, so as to harmonize therewith. And when so construed, the sale and use before application for letters patent to work a license, must be a sale or use with the consent and allowance of the inventor.

There can be no license without consent, and no consent without knowledge; and yet the first exception calls for a construction of the act which shall work a license merely on proof of user by the defendants, before the plaintiff's application for a patent, with or without his knowledge or consent.

The second exception calls for a construction which shall work a license on proof of knowledge, with or without consent. And the third exception calls for a construction which shall work a license on proof of knowledge, and in the absence of notice that he did not consent.

The presumption is against the consent; and yet the exceptions would invert the rule, and put the *onus probandi* on the party having the advantage of presumption.

Mr. Justice **Daniel** delivered the opinion of the court:

This was an action on the case in the circuit court of the United States, instituted by the defendant in error against the plaintiffs, for the recovery of damages for an alleged infringement by the latter of the rights of the former as a patentee. No question was raised upon the pleadings or the evidence in this case as to the originality or novelty of the invention patented, nor with respect to the identity of that invention with the machine complained of as an infringement of the rights of the patentee, nor as to the use of that machine. These several facts were conceded; or at any rate were not controverted. between the parties to this suit.

Under a plea of *not guilty*, the defendant in the circuit court gave notice of the following defenses to be made by him:

1. A license from the plaintiff to use his invention.

2. A right to use that invention in virtue of the 7th section of the act of Congress of the 3d of March, 1839, which section provides: "That every person or corporation who has or shall have purchased or constructed any newly invented machine, manufacture, or composition of matter. prior to the application of the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter, so made or purchased, without liability therefor to the inventor or any other person interested in such invention."

To the relevancy and effect of the evidence adduced with reference to the two defenses thus notified, and to the questions of law arising upon the issues made by those defenses, this controversy is properly limited.

Upon the trial in the circuit court, in support of this defense, evidence was introduced tending to show that the plaintiff *con- [*324 structed a machine, in substantial conformity with his specification, as early as 1846, and that in 1849 he had several such machines in operation, on which he made harness to supply all such orders as he could obtain; that he continued to run these machines until he obtained his letters patent; that he repeatedly declared to different persons that the machine was so complicated that he preferred not to take a patent, but to rely on the difficulty of imitating the machine, and the secrecy in which he kept it. And the defendants also gave evidence tending to prove that the first of their machines was completed in the autumn of 1853, and the residue in the autumn of 1854; and that, in the course of that fall, the plaintiff had knowledge that the defendants had built, or were building, one or more machines like his invention, and did not interpose to prevent them.

The plaintiff gave evidence tending to prove that the first machine built by him was never completed so as to operate; that his second machine was only partially successful, and improvements were made upon it; that in 1849 he began four others, and completed them in that year, and made harness on them, which he sold when he could get orders; that they were subject to some practical difficulties, particularly as it respected the method of marking the harness, and the liability of the bobbin to get out of the clutch; that he was employed in devising means to remedy these defects, and did remedy them; that he also endeavored to simplify the machine by using only one cam-shaft; that he constantly intended to take letters patent when he should have perfected the machine; that he applied to Mr. Keller for this purpose in February, 1853, but the model and specifications were not sent to Washington till November, 1854; that he kept the machines from the view of the public, allowed none of the hands employed in the mill to introduce persons to view them, and that the hands pledged themselves not to divulge the invention; that among the hands employed by the plaintiff was one Kendall Aldridge, who left the plaintiff's employment in the autumn of 1852, and entered into an arrangement with the defendants to copy the plaintiff's machine for them, and did so; and that it was by Aldridge, and *under [*325 his superintendence, and by means of the knowledge which he had gained while in the plaintiff's employment, under a pledge of secrecy, that the defendant's machines were built and put in operation; and that one of the defendants had procured drawings of the plaintiff's machine, and has taken out letters patent for it in England.

Each party controverted the facts thus sought to be proved by the other.

The defendant's counsel prayed the court to instruct the jury as follows:

1. That it is the duty of an inventor, if he would secure the protection of the patent laws, to apply for a patent as soon as his machine (if he has invented a machine) is in practical working order, so as to work regularly every day in the business for which it was designed; and if he does not so apply, he has no remedy against any persons who possess themselves of the invention, with his knowledge and without his notification to desist, or of his claims as an inventor before he applies for his patent.

2. That a machine can no longer be considered as an experiment, or the subject of experiment, when it is worked regularly in the course of business, and produces a satisfactory fabric, in quantities sufficient to supply the entire demand for the article.

3. That in order to justify the delay of the plaintiff in applying for a patent after his machine was in practical working order, on the ground of the desire to improve and perfect it, the plaintiff must show some defect in construction, or difficulty in the operation or mode of operation, which he desired and expected to remove by further thought and study; and if no such thing is shown, then the machine must be held to have been completed and finished, in the sense of the patent law, at the time it was put in regular working use and operation.

4. That under the 7th section of the act of 1839, entitled, etc., if the jury are satisfied that the machines for the use of which the defendants are sued, were constructed and put in operation before the plaintiff applied for his patent, then the defendants possessed the right 326*] to use, and vend to others to be *used, the specific machines made or purchased by them, without liability therefor to the plaintiff; and the jury are to inquire and find only the fact of such construction before the date of the plaintiff's application, in order to render a verdict for the defendants.

5. That under said section of said act, if the machines used by the defendants were purchased or constructed by them before the application of the plaintiff for his patent, with the knowledge of the plaintiff, then they must be held to possess the right to use, and vend to others to be used, the machines so purchased or constructed; and the jury are to inquire into and find only the fact of such purchase or construction, and that the plaintiff had knowledge of the same, in order to render a verdict for the defendants.

6. That under said section of said act, if the machines used by the defendants were purchased or constructed by them before the application of the plaintiff for his patent, without the knowledge of the plaintiff, and without his notifying the defendants of his claim as the inventor, and requiring them to desist from such construction, then they must be held to possess the right to use, and vend to others to use, the machines so purchased or constructed; and the jury are to inquire only into and find the fact of such purchase or construction, and that the plaintiff had knowledge of the same, and did not notify the defendant to desist from such purchase or construction of his claims as inventor, in order to render a verdict for the defendants.

The court set aside all those prayers for instructions, and did instruct the jury as follows:

1. That if Aldridge, under a pledge of secrecy, obtained knowledge of the plaintiff's machine—and he had not abandoned it to the public—and thereupon, at the instigation of the defendants, and with the knowledge, on their part, of the surreptitiousness of his acts, constructed machines for the defendants, they would not have the right to continue to use the same after the date of the plaintiff's letters patent. But if the defendants had these machines constructed before the plaintiff's application for his letters patent, under the belief authorized by him that he *consented [*327 and allowed them so to do, then they might lawfully continue to use the same after the date of the plaintiff's letters patent, and the plaintiff could not recover in this action. And that if the jury should find that the plaintiff's declaration and conduct were such as to justify the defendants in believing he did not intend to take letters patent, but to rely on the difficulty of imitating his machine, and the means he took to keep it secret, this would be a defense to the action. And they were further instructed, that to constitute such an abandonment to the public as would destroy the plaintiff's right to take a patent, in a case where it did not appear any sale of the thing patented had been made, and there was no open public exhibition of the machine, the jury must find that he intended to give up and relinquish his right to take letters patent. But if the plaintiff did intend not to take a patent, and manifested that intent by his declarations or conduct, and thereupon it was copied by the defendant, and so went into use, the plaintiff could not afterwards take a valid patent.

To which refusal to give the instructions prayed for, as well as to the instructions given, the defendants, by their counsel, excepted before the jury retired from the bar; and, as the matter thereof did not appear of record, prayed the court to allow and seal this bill of exceptions; which, being found correct, has been allowed and sealed accordingly by the presiding judge.

[L. S.] B. R. Curtis,
Justice Sup. Ct. U. S.

The first ground of defense assumed under the notice from the defendant in the court below—*viz.*, a license from a patentee—may at once be disposed of by the remark that no evidence was offered on the trial, bearing directly or remotely upon the fact of an actual license from the patentee, either to the defendant or to any person whomsoever. The defense, then, must depend exclusively upon the proper construction of the section of the law above cited, and the application of that section to the conduct of the parties, as shown by the bill of exceptions.

It is undeniably true, that the limited and temporary *monopoly granted to in- [*328 ventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly. This was at once the equivalent given by the public for benefits bestowed

by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects. The true policy and ends of the patent laws enacted under this government are disclosed in that article of the Constitution, the source of all these laws, *viz.*, "to promote the progress of science and the useful arts," contemplating and necessarily implying their extension, and increasing adaptation to the uses of society. *Vide* Constitution of the United States, art. I. § 8, clause 9. By correct induction from these truths, it follows that the inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts of Congress. He does not promote, and, if aided in his design, would impede, the progress of science and the useful arts. And with a very bad grace could he appeal for favor or protection to that society which, if he had not injured, he certainly had neither benefited nor intended to benefit. Hence, if, during such a concealment, an invention similar to or identical with his own should be made and patented, or brought into use without a patent, the latter could not be inhibited nor restricted, upon proof of its identity with a machine previously invented and withheld and concealed by the inventor from the public. The rights and interests, whether of the public or of individuals, can never be made to yield to schemes of selfishness or cupidity; moreover, that which is once given to or is invested in the public cannot be recalled nor taken from them.

But the relation borne to the public by inventors, and the obligations they are bound to fulfill, in order to secure protection from the former and the right to remuneration, by no means forbid a delay requisite for completing an invention, or for a test of its value or success by a series of sufficient and practical experiments; nor do they forbid a discreet and 329*] *reasonable forbearance to proclaim the theory or operation of a discovery during its progress to completion, and preceding an application for protection in that discovery. The former may be highly advantageous, as tending to perfecting the invention; the latter may be indispensable, in order to prevent a piracy of the rights of the true inventor.

It is the unquestionable right of every inventor to confer gratuitously the benefits of his ingenuity upon the public, and this he may do either by express declaration or by conduct equally significant with language—such, for instance, as an acquiescence, with full knowledge in the use of his invention by others; or he may forfeit his rights as an inventor by a wilful or negligent postponement of his claims, or by an attempt to withhold the benefit of his improvement from the public until a similar or the same improvement should have been made and introduced by others. Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these. But whilst inventors are bound to diligence and fairness in their dealings with the public with reference to their discoveries on the other hand, they are by obligations equally strong entitled to protection against frauds or wrongs practised to pirate from them the results of thought and labor, in which nearly a lifetime may have been exhausted; the fruits of more than the *viginti annorum lucubrationes*, which fruits the public are ultimately to gather. The shield of this protection has been constantly interposed between the inventor and fraudulent spoliator by the courts in England, and most signally and effectually has this been done by this court, as is seen in the cases of *Pennock & Sellers* v. *Dialogue*, 2 Pet. 1, and of *Shaw* v. *Cooper*, 7 Pet. 292. These may be regarded as leading cases upon the questions of the abrogation or relinquishment of patent privileges as resulting from avowed intention, from abandonment or neglect or from use known and assented to.

Thus, in the former case, the court, on page 18, interpreting the phrase, "not known or used before the application for a patent, *make the inquiry, 'what is the true [*330 meaning of the words *not known or used*,' etc. They cannot mean that the thing invented was not known or used before the application by the inventor himself; for that would be to prevent the only means of his obtaining a patent. The use as well as the knowledge of his invention must be indispensable, to enable him to ascertain its competency to the end proposed, as well as to perfect its component parts. The words, then, to have any rational interpretation, must mean, not known or used by others before the application. But how known or used? If it were necessary, as it well might be, to employ others to assist in the original structure or use by the inventor himself, or if before his application his invention should be pirated by another, or used without his consent, it can scarcely be supposed that the legislature had within its contemplation such knowledge or use." Further on in the same case, page 19, the court says: "If an inventor should be permitted to hold back from the knowledge of the public the secrets of his invention, if he should for a long period of years retain the monopoly, and make and sell his invention publicly, and thus gather the whole profits of it, relying on his superior skill and knowledge of the structure, and then, and then only, when the danger of competition should force him to secure the exclusive right, he should be allowed to take out a patent, and thus exclude the public from any further use than what would be derived under it during his fourteen years, it would materially retard the progress of science and the useful arts, and give a premium to those who should be least prompt to communicate their discoveries." In *Shaw* v. *Cooper*, 7 Pet. this court, on page 319, in strict coincidence with the decision in 2 Pet. says: "The knowledge or use spoken of in the statute could have referred to the public only, and cannot be applied to the inventor himself; he must necessarily have a perfect knowledge of the thing invented and its use, before he can describe it, as by law he is required to do preparatory to the emanation of a patent. But there may be cases in which the knowledge of the invention may be surreptitiously obtained, and communicated to the public, that do not affect the right of the inventor. Under such circumstances, *no pre- [*331

sumption can arise in favor of an abandonment of the right to the inventor to the public, though an acquiescence on his part will lay the foundation for such a presumption."

The real intent of the inventor with respect to an assertion or surrender of his rights under the Constitution and laws of the United States, whether it be sought in his declarations or acts, or in forbearance or neglect to speak or act, is an inquiry or conclusion of fact, and peculiarly within the province of the jury, guided by legal evidence submitted to them at the trial.

Recurring now to the instruction from the judge at circuit in this case, we consider that instruction to be in strict conformity with the principles hereinbefore propounded, and with the doctrines of his court, as declared in the cases of *Pennock* v. *Dialogue* and *Shaw* v. *Cooper*. That instruction diminishes or excludes no proper ground upon which the conduct and intent of the plaintiff below, as evinced either by declarations or acts, or by omission to speak or act, and on which also the justice and integrity of the conduct of the defendants were to be examined and determined. It submitted the conduct and intentions of both plaintiff and defendants to the jury, as questions of fact to be decided by them, guided simply by such rules of law as had been settled with reference to issues like the one before them; and upon those questions of fact the jury have responded in favor of the plaintiff below, the defendant in error. We think that the rejection by the court of the prayers offered by the defendants at the trial was warranted by the character of those prayers, as having a tendency to narrow the inquiry by the jury to an imperfect and partial view of the case, and to divert their minds from a full comprehension of the merits of the controversy.

The decision of the Circuit Court is affirmed, therefore, with costs.

STEPHEN V. R. ABLEMAN, *Plff. in Err.*,
v.
SHERMAN M. BOOTH,
AND
THE UNITED STATES, *Plff. in Err.*,
v.
SHERMAN M. BOOTH.

(See S. C. 21 How. 506-526.)

Certificate in record that acts of Congress came in question, unnecessary—judicial authority must be conferred by government—cannot be exercised in jurisdiction of another government—state government and general government are separate and distinct sovereignties—judicial power of this court—state court or judge may issue habeas corpus except when person imprisoned by United States—duty of marshal to make return to state court, but to refuse to obey its mandate, or to take prisoner before state court or judge—state judge or court no right to require it—marshal's duty to resist state process—process has no validity beyond jurisdiction—defects in commissioners' proceedings, how revised—exclusive jurisdiction of district court.

Where, after judgment in the supreme court of Wisconsin, and before writ of error was sued out, the state court entered on its record that, in such final judgment the validity of certain acts of Congress was drawn in question, and the decision of the court was against their validity respectively; held, that this certificate was not necessary to give this court jurisdiction, because the proceedings upon their face show that these questions arose, and how they were decided.

There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty.

No state can authorise one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and an independent government.

Although the state of Wisconsin is sovereign within its territorial limits, to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States.

The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.

This court has judicial power over all cases in law and equity arising under the Constitution and laws of the United States, and in such cases, as well as others enumerated, has appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make.

State court, or judge, who is authorized by the laws of the state to issue the writ of habeas corpus, may issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned, is in custody under the authority of the United States.

The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty.

And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody.

But it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government.

And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority.

No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them.

And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of the prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference.

No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

If there was any defect of power in the commissioner of the United States, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a state court.

Where the district court had exclusive and final jurisdiction, by the laws of the United States, neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a state or the United States, by habeas corpus or other process.

Argued Jan. 19, 1859. Decided Mar. 7, 1859.

ERRORS to the Supreme Court of the State of Wisconsin.

The history of these cases and a statement of the facts appear in the opinion of the court.

See, also, 59 U. S. (18 How.) 476 and 479.

NOTE.—*Conflict of jurisdiction between Federal and state courts*—see note, 22 C. C. A. 356.

No counsel appeared in this court for the defendant in error.

Mr. **J. S. Black,** *Atty. Gen.*, for the plaintiffs in error:

1. When a writ of error has issued from this court to the highest tribunal of a state, the judges to whom it is directed are bound to obey it, or make some return which will excuse them. If they refuse obedience they are punishable as for a contempt.

2 Co. Inst. 425, 427; 4 Jurist, 190; 17th sec. Judiciary act of 1789; act of 2d March, 1831.

2. The fugitive slave law of 1850 is constitutional and valid.

Jones v. *Van Zandt*, 5 How. 230; *Moore* v. *Illinois*, 14 How. 13; *Henry* v. *Lowell*, 16 Barb. 268; *Sim's Case*, 7 Cush. 285; *Miller* v. *McQuerry*, 5 McL. 469; *Commonwealth* v. *Griffith*, 2 Pick. 11; *Wright* v. *Deacon*, 5 S. & R. 62; *Jack* v. *Martin*, 12 Wend. 311; *Hill* v. *Low*, 4 Wash. C. C. 327; *Prigg* v. *Pa.* 16 Pet. 539; *Johnson* v. *Tompkins*, 1 Bald. 571; *Murray* v. *Hoboken Co.* 18 How. 272.

3. The judgment of a Federal court, charged by act of Congress with the duty of trying an offender against the laws of the United States, conclusively settles and determines in every case tried all questions of constitutional law or statutory construction and of pleading, which were or might have been raised at the trial.

Cobbett's Case, 5 C. B. 418; *Dime's Case*, 14 Q. B. 566; *Partington's Case*, 6 Q. B. 649; *Baine's Case*, 1 Cr. & P. 44; *Dunn's Case*, 57 E. C. L. 216; *Chamber's Case*, Cro. Car. 168; *Prime's Case*, 1 Barb. 340; *Williamson's Case*, 26 Pa. 9; Rev. Stat. of Wis. Hab. Cor. 1 Curt. Com. 155, 159; 1 Kent's Com. 319, 439; 2 Story, Const. § 1756, 1757; 39th No. of Federalist; 81st No. of Federalist; 2 Wall. Jr. 526.

4. When a party is accused of any offense against the United States, and is arrested and held for trial before a Federal court of exclusive jurisdiction, no state court has power to liberate him by habeas corpus.

Bushell's Case, 1 Mod. 119; *Watkin's Case*, 3 Pet. 202, 2 Hale's Pleas of the Crown, 144; *King* v. *Platt*, 10 Petersd. Abr. 287; Resolution of Judges, 2 Inst. 615; *Paty's Case*, 2 Ld. Raym. 1110; *Holloway's Case*, 5 Binn. 514.

5. When an attempt is made by a state court which has no jurisdiction to take a criminal out of the hands of a Federal court which has jurisdiction, whether before judgment or afterwards, the Federal officers are bound to disregard such attempts, and obey the mandate of the court to which they belong.

Case of *The Marshalsea*, 10 Co. 76; *Cable* v. *Cooper*, 15 Johns. 152; *Horan* v. *Wahrenberger*, 9 Tex. 319; *State* v. *Richmond*, 6 Fost. 239; *Bush* v. *Richmond*, 5 Barb. 276.

6. When a state court lawlessly attempts to obstruct the administration of criminal justice in a Federal court, the Federal court is bound to protect its officers against all personal consequences arising out of their refusal to obey the state court.

Act of March 2, 1833; 2 Wall. Jr. 521; *Ex parte Robinson*, 3 Liv. Law. Mag. 386.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The plaintiff in error in the first of these cases is the marshal of the United States for the district of Wisconsin, and the two cases have arisen out of the same transaction, and depend to some extent, upon the same principles. On that account, they have been argued and considered together; and the following are the facts as they appear in the transcripts before us:

Sherman M. Booth was charged before Winfield Smith, a commissioner duly appointed by the district court of the United States for the district of Wisconsin, with having, on the 11th day of March, 1854, aided and abetted, at Milwaukee, in the said district, the escape of a fugitive slave from the deputy marshal, who had him in custody under a warrant issued by the district judge of the United States for that district, under the act of Congress of September 18, 1850.

Upon the examination before the commissioner, he was satisfied that an offense had been committed as charged, and that there was probable cause to believe that Booth had been guilty of it; and thereupon held him to bail to appear and answer before the district court of the United States for the district of Wisconsin, on the first Monday in July then next ensuing. But on the 26th of May his bail or surety in the recognizance delivered him to the marshal, in the presence of the commissioner, and requested the commissioner to recommit Booth to the custody of the marshal; and he having failed to recognize again for his appearance before the district court, the commissioner committed him to the custody of the marshal, to be delivered to the keeper of the jail until he should be discharged by due course of law.

Booth made application on the next day, the 27th of May, *to A. D. Smith, one of the [*508 justices of the supreme court of the state of Wisconsin, for a writ of habeas corpus, stating that he was restrained of his liberty by Stephen V. R. Ableman, marshal of the United States for that district, under the warrant of commitment hereinbefore mentioned; and alleging that his imprisonment was illegal, because the act of Congress of September 18, 1850, was unconstitutional and void; and also that the warrant was defective, and did not describe the offense created by that act, even if the act were valid.

Upon this application, the justice, on the same day, issued the writ of habeas corpus, directed to the marshal, requiring him forthwith to have the body of Booth before him (the said justice), together with the time and cause of his imprisonment. The marshal thereupon, on the day above mentioned, produced Booth, and made his return, stating that he was received into his custody as marshal on the day before, and held in custody by virtue of the warrant of the commissioner above mentioned, a copy of which he annexed to and returned with the writ.

To this return Booth demurred, as not sufficient in law to justify his detention. And upon the hearing the justice decided that his detention was illegal, and ordered the marshal to discharge him and set him at liberty, which was accordingly done.

Afterwards, on the 9th of June, in the same year, the marshal applied to the supreme court of the state for a certiorari, setting forth in his

application the proceedings hereinbefore mentioned, and charging that the release of Booth by the justice was erroneous and unlawful and praying that his proceedings might be brought before the supreme court of the state for revision.

The certiorari was allowed on the same day; and the writ was accordingly issued on the 12th of the same month, and returnable on the third Tuesday of the month; and on the 20th the return was made by the justice, stating the proceedings, as hereinbefore mentioned.

The case was argued before the supreme court of the state, and on the 19th of July it pro-
509*] nounced its judgment, affirming *the decision of the associate justice discharging Booth from imprisonment, with costs against Ableman, the marshal.

Afterwards, on the 26th of October, the marshal sued out a writ of error, returnable to this court on the first Monday of December, 1854, in order to bring the judgment here for revision; and the defendant in error was regularly cited to appear on that day; and the record and proceedings were certified to this court by the clerk of the state court in the usual form, in obedience to the writ of error. And on the 4th of December, Booth, the defendant in error, filed a memorandum in writing in this court, stating that he had been cited to appear here in this case, and that he submitted it to the judgment of this court on the reasoning in the argument and opinions in the printed pamphlets therewith sent.

After the judgment was entered in the supreme court of Wisconsin, and before the writ of error was sued out, the state court entered on its record, that, in the final judgment it had rendered, the validity of the act of Congress of September 18, 1850, and of February 12, 1793, and the authority of the marshal to hold the defendant in his custody, under the process mentioned in his return to the writ of habeas corpus, were respectively drawn in question, and the decision of the court in the final judgment was against their validity, respectively.

This certificate was not necessary to give this court jurisdiction, because the proceedings upon their face show that these questions arose, and how they were decided; but it shows that at that time the supreme court of Wisconsin did not question their obligation to obey the writ of error, nor the authority of this court to re-examine their judgment in the cases specified. And the cetificate is given for the purpose of placing distinctly on the record the points that were raised and decided in that court, in order that this court might have no difficulty in exercising its appellate power, and pronouncing its judgment upon all of them.

We come now to the second case. At the January term of the district court of the United States for the district of Wisconsin, after Booth had been set at liberty, and after the transcript of the proceedings in the case above mentioned
510*] had been *returned to and filed in this court, the grand jury found a bill of indictment against Booth for the offense with which he was charged before the commissioner, and from which the state court had discharged him. The indictment was found on the 4th of January, 1855. On the 9th a motion was made by counsel on behalf of the accused, to quash the indictment, which was overruled by the court; and he thereupon pleaded not guilty, upon which issue was joined. On the 10th a jury was called and appeared in court, when he challenged the array; but the challenge was overruled and the jury impaneled. The trial, it appears, continued from day to day, until the 13th, when the jury found him guilty in the manner and form in which he stood indicted in the fourth and fifth counts. On the 16th he moved for a new trial and in arrest of judgment, which motions were argued on the 20th, and on the 23d the court overruled the motions, and sentenced the prisoner to be imprisoned for one month, and to pay a fine of $1,000 and the costs of prosecution; and that he remain in custody until the sentence was complied with.

We have stated more particularly these proceedings, from a sense of justice to the district court, as they show that every opportunity of making his defense was afforded him, and that his case was fully heard and considered.

On the 26th of January, three days after the sentence was passed, the prisoner, by his counsel, filed his petition in the supreme court of the state, and with his petition filed a copy of the proceedings in the district court, and also affidavits from the foreman and one other member of the jury who tried him, stating that their verdict was, guilty on the fourth and fifth counts, and not guilty on the other three; and stated in his petition that his imprisonment was illegal, because the fugitive slave law was unconstitutional; that the district court had no jurisdiction to try or punish him for the matter charged against him, and that the proceedings and sentence of that court were absolute nullities in law. Various other objections to the proceedings are alleged, which are unimportant in the questions now before the court, and need not, therefore, be particularly stated. On the next day, the 27th, the court directed *two [*511 writs of habeas corpus to be issued—one to the marshal, and one to the sheriff of Milwaukee, whose actual keeping the prisoner was committed by the marshal, by order of the district court. The habeas corpus directed each of them to produce the body of the prisoner, and make known the cause of his imprisonment, immediately after the receipt of the writ.

On the 30th of January the marshal made his return, not acknowledging the jurisdiction, but stating the sentence of the district court as his authority; that the prisoner was delivered to, and was then in the actual keeping of, the sheriff of Milwaukee county, by order of the court, and he, therefore, had no control of the body of the prisoner; and if the sheriff had not received him, he should have so reported to the district court, and should have conveyed him to some other place or prison, as the court should command.

On the same day the sheriff produced the body of Booth before the state court, and returned that he had been committed to his custody by the marshal, by virtue of a transcript, a true copy of which was annexed to his return, and which was the only process or authority by which he detained him.

This transcript was a full copy of the proceedings and sentence in the district court of

the United States, as hereinbefore stated. To this return the accused, by his counsel, filed a general demurrer.

The court ordered the hearing to be postponed until the 2d of February, and notice to be given to the district attorney of the United States. It was accordingly heard on that day, and on the next (February 3d), the court decided that the imprisonment was illegal, and ordered and adjudged, that Booth be, and he was, by that judgment, forever discharged from that imprisonment, and restraint, and he was accordingly set at liberty.

On the 21st of April next following, the Attorney General of the United States presented a petition to the Chief Justice of the Supreme Court, stating briefly the facts in the case, and at the same time presenting an exemplification of the proceedings hereinbefore stated, duly certified by the clerk of the state court, and averring in his petition that the state court had no 512*] *jurisdiction in the case, and praying that a writ of error might issue to bring its judgment before this court to correct the error. The writ of error was allowed and issued, and, according to the rules and practice of the court, was returnable on the first Monday of December, 1855, and a citation for the defendant in error to appear on that day was issued by the Chief Justice at the same time.

No return having been made to this writ, the Attorney General, on the 1st of February, 1856, filed affidavits, showing that the writ of error had been duly served on the clerk of the supreme court of Wisconsin, at his office, on the 30th of May, 1855, and the citation served on the defendant in error on the 28th of June, in the same year. And also the affidavit of the district attorney of the United States for the district of Wisconsin, setting forth that when he served the writ of error upon the clerk, as above mentioned, he was informed by the clerk, and has also been informed by one of the justices of the Supreme Court, which released Booth, "that the court had directed the clerk to make no return to the writ of error, and to enter no order upon the journals or records of the courts concerning the same." And, upon these proofs, the Attorney General moved the court for an order upon the clerk to make return to the writ of error, on or before the first day of the next ensuing term of this court. The rule was accordingly laid, and on the 22d of July, 1856, the Attorney General filed with the clerk of this court the affidavit of the marshal of the district of Wisconsin, that he had served the rule on the clerk on the 7th of the month above mentioned; and no return having been made, the Attorney General, on the 27th of February, 1857, moved for leave to file the certified copy of the record of the supreme court of Wisconsin, which he had produced with his application for the writ of error, and to docket the case in this court, in conformity with a motion to that effect made at the last term. And the court thereupon, on the 6th of March, 1857, ordered the copy of the record filed by the Attorney General to be received and entered on the docket of this court, to have the same effect and legal operation as if returned by the clerk with the writ of error, and that the case stand for *argument at the next ensuing term, [*513 without further notice to either party.

The case was accordingly docketed, but was not reached for argument in the regular order and practice of the court until the present term.

This detailed statement of the proceedings in the different courts has appeared to be necessary in order to form a just estimate of the action of the different tribunals in which it has been heard, and to account for the delay in the final decision of a case, which, from its character, would seem to have demanded prompt action. The first case, indeed, was reached for trial two terms ago. But as the two cases are different portions of the same prosecution for the same offense, they, unavoidably, to some extent, involve the same principles of law, and it would hardly have been proper to hear and decide the first before the other was ready for hearing and decision. They have accordingly been argued together, by the Attorney General of the United States, at the present term. No counsel has in either case appeared for the defendant in error. But we have the pamphlet arguments filed and referred to by Booth in the first case, as hereinbefore mentioned, also the opinions and arguments of the supreme court of Wisconsin, and of the judges who compose it, in full, and are enabled, therefore, to see the grounds on which they rely to support their decisions.

It will be seen, from the foregoing statement of facts, that a judge of the supreme court of the state of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offense against the laws of this government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the supreme court of the state.

In the second case the state court has gone a step farther, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by habeas corpus, *has set aside and annulled its [*514 judgment, and discharged a prisoner, who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court.

And it further appears that the state court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the state court.

These propositions are new in the jurisprudence of the United States as well as of the states; and the supremacy of the state courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the supreme court of a state.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed

with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of habeas corpus. But the paramount power of the state court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of habeas corpus, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the state in which the party happens to be imprisoned; for, if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of Con- [*515 gress in question, *it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole Criminal Code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than to state the result to which these decisions of the state courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty, and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges *or courts to exercise judicial power, by [*516 habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned.

It is, however, due to the state to say, that we do not find this claim of paramount jurisdiction in the state courts over the courts of the United States asserted or countenanced by the Constitution or laws of the state. We find it only in the decisions of the judges of the Supreme Court. Indeed, at the very time of these decisions were made, there was a statute of the state which declares that a person brought up on a habeas corpus shall be remanded, if it appears that he is confined.

1st. By virtue of process, by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2d. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction. Revised Statutes of the state of Wisconsin, 1849, ch. 124, page 629.

Even. therefore. if these cases depended upon the laws of Wisconsin, it would be difficult to find in these provisions such a grant of judicial power as the Supreme Court claims to have derived from the state.

But, as we have already said, questions of this kind must *always depend upon the Con- [*517 stitution and laws of the United States, and not of a state. The Constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one state upon the rights of another, which would ultimately terminate in vio-

lence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals.

The language of the Constitution, by which this power is granted, is too plain to admit of doubt or to need comment. It declares that "this Constitution, and the laws of the United States which shall be passed in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

But the supremacy thus conferred on this government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice in the several states, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free 518*] *from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal government, would soon receive different interpretations in different states, and the government of the United States would soon become one thing in one state and another thing in another. It was essential, therefore, to its very existence as a government, that it should have the power of establishing courts of justice, altogether independent of state power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a state court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly, it was conferred on the general government, in clear, precise and comprehensive terms. It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question shall arise. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such a question arises, whether it be in a judicial tribunal of a state or of the United States. And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the general government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every state; and to guard against evils which would *inevitably arise from conflicting [*519 opinions between the courts of a state and of the United States, if there was no common arbiter authorized to decide between them.

The importance which the framers of the Constitution attached to such a tribunal, for the purpose of preserving internal tranquility, is strikingly manifested by the clause which gives this court jurisdiction over the sovereign states which compose this Union, when a controversy arises between them. Instead of reserving the right to seek redress for injustice from another state by their sovereign powers, they have bound themselves to submit to the decision of this court, and to abide by its judgment. And it is not out of place to say, here, that experience has demonstrated that this power was not unwisely surrendered by the states; for in the time that has already elapsed since this government came into existence, several irritating and angry controversies have taken place between adjoining states, in relation to their respective boundaries, and which have sometimes threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every state." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the state judges bound to carry it into execution. And as the courts of a state, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the states, which must be settled by force of arms, unless some tri-*bunal was created to decide between [*520 them finally and without appeal.

The Constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this Constitution" and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.

This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the general

government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to the Federal government, it is the duty of the courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the states, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry. And no one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquility could not have been preserved; and if such controversies were left to arbitrament of physical force, our government, state and national, 521*] would soon cease to be governments *of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions.

In organizing such a tribunal, it is evident that every precaution was taken, which human wisdom could devise, to fit it for the high duty with which it was intrusted. It was not left to Congress to create it by law; for the states could hardly be expected to confide in the impartiality of a tribunal created exclusively by the general government, without any participation on their part. And as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of Congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the Federal government, but by the people of the states, who formed and adopted that government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court should have appellate power in all cases arising under the Constitution and laws of the United States. So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceeding the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force.

These principles of constitutional law are confirmed and illustrated by the clause which confers legislative power upon Congress. That power is specifically given in article 1, § 8, paragraph 18, in the following words:

"To make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Under this clause of the Constitution, it became the duty of Congress to pass such laws as were necessary and proper to *carry [*522 into execution the powers vested in the judicial department. And in the performance of this duty, the First Congress, at its first session, passed the act of 1789, ch. 20, entitled "An Act to Establish the Judicial Courts of the United States." It will be remembered that many of the members of the convention were also members of this Congress, and it cannot be supposed that they did not understand the meaning and intention of the great instrument which they had so anxiously and deliberately considered, clause by clause, and assisted to frame. And the law they passed to carry into execution the powers vested in the judicial department of the government proves, past doubt, that their interpretation of the appellate powers conferred on this court was the same with that which we have now given; for by the 25th section of the act of 1789, Congress authorized writs of error to be issued from this court to a state court, whenever a right had been claimed under the Constitution or laws of the United States, and the decision of the state court was against it. And to make this appellate power effectual, and altogether independent of the action of state tribunals, this act further provides, that upon writs of error to a state court, instead of remanding the cause for a final decision in the state court, this court may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.

These provisions in the act of 1789 tell us, in language not to be mistaken, the great importance which the patriots and statesmen of the First Congress attached to this appellate power, and the foresight and care with which they guarded its free and independent exercise against interference or obstruction by states or state tribunals.

In the case before the supreme court of Wisconsin, a right was claimed under the Constitution and laws of the United States, and the decision was against the right claimed; and it refuses obedience to the writ of error, and regards its own judgment as final. It has not only reversed and annulled the judgment of the district court of the United States, but it has reversed and annulled the provisions of the Constitution itself, *and the act of Con- [*523 gress of 1789, and made the superior and appellate tribunal the inferior and subordinate one.

We do not question the authority of state court, or judge, who is authorized by the laws of the state to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody

under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of habeas corpus, and the duty of the officer to make a return, grow, necessarily, out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate 524*] or *process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a state judge or court upon a habeas corpus issued under state authority. No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the states. The Constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a state, is proved by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states (as well as those of the general government), shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the *Constitu- [*525 tion was submitted to the people of the several states, for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign state, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every state has plighted to the other states to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. And no power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state.

We are sensible that we have extended the examination of these decisions beyond the limits required by any intrinsic difficulty in the questions. But the decisions in question were made by the supreme judicial tribunal of the state; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the state court has fallen, and the consequences to which they would inevitably lead.

But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the *tribunals of the [*526

United States to revise and correct it, and not for a state court. And as regards the decision of the district court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a state or the United States, by habeas corpus or any other process.

But although we think it unnecessary to discuss these questions, yet, as they have been decided by the state court, and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this court, the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States; that the commissioner had lawful authority to issue the warrant and commit the party, and that his proceedings were regular and conformable to law. We have already stated the opinion and judgment of the court as to the exclusive jurisdiction of the district court, and the appellate powers which this court is authorized and required to exercise. And if any argument was needed to show the wisdom and necessity of this appellate power, the cases before us sufficiently prove it, and at the same time emphatically call for its exercise.

The judgment of the Supreme Court of Wisconsin must, therefore, be reversed in each of the cases now before the court.

JOHN W. BRITTAN, *Appt.*,
v.
WM. A. BARNABY, Claimant of the Ship Alboni, her Tackle, etc.

(See S. C. 21 How. 527-538.)

Freight, when demandable—what is—delivery of part—reasonable time—lien for, when part delivered—opportunity to examine goods—when may be stored, to preserve lien—memorandum on bill of lading—custom, as varying.

The consignee of a ship has no right to demand the freight upon the whole shipment, when he was only ready to deliver a part of it.

Where a ship master has a larger shipment under one bill of lading than he can land in the business hours of a day, as he has the control of unloading the cargo, he must take care to do it in such quantities that he may be able to have the *pro rata* freight ascertained; and until it shall be done, he is not in readiness to deliver such part, or to demand the freight which may be due upon it. Goods so landed will be under his care and responsibility, without additional expense to the consignee of them until they shall be ready for delivery.

"Freight" is the hire agreed upon between the owner and master, for the carriage of goods from one port or place to another.

That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it. Then the freight must be paid before an actual delivery can be called for.

The master is bound to deliver the goods in a reasonable time.

When the shipment cannot be landed in a day, if he lands a part of it, his lien upon the whole gives him the power to ask from the consignee of the merchandise a satisfactory security for the payment of the entire freight as called for by the bill of lading. But a security or arrangement is all that he can ask.

He may not demand that the whole freight of the shipment should be paid before the consignee has the opportunity to examine his goods, to see if the obligations of the bill of lading have been fulfilled by the ship owner.

When landings of the same shipment are made on different days, if the shipper shall not be present to receive the goods, and has not made an arrangement to secure the payment of the freight, they may be stored for safe keeping at the consignee's expense and risk, in the ship owner's name, to preserve his lien for the freight.

A stamp or memorandum upon a bill of lading (that freight is payable prior to delivery) cannot of itself change the well-known commercial rule in respect to the delivery of goods and the payment of freight.

The conveyance and delivery is a condition precedent, to payment of freight, and must be fulfilled.

A memorandum or stamp upon the back of a bill of lading, is insufficient to explain or change it though the ship owner may have made it as an intimation of his mode of doing business, or that a practice prevailed in conformity with it at the port to which the goods were carried and delivered to the consignee.

Any practice at San Francisco, however general it may have become, has not the force of custom to release its merchants from the obligation of an ordinary bill of lading.

Argued Jan. 27, 1859. Decided Mar. 7, 1859.

APPEAL from the Circuit Court of the United States for the districts of California.

The libel in this case was filed in the district court of the United States for the northern district of California, by the appellant, for the recovery of the value of certain goods and merchandise shipped on board of said vessel in New York, to be transported and delivered to the libelant at San Francisco.

The said court entered a decree dismissing the libel, with costs. This decree having been affirmed, on appeal, by the circuit court, the libelant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **John Sherwood** and **D. Lord**, for appellant:

The principle of mercantile law, that the consignee of the goods has a right to insist that they shall be discharged from the vessel and that he may examine them before he makes himself liable for the freight, is elementary.

The carrier is not at liberty to insist that the goods shall not be landed before he can call upon the merchant for freight. Abb. Ship. 5th Am. ed. pp. 375, 6, 7; 3d Kent's Com. p. 214, and the notes and authorities there cited; Fland. Ship. p. 281, art. 281; *Certain Logs of Mahogany*, 2d Sumn. 600; *The Salmon Falls Manufg. Co.* v. *The Bark Tangier*, Op. Justice Curtis; Monthly Law Rep. for May, 1858, p. 6.

This principle is also fully established by the Civil Law.

1 Valin, Liber 6. tit. 3, p. 665.

The master has no right to retain the merchandise on board his vessel for default of pay-

NOTE.—*Lien for freight. Who has, and how waived*—see note to Blaine v. The Charles Carter, 2 L. ed. U. S. 636, and note to Raymond v. Tyson, 15 L. ed. U. S. 47.

ment of the freight; but he may, at the time of the discharge, refuse to deliver it, or cause it to be held for the freight.

Opinion of Story, J., in 2 Sumn. 600; *Bishop* v. *Ware*, 3 Camp. 360; *Ostrander* v. *Brown*, 15 Johns. 39; *House* v. *The Lexington*, 2 Leg. Obs. 4.

Delivery cannot be perfect, until the carrier has discharged the goods from the vessel. Until the carrier is thus discharged from the custody of the goods the freight is not earned.

The distinction between "discharged" and "delivery" is clearly settled.

Ostrander v. *Brown*, 15 Johns. 39; 1 Pars. Cont. 673; *Price* v. *Powell*, 3 N. Y. 322.

When the consignee is ready to receive the goods and tenders the freight, but delivery is refused for the reason that a claim exists contrary to the terms of the bill of lading, the carrier certainly cannot be discharged from his liability.

Stevenson v. *Hart*, 4 Bing. 476; *Powell* v. *Myers*, 26 Wend. 591; 1 Pars. Cont. 666.

2. In this action, all the goods set forth in the bill of lading were not discharged in one day. The reason does not appear. A part having been discharged on the 24th day of October, the libelant offered to pay the freight on that part, and thus placed it in the power of the carrier to have relieved himself from the responsibility of sending the goods to the warehouse.

It was competent for the parties to have agreed to this, and no greater expense or inconvenience would have accrued or resulted. The claimant having refused this reasonable offer, must take the consequences resulting from his refusal.

3. The claimant has offered testimony on the subject of the usages or customs of San Francisco. No foundation for this, however, was laid in his answer or otherwise.

Customs and usages must be pleaded. The decree must be upon the matters alleged and proved.

1 Chit. Pl. 217; 9 East. 185; Grant Corp. 346; 7 Cranch, 389; *The Rhode Island*, Olcott, 511.

Such usages must be reasonable, certain, and sufficiently ancient to authorize a presumption that they are generally known.

United States v. *Buchanan*, 8 How. 83; *Coxe* v. *Heisley*, 19 Pa. 245; 1 Smith L. C. Har. Wall. notes 687, 689.

The custom claimed in this case was opposed to the general law of the land, and will not be permitted to defeat rights hitherto settled and established.

2 Sumn. 569; *Wadsworth* v. *Allcott*, 6 N. Y. 64; *Turner* v. *Burrows*, 5 Wend. 541; *Coxe* v. *Heisley*, 19 Pa. 245; 8 Wend. 144, 2 Sumn. 366; 2 Wash. C. C. 10; 2 Greenl. Ev. 250.

4. According to the bill of lading, the freight was payable on delivery, and the acts are concurrent.

2 Sumn. 603; *Yates* v. *Railston*, 2 Moo. J. B. 294.

The words stamped, "goods to be delivered at the vessel's tackles when ready for delivery; not accountable for breakage, leakage, or for loss or damage by fire or collision; freight payable prior to delivery, if required; contents," do not vary the contract. Part of them are inconsistent with the words used in the body of the instrument, and otherwise are too indefinite.

No other effect can be given to these stamped words, than to those notices which are intended to limit the carrier's liability, but which generally are rejected as having no value.

1 Smith's Lead. Cas. 320; Pars. Cont. 703.

Mr. **Jacob Broom**, for appellee:

1. By the general mercantile law, the obligation of the carrier does not extend beyond carrying from port to port; for this he receives his freight money. All necessary and proper charges that accrue on the goods after arrival, as wharfage, cartage, etc., must be paid by the shipper. If he insist upon a delivery of all the goods at once, before payment, such charges as this renders necessary must be borne by him. According to the course of the California trade, storage is proper and necessary where all the goods embraced in the bill of lading are not got out in one day; for the master is not at liberty to leave goods exposed on a wharf, but it is his duty to see that they are safely kept.

Abb. Ship. 7th Am. ed. 494, 495; Abb. Ship. 491, 492; Fland. Ship. 273–276; Story Bailm. 566; 3 Camp. 360; 4 T. R. 260.

2. There is no obligation on the master to deliver part of the goods in a single bill of lading, upon payment of part of the freight. Abb. Ship. 493; marginal paging, 377.

3. The contract of the parties here is express, that the consignee shall receive the goods at "the ship's tackles," and that freight must be paid "prior to delivery if required." The stamp is a part of the contract.

1 Duer Ins. 75, 141; 4 Mass. 245; 14 Mass. 322; 10 Pick. 223; 10 Pick. 293; 4 Met. 230; 8 Met. 226; 16 Vt. 26; these cases are cited: Chit. Bills, 11th Am. ed. 141, note.

4. A good and valid usage was proved: and that usage controls the general rule of mercantile law, if that rule be different from what it is contended for.

1 Duer, Ins. 255, 264, 269, 271, § 58; 14 Wend. 26; 17 Wend. 207; 9 Wheat. 581, 230, 231, 1 Duer, 186; 1 Duer, 267.

5. Even if the usage were not perfect and universal, but partial, yet, as it was the usage of D. L. Ross & Co., and the libelants had notice of it by previous dealings with that house, and took a bill of lading with notice stamped on its face, it is binding on them.

1 Duer, Ins. 254, 263, § 57, 286; note, and cases cited; 4 Cow. & Hill's ed. of Phil. Ev. 511.

Mr. Justice **Wayne** delivered the opinion of the court:

This cause involves an important commercial principle, of daily recurrence in practice, which does not appear to be well understood and settled in San Francisco. Our decision will correct the misapprehension there, in regard to the delivery of merchandise by ship owners, and the payment of freight for its transportation.

The libelant was the owner and consignee of goods of a value exceeding $4,000, which were shipped in good order and condition at New York, on board of the ship Alboni, to be carried and delivered in San Francisco, in the same

order, at a rate of freight expressed in the bill of lading. It amounted to $247.12, including $11.77 for primage. The bill of lading, upon its face, is in the ordinary form; but there was a stamp upon the back of it, in these words: "That the goods were to be delivered at the ship's tackles when ready for delivery—not accountable for loss or damage by fire or collision; freight payable prior to delivery, if required; contents unknown." The proctors in the cause agreed that those words were stamped on the original bill of lading.

The ship arrived at San Francisco. Notice of it was given to the libelant by the consignee of the ship; and he also required payment of the freight of the goods as they should be landed from the ship on the wharf, and that if it was not paid, and the goods received by four o'clock of the day, such of them as had been landed would be placed in a warehouse for safe keeping, at the expense of the libelant. The notice and the requirement are taken from the second article of the respondent's answer to the libel. He adds, that the libelant had refused to pay the freight according to the terms of the bill of lading.

The testimony discloses what the respondent considered to be its terms, and the refusal of the libelant to acquiesce in his interpretation. 532*] *The goods were landed from the ship in parcels, on different days, from the 24th to the 27th of October, inclusive. The clerk of the libelant attended on each day to receive them, and in conformity to the notice which had been given, he offered to pay the freight of such of the merchandise as had been landed. The consignee of the ship refused to receive it, or to deliver such goods, claiming that he had a right to demand the freight upon the whole shipment, when he was only ready to deliver a part of it. In the assertion of this right (certainly not in conformity with the notice he had given to the libelant) the respondent from day to day warehoused the goods.

The libelant did all he was bound to do under the notice which had been given to him. He could not have done more. The respondent's refusal to deliver the parcels as they were landed cannot be justified, under the notice he had given, by any delay there may have been in the delivery, either from the necessity of weighing or measuring them, or from the claim made by him to have the freight paid upon the whole shipment before he would deliver a part of it. He had taken his course, and the libelant acquiesced in it, by offering to pay the freight on each parcel as it was put on the wharf, though not bound to do so by the commercial law. The respondent's refusal has no justification, either in law, nor can it be vindicated by any evidence in the cause.

We do not mean to say that the libelant had a right to take the parcels on the days they were landed, without the payment of a *pro rata* freight; but where a shipmaster has a larger shipment under one bill of lading than he can land in the business hours of a day, as he has the control of unloading the cargo, he must take care not to do it in such quantities that he may not be able to have the *pro rata* freight ascertained in the only way in which it can be done. Until it shall be done, he is not in readiness to deliver such part, or to demand the freight which may be due upon it. Goods so landed will be under his care and responsibility, without additional expense to the consignee of them, until they shall be ready for delivery.

Ordinarily, no difficulty arises between the ship's owner and *the consignee of the [*533 goods; their interest, convenience, and responsibilities, usually suggest to them some arrangement for the freight beforehand, by which goods landed from day to day may be taken without delay by the consignee of them. In this instance, however, no opportunity was given to the libelant to make such an arrangement, the consignee of the ship having absolutely demanded the whole freight of the shipment as the condition for the delivery of any part of it.

On the fourth day, when all of the libelant's shipment had been landed, and before they were sent to a warehouse, he demanded from the consignee of the ship a delivery order for all the merchandise specified in the bill of lading, tendering at the same time, in gold, the whole freight due. The delivery order was refused, the answer being that the goods were subject, in addition to the freight, to a charge for storage and cartage. The last was also warehoused by the respondent, as those of the three previous landings had been.

The foregoing is a sufficient statement of the facts and evidence in this case for the decision of it. It will not be necessary to notice again the attendance of the clerk of the libelant on days of landing, to receive the goods and pay the freight.

The word freight, when not used in a sense to imply the burden or loading of the ship, or the cargo which she has on board, is the hire agreed upon between the owner and master for the carriage of goods from one port or place to another. That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it. Then the freight must be paid before an actual delivery can be called for. In other words, the rule is, in the absence of any agreement to the contrary of it, that freight, under an ordinary bill of lading, is only demandable by the owner, master, or consignee of the ship, when they are ready to deliver the goods in the like good order as they were when they were received on board of the ship. Such is the general rule. Neither party can require from the other that the merchandise shipped under one bill of lading shall be put up into parcels for delivery, or for the payment of freight. They may do so by stipulation in the bill of lading, *or by subse- [*534 quent agreement, for either of the purposes just mentioned. The master is bound to deliver the goods in a reasonable time. What may be so, depends upon the facilities there may be for the discharge of the cargo at the port of delivery, and the impediments in the way of it. When the shipment is large, or, from the master's storage of it, it cannot be landed in a day, if he leaves a part of it, his lien upon the whole gives him the power to ask from the consignee of the merchandise a satisfactory security for the payment of the entire freight as called for by the bill of lading. But a se-

curity or arrangement is all that he can ask. He may not demand that the whole freight of the shipment should be paid before the consignee has had the opportunity to examine his goods, to see if the obligations of the bill of lading have been fulfilled by the ship owner. Nor is the ship bound to land an entire shipment in a day, for the proper storage of the goods is the master's care, and he may do it in such a way as may be most advantageous to the ship, taking care that it shall not be done to the injury of the goods, or in such a manner as to produce unreasonable delay in the delivery of them. And when landings of the same shipment are made on different days, if the shipper disregards the notice given to him that such will be the case, and he shall not be present to receive the goods, and has not made an arrangement to secure the payment of the freight, they may be stored for safe keeping at the consignee's expense and risk, in the ship owner's name, to preserve his lien for the freight. This course was not pursued in this case by the consignee of the ship. He attempts to justify what he did upon the allegation in his answer to the libel, that the bill of lading contained a stipulation, that the freight to be earned on the whole shipment was payable when a portion of it had been landed.

The bill of lading, upon the face of it, is the ordinary one between parties for the transportation of merchandise. The merchandise mentioned in it was to be carried from New York to San Francisco at fixed rates for freight, with primage and average accustomed. There is no other stipulation or condition in it, than the undertaking for carrying the goods, and 535*] *that of the shipper to pay the freight. But the consignee of the ship claimed that the stamp upon the back of the bill of lading was equivalent to one. So his counsel contended in argument. This stamp was in red ink, and was put on the bill of lading by the ship's owner. We will suppose it had been made by Captain Barnaby before he signed the bill of lading. But it was not signed by the parties, nor is there any proof that it was ever recognized by the shipper as a part of his contract. Nothing seems to have been said about it when the bill of lading was signed, nor until it was claimed in San Francisco to be a part of it. It no doubt has a relation to the subject-matter of the bill of lading, and was put there by Captain Barnaby for that purpose; but unless it received the assent of the shipper, it cannot vary the obligations of the contract so as to authorize a demand for freight before the goods were ready for delivery. The question we are now considering is not what effect might be given to such a stamp upon a bill of lading by proof that the parties, at the time it was made, adopted it as a stipulation or agreement that the shipper was to pay the whole freight upon his shipment when a portion of it had been landed from the ship; but the question is, whether such a stamp, of itself, upon a bill of lading, can change the well-known commercial rule in respect to the delivery of goods and the payment of freight. It is that which is asked in this case by the respondent. There is not a word of proof that the shippers in New York, or the consignee in San Francisco, ever regarded it in such a light; none that Captain Barnaby considered the stamp to be a part of the bill of lading assented to by the shipper, until it was asserted by him to be so, in his answer, after the consignee of the ship had attempted to enforce it, as a part of the contract, upon the libelant. It was properly resisted. The personal obligation to pay freight rests upon a bill of lading, when one has been given, and the payment of it is made a condition of delivery. The general rule is, that the delivery of the goods at the place of destination, according to the bill of lading, is necessary to entitle the ship to freight. The conveyance and delivery is a condition precedent, and must be fulfilled. 3 Kent, 218.

*Such a stamp cannot be considered a [*536 stipulation, according to the legal meaning of that word. All writers upon commercial law use the word "stipulation" to denote a particular engagement, which may be insisted upon, before it can control the general operation of law, or vary a contract. Such stipulations are not uncommon between ship owners and shippers of merchandise, in charter parties and in bills of lading. But when done in either, they must be made in words sufficiently intelligible to indicate an agreement that the operation of the law merchant, in respect to those instruments, is not to prevail; and the stipulation must be in writing, and be signed by the parties, before it can be received as an auxiliary to explain how the contract is to be performed. A memorandum or stamp upon the back of a bill of lading is insufficient for such a purpose, though the ship owner may have made it as an intimation of his mode of doing business, or that a practice prevailed in conformity with it at the port to which the goods were to be carried and delivered to a consignee. An attempt was made to assimilate the stamp in this case to a memorandum on a policy of insurance. In the first place, as loose, indefinite, and dangerous, as some of the decisions in the English and American reports are, concerning memorandums of that kind, no case can be found in either, in which effect has been given to any memorandum which was not on the face or in the margin of the policy. But if such a case can be found, we should not feel ourselves at liberty to extend it to a bill of lading for the transportation of merchandise.

Those instruments of commerce are construed by very different principles and usages. The cases cited by counsel to show that the memorandums upon the face of the one were analogous to a stamp put upon a bill of lading, do not apply. Neither do the texts from Duer, 75, 141, do so. The rule in respect to policies of insurance is, that it is not material whether the written words of a policy are inserted in the body of the instrument, or written on its face or on the margin of it; but they must be there in fact; must have been written before the execution of it, or by mutual consent after the execution, and before the commencement of the risk. Thus they *then form parts [*537 of the contract, it having been determined, from the usages of insurances, that the parties contracted in reference to them, and that the signature and acceptance of the policy was proof that they had done so. All of the other cases cited are agreements, varying, in some particulars, the payment of notes of hand, en-

tered into contemporaneously with the execution of the notes, and which, by proofs, were shown to have been meant by the parties to be a part of them. An attempt was also made to show that a practice prevailed in San Francisco which gave an effect to the stamp upon the bill of lading, so as to control the general rules of commercial law in respect to the payment of freight, and the delivery of merchandise from ships. Whatever may be the practice there, or however general it may be, it is too recent in its use to make an exception, on the ground that it was a custom. The trade of San Francisco is already large; every day develops its resources and the advantages of its position for commerce. No doubt it has not as yet those facilities for the landing of merchandise and loading of ships which our older ports have; but that will not give to any practice there, however general it may have become, the force of custom to release its merchants from the obligation of an ordinary bill of lading. If inconveniences exist in the particular just mentioned, it will be best for the merchants of San Francisco, and those with whom they deal in other parts of the world, that the contract of a bill of lading should have its fixed meaning and obligation, and that it is only alterable by express stipulations made in the way which has been already stated in the decision.

The testimony, however, in this case shows a very uncertain opinion and a fluctuating practice in San Francisco upon the subject of the delivery of shipments of goods and the payment of freight; that such a demand as was made upon the libelant to pay his freight upon all the merchandise mentioned in his bill of lading when only a portion of it had been landed upon the wharf, had only been acquiesced in by many of the merchants there to avoid trouble, to get early possession of their importations, and from an unwillingness to be troubled with lawsuits. There are also differences of opinion as to the 538*] efficacy *of such a stamp as there was upon the bill of lading in this case, many of them, from their experience and knowledge of trade elsewhere, having a more correct apprehension of the commercial law than the reverse of it, which was attempted to be imposed upon the libelant. Nor can any previous assent to the usage of a particular firm engaged in the shipping business, though acquiesced in by one who had had other dealings with it, be interpreted into an agreement so as to deprive him of a right under an ordinary bill of lading subsequently made.

The view which we have given of this case determines the whole controversy. It comprehends every point raised by the record, or made in the argument of it. The respondent having in the first instance demanded the entire freight called for by the bill of lading, without any right to do so, and having refused to deliver the merchandise belonging to the libelant when the last parcel of it was landed on the wharf, and when the freight due upon the whole of it was tendered, on the ground that there were due charges for cartage and storage, did so without color of law for such refusal. Our judgment is, that those charges must be paid by the respondent, and we shall reverse the decision of the court below, and direct a mandate to be sent to the circuit court to order a decree for the libelant for the sum of $4,367.45, with interest from the 2d day of November, 1855. 9th vol. Stat. at L. 181.

The sum mentioned is proved to have been the value of the libelant's merchandise after freight and primage had been deducted, when it was wrongfully detained by the respondent. The respondent will also be charged with the costs which have been incurred in the prosecution of this libel.

Mr. Justice **Daniel** dissents to the decision in this case, upon the grounds that the court of admiralty in this country, as in England, can take no cognizance of charter-parties or bills of lading, and because this case was within the plain jurisdiction of the courts of the state of California, either at common law or in equity.

ALTON R. EASTON, *Plff. in Err.*, *v.* THOMAS L. SALISBURY.

(See S. C. 21 How. 426-432.)

New Madrid certificate—located within one year—estoppel by deed.

A holder of a New Madrid certificate had a right to locate it on any of the public lands which had been authorized to be sold.

All New Madrid warrants not located within one year from the 26th of April, 1822, are null and void.

Where a conveyance was made by one not having the legal title, but afterwards under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him; it inured, by way of estoppel to his grantee, and those who claim by deed under him.

Argued Feb. 18, 1859. Decided Mar. 7, 1859.

IN ERROR to the Supreme Court of the State of Missouri.

This case arose upon a petition filed in the St. Louis court of common pleas, by the plaintiff in error, to settle the title to certain lots.

The case was finally submitted to the court on an agreed statement, which is set out in full in the opinion of this court. The court having entered a judgment in favor of the defendant, the plaintiff took an appeal to the supreme court of the state of Missouri, which court affirmed the judgment of the court below; whereupon the plaintiff sued out this writ of error.

Mr. **H. R. Gamble** and **C. Gibson**, for plaintiff in error:

1. The title under which the plaintiff claims was good against the United States.

Les Bois v. *Bramell*, 4 How. 449; *Stoddard* v. *Chambers*, 2 How. 284; *Mills* v. *Stoddard*, 8 How. 364; *Menard* v. *Massey*, 8 How. 310; *Delauriere* v. *Emison*, 15 How. 525; *Hoffnagle* v. *Anderson*, 7 Wheat. 212.

The survey made by the surveyor general, its return by him to the recorder of land titles, the issuing of a patent certificate by that officer, and of a patent by the President of the United States, were all acts done by the proper officers of the United States; and the question is now

for the first time raised in this court, as to the effect of these acts as against the United States.

This question was not only not decided in *Mills* v. *Stoddard*, or *Stoddard* v. *Chambers*, but the point was not involved in those cases, nor raised by the counsel. On the contrary, in *Stoddard* v. *Chambers*, 2 How. 295, the inquiry was, as stated by this court, "whether the defendant (Chambers) had any title as against the plaintiffs."

2. The land was subject to be disposed of by the government during the existence of the bar, from 1829 to 1832, to any person or in any manner, and was then open to entry or location.

And the plaintiff had the right during this time to perfect his title. But had the plaintiff applied for a patent during the War, he would have been properly answered by the officers of the government, that two patents could never issue by the government for the same land, under the same title, and to the same person; and that, as his patent passed any title the government might have, a second patent could add no strength to his claim.

This case is distinguishable from the one of *Mills* v. *Stoddard* in this, that there Mills' title was not complete until after the revival of the reservation; he had a mere equity. Here the title was complete before the passage of the act of 1832.

The patent was not void as against the government. It continued to claim the land in New Madrid, in lieu of which this patent issued. In all the cases decided in this court on this subject, it is held that if the patent had issued during the War, it would have passed the title. Yet, where does the President derive his authority to issue a patent upon proceedings utterly void, even as against the government; and if he had any such authority from 1829 to 1832, he surely possessed it in 1827, and we invoke it in this case.

Menard v. *Massey*, 8 How. 316.

A patent merges all former proceedings.

Bagnell v. *Broderick*, 13 Pet. 436.

A bona fide transfer of the title in fee to the property by the President, for a valuable consideration, was a sale within the saving clause of the act of 1836. What is more reasonable or just than to suppose that Congress did not intend that when a title had been completed for a valuable consideration moving to the government, it should not be defeated in favor of claimants, who had very doubtful if any claim at all against the government. This does not conflict with *Stoddard* v. *Chambers*, or *Mills* v. *Stoddard*; for there the confirmation related back to the passage of the act of 1832, and Peltier's patent was not then issued. The fee was still in the government.

Mr. **T. Ewing**, for defendant in error:

The New Madrid certificate was a gift. The Spanish succession was a right which the United States was bound to respect, both by the treaty stipulation and the law of nations.

Delassus v. *United States*, 9 Pet. 133.

The plaintiff has, therefore, no equity as against the defendant, or as against the United States. In order to recover, he must show a title according to law. He must receive the gift subject to all the restrictions imposed by the donor.

The case is well presented in the opinion of the supreme court of Missouri (from which the counsel quoted).

The location of their warrant, being against law, was void. In equivalent words, the warrant was unlocated, and in that condition it was an unlocated warrant on the 26th of April, 1823, and on that day all unlocated warrants were, by the act of Congress of April 26, 1822, ch. 40, declared "null and void." There could be no location of them thereafter. The attention of the court was not called to this provision of the act of 1822, in the case of *Stoddard* v. *Chambers*.

2. The location made on Nov. 16, 1816, being on forbidden ground, was void.

The location being void, was as if it had never been. Having been issued while the saving in favor of the Spanish title, which is an implied prohibition, was in force, the patent as well as the location, was void, because "issued against law."

2 How. 318; 8 How. 332.

The patent then, which was void *ab origine*, had not become valid on the 28th of May, 1830, when the first series of statutes saving the Spanish claims expired; for a void patent has no more the faculty of creating itself, making itself out of nothing, than a void location. The United States alone can pass the title to its lands. It requires the concurrent act of the Legislative and Executive Departments. The legislature forbade the transfer of this title upon this warrant of location. The Executive issued a patent—the act was unauthorized and void. It was not the patent of the United States, for it was issued without authority of law.

9 Cranch, 99; 2 How. 318; 8 How. 332.

Mr. Justice **McLean** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Missouri.

The parties agreed as to the facts in this case, in order that the points of law might be ruled by the court.

On the 9th of July, 1811, there were confirmed to James Smith, by the commissioners for the adjustment of titles to land in the territory of Missouri, lots nine and ten (9 and 10), containing two arpents of land in the village of Little Prairie, in the county of New Madrid, state of Missouri. Afterwards *these [*429 lots, while still owned by said Smith, were materially injured by earthquakes, and proof thereof was made before the recorder of land titles at St. Louis, on the 16th of November, 1815; whereupon, there was issued by said recorder, to said James Smith, a certificate of new location (commonly called a New Madrid certificate), numbered 159. On the 22d of October, 1816, said Smith and wife conveyed to Rufus Easton the said two arpents in Little Prairie, and assigned to him the right to locate other lands under said certificate in lieu of the land so injured, and also conveyed to said Easton the land that might be located by means of said certificate. On the 16th of November, 1816, Easton gave notice to the surveyor general of said territory of Missouri of the location of said certificate on a tract of land about two miles west of the city of St. Louis, and demanded a

survey thereof. In March, 1818, a survey was made, by direction of the surveyor general, in pursuance of said selection and was duly returned and approved by said surveyor general; said survey is numbered 2,491, and the land thereby designated embraces the land in controversy, and is within St. Louis township, in St. Louis county, Missouri. By virtue of the premises, Easton held said land, claiming the same until 1826, when he conveyed the same to William Russell. On the 28th day of May, 1827, the United States issued a patent on said location for said land to James Smith or his legal representatives. On the 19th of January, 1839, William assigned and conveyed all his interest in said land to J. G. Easton, who, on the 18th of March, 1845, conveyed and assigned the same to plaintiff. Defendant is in possession of the land described in the petition, and the same is within the boundaries indicated by said survey and patent.

On the 20th of January, 1800, a concession was made by the Spanish lieutenant-governor, to one Mordecai Bell, of three hundred and fifty arpents of land, including the premises in controversy. The representatives of Mordecai Bell, on the 29th of June, 1808, presented the claim for said land, together with a descriptive plat of survey thereof, to the board of commissioners for the adjustment of land titles in the territory of Missouri. The documents showing 430*] said claim, and the derivative *title from Mordecai Bell, were duly recorded in 1808 by the recorder of land titles for the territory of Missouri. And on the 4th day of July, 1836, the United States confirmed said claim, according to said plat of survey, to the legal representative of M. Bell; a survey of said confirmation was made by authority of the United States in ——, and is numbered 3,026. Said survey embraces the land in dispute; and all the title of the confirmee, by the act of 1836, is in the defendant. The survey numbered 2,491, and also the patent dated 28th of May, 1827, are in due form of law; but defendant does not admit the authority of the officers of the United States to make the one or issue the other, nor that the same were made or issued under any law. It is admitted that the land in controversy is worth more than $2,000; that if the court should be of opinion that the plaintiff is entitled to recover, it is agreed that the damages shall be fixed at one cent, and the monthly value of the premises at $1. Either party is at liberty to turn this case into a bill of exceptions, and thereon prosecute a writ of error, or take an appeal to the supreme court of the state of Missouri, or of the United States. It is admitted that survey No. 3,026 was made under the authority of the United States, but the plaintiff may dispute the power of the United States as regards both the confirmation of 1836 and the survey No. 3,026.

It is admitted that the plaintiff had, at the commencement of this suit, all the title that was invested in said James Smith, or his representatives, by the New Madrid location and patent above mentioned.

It will be observed that this controversy arises between a New Madrid title and a Spanish concession. A holder of a New Madrid certificate had a right to locate it on any of the public lands which had been authorized to be sold. This claim came into the hands of Alton R. Easton, the plaintiff in error. It was surveyed in March, 1818, and the 28th of May, 1827, the United States issued a patent to James Smith, or his legal representatives.

From 1808 to the 26th of May, 1829, reservations were made from time to time to satisfy certain claims, but from that time *they [*431 ceased, until renewed by the act of the 9th of July, 1832. During this period, it is understood by the plaintiff in error, the "land in question was subject to be disposed of to any person, or in any manner, and was then open to entry or location. And it is urged that the plaintiff had the right during this time to perfect his title."

The President of the United States has no right to issue patents for land, the sale of which is not authorized by law. In the case of *Stoddard* v. *Chambers*, 2 How. 318, it is said: "The location of Chambers was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued." Had the entry been made or the patent issued after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested.

Nothing was done to give Easton's title validity, from the cessation of the reservation, in 1829, until its revival, in 1832. His entry was made in 1818, and on the 28th of May, 1827, his patent was issued. The land located and patented, having been reserved, was not liable to be appropriated by his patent. Whether the withdrawal of the patent might have been procured, or a new one instituted, it is not necessary to inquire. No such attempt was made.

But it seems by the act of the 26th of April, 1822, it was provided that all warrants under the New Madrid act of the 15th of February, 1815, which shall not be located within one year, shall be held null and void. This law is decisive upon this point; all New Madrid warrants not located within one year from the 26th of April, 1822, are null and void. Smith's or Easton's certificate for the New Madrid claim was void, and also his patent when issued, under the paramount claim of Bell, whose title was confirmed by the act of the 4th of July, 1836. Bell made the conveyance to Mackey, not having the legal title; but when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him and inured, by way of estoppel, to the grantee and those who claim by deed under him. *Stoddard* v. *Chambers*, 2 How. 317.

*There was no period from the entry [*432 and patent of the New Madrid claim in which that claim was valid. The location was not only voidable, but it was absolutely void, as it was made on land subject to a prior right. And under the act of 1822, all New Madrid warrants not located within a year from that date, were declared to be void.

Whether we look at the confirmatory act of 1836, which vested the title in the confirmee, or to the New Madrid title asserted against it, it is clear that *the New Madrid title is without validity, and that the fee is vested in the grantee of Bell.*

SAMUEL PEARCE, *Plff. in Err.*,
v.
THE MADISON AND INDIANAPOLIS RAILROAD COMPANY and The Peru and Indianapolis Railroad Company.

(See S. C. 22 How. 441-445.)

Power of consolidated railroad corporation—not to buy steamboat—persons dealing with, must take notice of powers—indorsee must.

Where separate Indiana railroad corporations, created to construct distinct lines of railroad, were consolidated by agreement, and the president of the consolidated company gave notes in its name in payment for a steamboat, to run in connection with the railroads; the rights, duties, and obligations of the separate corporations being defined in the laws of Indiana, under which they were organized., Held, that there was no authority of law to consolidate these corporations, and to place both under the same management or to subject the capital of the one to answer for the liabilities of the other.

Also held, that the managers of these corporations had no power to establish a steamboat line to run in connection with the railroads.

Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation.

In suit on notes by an indorsee; held, that the corporation had not the capacity to make the contract, in the fulfillment of which they were executed.

Submitted Mar. 1, 1859. Decided Mar. 11, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit brought in the court below, by the appellant, as assignee of William McClain, on five promissory notes, for $1,000 each.

The defendants demurred to each of the special counts contained in the declaration. The court below sustained the demurrers, and entered a final judgment for the defendants; whereupon the plaintiff took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Charles Fox** and **O. H. Smith**, for the plaintiff in error:

The contract for the purchase of the boat, after it was executed by the delivery of the boat to the appellees, was binding upon them, and it does not lie with them to take advantage of their own wrong, by rescinding their contract and keeping the boat.

16 Eng. Law & Eq. 596.

But even if the contract was void, the boat remained in the hands of the appellees, the property of the payee of these notes, and he could have maintained replevin or detinue for the property before it was sold by the appellees, and converted to their own use.

1 Chit. Pl. title *Replevin*, p. 162, ed. 1855.

If the possession of the boat was obtained by the appellees under a void contract, and they sold the boat and converted the proceeds to their own use, the payee of the notes could have maintained an action of trover and conversion against the appellees for his damages.

1 Chit. Pl. title *Trover*, p. 146, ed. 1855; 16 East, 6; 1 A. & E. 526; 2 Wend. 452; 7 Conn. 487; 2 McLean, 145; 9 Mass. 297; 2 Aik. 255.

After the boat was sold, it was competent to waive the tort and bring an action of *indebitatus assumpsit.*

5 Pick. 285; 5 Blackf. 14; 1 Taunt. 112; Barn. & C. 94; 4 Phil. Ev. 110; 3 N. H. 389; 1 Chit. pl. title of the Election of Actions, ed. 1855, p. 207.

The objection urged in the circuit court was, that as the notes were executed by the consolidated company, they cannot be sued jointly upon them, since the consolidation was dissolved. The answer to this is:

1. That they cannot be sent separately, without hazarding a plea in abatement for the nonjoinder of the other joint contractor.

Chit. pl. ed. 1855, p. 452, notes and authorities.

2. The consolidation was formed by the appellees; the notes were given by them jointly; the dissolution was of the consolidation and not of the incorporation of the appellees, and could not discharge their joint liability.

17 Jurist, 1103; 6 Eng. R. R. Cas. 177; 7 Eng. L. & Eq. 124; 1 Eng. R. R. Cas. 58.

These companies stood after the dissolution of the consolidation, upon the same principle, as to their debts, that the individuals composing a mercantile firm do after the dissolution of the partnership, as to the firm debts.

Ang. & A. Corp. 643, 644, 648; 1 Eng. R. R. Cas. 58, 68; 14 Eng. L. & Eq. 9; 19 Eng. L. & Eq. 87; 1 Am. Rw. Cas. 96.

Mr. **T. A. Hendricks** for defendants in error.

Mr. Justice **Campbell** delivered the opinion of the court:

The defendants are separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connect at Indianapolis, in that stae. The plaintiff is the assignee of five promissory notes, that were executed under conditions set forth in the declaration, and of which he had notice. The two corporations (defendants), some time before the date of the notes, were consolidated by agreement, and assumed the name of the Madison, Indianapolis, & Peru Railroad Company, and under that name, and under a common board of management, conducted the business of both lines of road.

While the business of the two corporations was thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat, which was to be employed on the Ohio river, to run in connection with the railroads. After the execution of the notes, and the acquisition of the boat, this relation between the corporations was dissolved by due course of law, and, at the commencement of the suit, each corporation was managing its own affairs. The plaintiff claims that the two corporations are jointly bound for the payment of the notes, but the circuit court sustained a demurrer to the declaration.

The rights, duties, and obligations of the defendants are defined in the acts of the legislature of Indiana, under which they were organized, and reference must be had to these, to *ascertain the validity of their con- [*443 tracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the

NOTE.—*Liability of a consolidated railroad company for the debts of its predecessor*—see note, 23 L. R. A. 231.

cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality, the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils, for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority. In *McGregor* v. *The Official Manager of the Deal and Dover Railway Co.* 16 Eng. L. & Eq. 180, it was considered that a railway company incorporated by act of Parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of Parliament, must be taken to be known to the whole world. In *Coleman* v. *The Eastern Counties Railway Co.* 10 Beav. 1, Lord Langdale, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and similar arrangements were not unusual among railway companies. Lord Langdale said: "Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend 444*] that it has *nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however, various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which these acts are done, they furnish no authority whatever. In *The East Ang. Railway Company* v. *The Eastern Counties Railway Company*, 11 C. B. (73 Eng.) 803, the court says the statute incorporating the defendants' company gives no authority respecting the bills in Parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of *Head* v. *Providence Insurance Company*, 2 Cranch, 127, and has been reaffirmed in a number of others that followed it. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Perrine* v. *Ches. & Del. Can. Co.* 9 How. 172.

It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the note, as an indorsee; and the only question is, had the corporation the capacity to make the contract, in *the fulfilment of which they were [*445 executed. The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.

Judgment affirmed.

THE UNITED STATES, *Appts.*,
v.
CHARLES FOSSATT.

(See S. C. 21 How. 445, 446.)

Practice—order of cases—after mandate to court below, no appeal till final decision.

No case can be taken up out of its order on the docket, where private interests only are concerned.

The only cases where this rule does not apply, are those in which the question in dispute will embarrass the government while it remains unsettled.

When a case is sent to the court below by a mandate from this court, no appeal will lie from any order or decision of the court, until it has passed its final decree in the case.

Argued Feb. 25, 1859. Decided Feb. 28, 1859.

APPEAL from the District Court of the United States for the Northern District of California.

The case appears in the opinions of the court.

See, also, 61 U. S. (20 How.) 413, for a report of this case, when before this court at the last term.

Messrs. **J. S. Black**, *Atty. Gen.*, and **R. Johnson** for appellants.

Messrs. **J. A. Bayard, Geo. M. Badger, J. M. Carlisle** and **Nelson**, for appellee.

On a motion to order this case for argument on a day certain.

Mr. Chief Justice **Taney** delivered the opinion of the court:

According to the rules and practice of the

NOTE.—*What is a "final decree" or judgment of state or other court from which appeal lies*—see note to Gibbons v. Ogden, 5 L. ed. U. S. 302.

court, no case can be taken up out of its order on the docket, where private interests only are concerned. The only cases in which they will depart from this rule, are those where the question in dispute will embarrass the operations of the government while it remains unsettled. But when a case is sent to the court below by a mandate from this court, no appeal will lie from any order or decision of the court until it has passed its final decree in the case. And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction. Upon looking into the record in the case of *United States* v. *Fossatt*, the court doubt whether there has been a final decision under the mandate, and whether the present appeal ought not to be dismissed on that ground. If there is no final decree, the proceedings of the court below cannot be interrupted by an appeal from interlocutory proceedings.

The court, therefore, desire to hear the counsel upon the question, whether the decree in question is final, upon motion to dismiss, and will hear the argument on Monday, March 7th.

THE UNITED STATES, *Appts.*,
v.
CHARLES FOSSATT.

(See S. C. 21 How. 446-451.)

Second appeal cannot be had, till first decree complied with.

After the authenticity of a grant of land in California is ascertained in this court, and a reference has been made to the district court, to determine the external bounds of the grant, in order that the final confirmation may be made, another appeal cannot be claimed until the whole of the directions of this court are complied with, and that decree made.

Argued Mar. 8, 1859. Decided Mar. 11, 1859.

ON MOTION to dismiss on the ground that the decree of the District Court is not final.

Mr. Justice **Campbell** delivered the opinion of the court:

This cause came before this court by appeal from the district court of the United States for the northern district of California, and was decided at the last term, and is reported in *U. S.* v. *Fossatt*, 29 How. 413.

The court determined:

"That a grant under which the plaintiff claimed land in California was valid for one league, to be taken within the southern, **447***] *western, and eastern boundaries designated therein, at the election of the grantee and his assigns, under the restrictions established for the location and survey of private land claims in California by the Executive Department of the government. The external boundaries of the grant may be declared by the district court from the evidence on file, and such other evidence as may be produced before it; and the claim of an interest equal to three fourths of the land granted is confirmed to the appellee."

The district court, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made. From the decree, in this form, the United States have appealed.

A motion has been submitted to the court for the dismissal of the appeal, because the decree of the district court is interlocutory, not final.

This motion is resisted, because the inquiries and decrees of the board of commissioners for the settlement of private land claims in California, by the act of 3d March, 1851 (9 Stat. at L., 632), in the first instance, and of the courts of the United States on appeal, relate only to the question of the validity of the claim—and by validity is meant its authenticity, legality, and in some cases interpretation, but does not include any question of location, extent, or boundary—and that the district court has gone to the full limit of its jurisdiction in the decree under consideration, if it has not already exceeded it.

The matter submitted by Congress to the inquiry and determination of the board of commissioners, by the act of 3d March, 1851 (9 Stat. at L. 632, § 8), and to the courts of the United States on appeal, by that act and the act of 31st August, 1852 (10 Stat. at L. 99, § 12), are the claims "of each and every person in California, by virtue of any right or title derived from the Spanish or Mexican government." And it will be at once understood that these comprehend all private claims to land in California.

The effect of the inquiry and decision of these tribunals upon the matter submitted is final and conclusive. If unfavorable *to the [*448 claimant, the land "shall be deemed, held, and considered, as a part of the public domain of the United States;" but if favorable, the decrees rendered by the commissioners or the courts "shall be conclusive between the United States and the claimants."

These acts of Congress do not create a voluntary jurisdiction, that the claimant may seek or decline. All claims to land that are withheld from the board of commissioners during the legal term for presentation, are treated as nonexistent, and the land as belonging to the public domain.

Thus it appears that the right and title of the inhabitants of California, at the date of the treaty of Guadalupe Hidalgo, to land within its limits, with the exception of some within the limits of a pueblo or corporation described in the 14th section of the act of 3d March, 1851, must undergo the scrutiny of this board, and that its decisions are subject to review in the district and supreme courts. This jurisdiction comprehends every species of title or right, whether inchoate or complete; whether resting in contract or evinced by authentic act and judicial possession.

The object of this inquiry was not to discover forfeitures or to enforce rigorous conditions. The declared purpose was to authenticate titles, and to afford the solid guarantee to rights

which ensues from their full acknowledgment by the supreme authority. The tribunals were therefore enjoined to proceed promptly, and to render judgment upon the pleadings and evidence; and in deciding, they were to be governed by the laws of nations, the stipulations of the treaty of Guadalupe Hidalgo, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States in similar cases.

What are the questions involved in the inquiry into the validity of a claim to land?

It is obvious that the answer to this question must depend, in a great measure, upon the state and condition of the evidence. It may present questions of the genuineness and authenticity of the title, and whether the evidence is forged or fraudulent; or, it may involve an 449*] inquiry into the authority of *the officer to make a grant, or whether he was in the exercise of the faculties of his office when it was made; or, it may disclose questions of the capacity of the grantee to take, or whether the claim has been abandoned or is a subsisting title, or has been forfeited for a breach of conditions. Questions of each kind here mentioned have been considered by the court in cases arising under this law.

But, in addition to these questions upon the vitality of the title, there may arise questions of extent, quantity, location, boundary, and legal operation, that are equally essential in determining the validity of the claim.

In affirming a claim to land under a Spanish or Mexican grant, to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that ownership and possession of land of definite boundaries rightfully attach to the grantee.

In the case of *The United States* v. *Arredondo*, 6 Pet. 691, the inquiries of this court, beside those affirming the legality of the grant, extended to questions of forfeiture for the nonfulfillment of conditions, the inalienability of lands in possession of an Indian tribe, and fraud. The superior court of Florida in that suit directed that the land should be surveyed, in the form of a square, with a designated monument as the center. This court annulled that decree, and ascertained another as the central point. The appeal in *Mitchell* v. *United States*, 15 Pet. 52, was taken in a case that had been decided here, and in which an issue upon the decree that succeeded the mandate of this court, and made in execution of it, subsequently arose. Certain property about Fort St. Mark's was excepted in the original decree of confirmation, and reserved to the United States, and the superior court in that decree was directed to ascertain the extent and boundaries of the land reserved. This was done, and the land specifically described, and on appeal this decree was affirmed.

These questions arose upon an act of Congress that required the courts, "by a final decree, to 450*] settle and determine the question *of the validity of the title according to the law of nations, the stipulations of any treaty and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it is alleged to have been derived." This act enumerates as proper to be heard and decided, preliminary to such a decree, questions of extent, location, and boundary. 4 Stat. at L. 52, § 2.

It is asserted on the part of the appellants that the district court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, and consequently cannot proceed further in the cause than it has done.

The 13th section of the act of 3d March, 1851, makes it the duty of the surveyor-general to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same. It was the practice under the acts of 1824 and 1828 (4 Stat. at L. 52, 284), for the court to direct their mandates specifically to the surveyor designated in those acts. And in the case *Ex parte Sibbald* v. *United States*, 12 Pet. 488, the duty of the surveyor to fulfill the decree of the court and the power of he court to enforce the discharge of that duty, are declared and maintained. The duties of the surveyor begin under the same conditions and are declared in similar language, in the acts of 1824, 1828, and of 1851.

The opinion of the court is, that the power of the district court over the cause, under the acts of Congress, does not terminate until the issue of a patent, conformably to the decree.

In the exercise of the jurisdiction conferred by this act, and acts of a similar character, this court has habitually revised decrees of the district court, which were not final decrees under the judiciary act of 1789. The court has uniformly accepted, in the first instance, as a final decree, one that ascertained the authenticity of the claimant's title, and declared, in general terms, its operation, leaving the questions of boundary and location to be settled subsequently. This practice was approved in the case last cited. The peculiar nature of these cases rendered such a relaxation, of the rules of proceeding of the court, appropriate. The United States did not appear in *the [*451 courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct their executive government to comply with that obligation.

They had instrumentalities adequate to the fulfillment of their engagements without delay, whenever their existence was duly ascertained. There was no occasion for the strict rules of proceeding that experience has suggested, to secure a speedy and exact administration between suitors of a different character. And it has rarely occurred that the same case has reappeared in the court after the first decree. If the litigation had been other than it was, the rule of proceeding would have varied with it.

But, after the authenticity of the grant is ascertained in this court, and a reference has been made to the district court, to determine the external bounds of the grant, in order that the final confirmation may be made, we cannot understand upon what principle an appeal can be claimed until the whole of the directions of this court are complied with, and that decree made. It would lead to vexatious and unjust delays to sanction such a practice. *It is the*

opinion of the court that this appeal was improvidently taken and allowed, and must be dismissed; and that the District Court proceed to ascertain the external lines of the land confirmed to the appellee, and enter a final decree of confirmation of the land.

RUSSELL STURGIS, *Libt. Appt.*,
v.
JOHN CLOUGH, Robert L. Mabey, and Henry M. Weed, Claimants of the Steamboat R. L. Mabey, her Tackle, etc.

(See S. C. 21 How. 451–456.,

Collision—steam-tugs—rule.

Two steam-tugs two or three miles apart, looking out for employment, each started for a brig, in different directions, to tender their services.

According to the established rules for navigating boats under such circumstances, the steam-tug, which was following in the wake of the brig, should come up on her starboard quarter, and slack her engine, so as not to pass the brig.

The steam-tug which was coming down in the opposite direction, ought to round to, either to windward or leeward, so as to head the same way as the brig.

The evidence clearly shows that this collision was occasioned wholly through the fault of the master and pilot, of the latter.

Argued Feb. 22, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in the case was filed in the district court of the United States for the southern district of New York, by the appellant, to recover damages resulting from a collision.

The court entered a decree dismissing the libel, without costs. The circuit court, on appeal, affirmed this decree; whereupon the libelant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **E. C. Benedict** for appellant.

Mr. **D. McMahon** for appellees.

The arguments of counsel, being almost entirely confined to the facts, are not here given.

Mr. Justice **Grier** delivered the opinion of the court:

The libelant in this case is owner of a steam-tug called The Zachary Taylor, or Hector.

The claimants are owners of the steam-tug Mabey.

At the time of this collision, on the 11th of August, 1854, they were both engaged in the business of towing vessels into the port of New York, from the neighborhood of Sandy Hook.

The Hector was an old, heavy boat, some one hundred and eighty or one hundred and ninety feet long; The Mabey a new, light boat, of about one hundred feet in length, and much the swifter of the two, in the ratio of about fourteen to eight.

*They were each looking out for em- [*453 ployment about noon of that day, when the brig Wanderer was passing in, by Sandy Hook, sailing slowly in a northwest course. The two steam-tugs must have been some two or three miles apart, when they each started for the brig in different directions, in order to tender their services. Each boat put all its steam, as the first who could hail the brig would be entitled to the job.

The Hector, being in the rear, came up in the wake of the brig and nearly on her course. The Mabey came in S. S. E. course, meeting the brig in an acute angle to its course. As they came together near the starboard quarter of the brig, their respective distances from her at the time of starting must have been in the ratio of their velocities. The Mabey, being much the faster boat, no doubt expected to make up for this difference in distance by her superior fleetness.

According to the established rules for navigating boats under such circumstances, The Hector, which was following in the wake of the brig, should come up on her starboard quarter, and slack her engine, so as not to pass the brig. The Mabey, which was coming down in the opposite direction, ought to round to, either to windward or leeward, so as to head the same way as the brig. Had these well-known rules been observed, no collision would have occurred in consequence of the race for precedence.

Cases may occur in which two steamboats engaged in unlawful racing may recklessly or wilfully dash against each other; and the courts, treating them both as criminals, may refuse to sustain an action or decide which was most to blame, leaving each to suffer the consequences of his own folly and recklessness.

We do not think that the testimony shows this to be such a case. Each of these boats had a right to move as fast as it could in order to obtain precedence, and each had a right to expect that the other would pursue the customary and proper course in navigating their vessels, in such circumstances, by the observance of which there would be no danger of collision.

Have both these boats, in their anxiety for precedence, disregarded the proper precautions to avoid a collision, or is the *fault [*454 wholly to be attributed to the mismanagement of The Mabey?

The defense set up in the answer, that The Mabey "got to the brig first, slacked her speed, slowed and stopped, and that The Hector attempted to pass under the bows of The Mabey, and in executing that maneuver, with the covetous desire of getting the right to tow the brig, she ran against The Mabey, obliquely," etc., is clearly and satisfactorily proven to be not true. The fact that the stem of The Mabey, the lighter and swifter boat, was driven into the starboard bow of The Hector, stripping her guards down to the wheel, shows conclusively that The Mabey was not stopped, but was under nearly full headway.

If the collision had occurred as stated in the answer, the great momentum of the larger boat would most probably have sunk the smaller.

The witnesses on The Hector all concur that, though the engineer was directed to proceed

NOTE.—*Collision. Rules for avoiding; steamer meeting steamer*—see notes to 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630.

with his utmost dispatch, The Hector followed in the wake of the brig, and when near to her had slacked her speed and stopped her wheel, so as to lap on the stern of the brig as she came alongside of her starboard quarter, and within twenty feet of her; and that she was nearly at rest when The Mabey ran, with all her force, into the starboard bow of The Hector. As these witnesses are all confirmed by the pilot of the brig, who was an impartial observer of the whole transaction, his statement may be fairly taken as a correct representation of it.

He states that he first saw The Hector about a mile distant, heading towards the brig, about northwest; that she came up to the brig in about ten minutes, stopped her engine when she came within one hundred or two hundred yards of the brig, and then came alongside with the way she had on; and the captain spoke to the witness. That the brig was going at the rate of about a mile an hour, and The Hector was dropping astern, if anything, when The Mabey ran into her.

That, when he first observed The Mabey, she was about half a mile off, coming southwest or west-southwest; that she was about an eighth of a mile from the brig when The Hector let 455*] *her steam off; that she continued her course till she struck the starboard bow of The Hector, and ran into her forward of the wheelhouse; that, when the pilot of The Mabey discovered that he had run his boat so as to render a collision inevitable, he ran out of the pilot house and went aft; that the wheels of The Mabey were in motion till the time of the collision; that The Hector could do nothing to avoid the collision, because she had stopped her engine and was falling behind the brig.

The master of The Hector acted on the supposition that The Mabey, according to custom, would round to, and could not anticipate that, contrary to all rule, she would run into The Hector, as she lay nearly at rest, lapping on the stern of the brig, when a single turn of her wheel, with her great headway, would have run her entirely clear of any danger of collision. Hence, when his pilot told him The Mabey was coming in a direction to run into him, he said, "No, she will go under our stern." He presumed, and had a right to presume, that the pilot of The Mabey knew his duty, and intended to round to, behind the stern of the brig and tug, and not make the reckless attempt to run between them.

The testimony of the pilot of The Mabey, in fact, confirms this view of the case, and shows the collision to have been occasioned entirely by his own fault, or that of the master who directed him. He says, "My instruction was to run close to the brig's stern." The master says, "he expected The Hector would get out of his way;" and the pilot says, "I supposed she would go on the other quarter, or else steer outside of me." In other words, he proceeded in a direction which he knew must produce a collision unless The Hector would get out of his way. It is clear that his intention was to drive The Hector away from the brig, or compel her to take the consequences. The pilot admits, also, that he knew the proper way to approach the brig was by rounding to; which would not have brought him within three hundred feet of the point of collision. He admits also, that he could have gone on either side of the brig, and "knew it was nautical and customary to come up on the weather quarter, and to round to for a tow, but he had *instructions from the captain [*456 to go for the brig, and to get there before The Hector if he could."

We are of opinion, therefore, that the evidence clearly shows that this collision was occasioned wholly through the fault of the master and pilot of The Mabey.

The decree of the Circuit Court is, therefore, reversed, with costs, and the record remitted with instructions to enter a decree in favor of libelant, and have such further proceedings as to justice and right may appertain.

THE WESTERN TELEGRAPH COMPANY,
Appt.,
v.
THE MAGNETIC TELEGRAPH COMPANY, and Arumah S. Abel and Zenus Barnum.

(See S. C. 21 How. 456-460.)

Telegraph contract—circuitous line.

Where the Western Telegraph Company had the exclusive right to use the Morse patent on lines from Baltimore to Wheeling, with branches to Washington and Pittsburg, respectively.

The complaint that at the points where the operations of the Western Telegraph cease, whether it be east, north, or west, the messages are not forwarded by the Western Telegraph Co., but they are diverted from those lines, and sent by circuitous routes, or at least by lines of increased length: as no contract, express or implied, is shown, entitles the complainant to no relief.

A choice of lines may well be exercised, if there be no violation of the patent, although the circuitous line passes over a greater distance, as this can be no ground of complaint.

Argued Mar. 3, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The bill in this case was filed in the court below, by the appellant, for an injunction and accounting, etc., for an alleged breach of certain patent privileges.

The court having entered a decree dismissing the bill, the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **Cornelius McLean**, for appellant:

1. The complainant claims that under its assignment it is entitled to all the business between Wheeling and Pittsburg, and Washington and Baltimore.

The defendants could not have set up a parallel line of telegraph between those points, and the question is, simply, whether they could do indirectly and by combination, what they could not do directly.

Lee v. *Lee*, 8 Pet. 44; *U. S.* v. *Quincy*, 6 Pet. 466; *The William King*, 2 Wheat. 148; see, also, *Feigley* v. *Feigley*, 7 Md. 561.

2. The complainant, being entitled to carry telegraphic messages between those points, has also the right to carry all messages reaching those points and destined for other points on its line, or other points to which its line is the shortest and most direct route; and the defendants cannot lawfully combine with others to divert them from the complainant's line.

Mr. R. J. Brent for appellees.

Mr. Justice McLean delivered the opinion of the court:

This is an appeal from the circuit court of the United States for the district of Maryland.

On the 30th of April, 1849, a contract was entered into between Amos Kendall, as attorney in fact for Samuel F. B. Morse, and Alfred Vail, of the first part, and the Western Telegraph Company of the second part.

In the agreement, it was stated that the United States had heretofore granted to Samuel F. B. Morse letters patent for the 458*] *magnetic telegraph, known as Morse's Telegraph; and that the said Morse subsequently assigned a portion of his interest in the said letters patent to Alfred and Leonard V. Gale; and the said Morse, Gale, and Vail, subsequently, by letters of attorney, recorded among the transfers of patent rights, constituted Amos Kendall their true and lawful attorney, for them and in their behalf, etc. And whereas, the said Western Telegraph Company are desirous to obtain, in due form, the privileges of said letters patent for lines of telegraph belonging to them between Baltimore and Wheeling, with a branch therefrom to Washington city, and a branch from Brownsville to the city of Pittsburg:

Now, the said Amos Kendall, in consideration of $36,000 paid to him in the stock certificates of the Western Telegraph Company, hath, as far as he possesses legal authority, by virtue of the power of attorney aforesaid, or otherwise, granted, assigned, and conveyed, to the Western Telegraph Company, the full and exclusive right to use the invention of the said Morse, secured by letters patent on the said lines from Baltimore to Wheeling, with branches to Washington and Pittsburg, respectively, for the remainder of the time yet to come in the said letters patent, with the benefit of any extensions and renewals thereof, it being understood that the right granted is to be for one wire only, unless with the consent of the patentee.

And Francis O. J. Smith conveyed his right to the Western Telegraph Company's existing lines from Baltimore, in the state of Maryland, to Wheeling, in the state of Virginia, and in branches to Washington and Pittsburg cities, in full right, on the 27th of March, 1857.

These conveyances vested in the Western Telegraph Company all the right which the patentee had, on the conditions stated, to use and enjoy the lines designated for the transmission of telegraphic messages, in as full and ample a manner as the patentee could himself have enjoyed, had no assignment of his right been made.

But it is alleged that another assignment of Morse's patent was made to a company from 459*] Pittsburg to Philadelphia, and *to another company from Harrisburg to Baltimore, and that, by conspiring with those companies, the Magnetic Company has taken messages at Philadelphia, sent from Pittsburg and Wheeling, directed to Baltimore and Washington, and other similar messages from the Harrisburg line directed to Washington; and also messages from Washington and Baltimore, by Philadelphia and Harrisburg, to Wheeling and Pittsburg, and through those points to points further west; and that this was done by uniting the lines or working them together, under a contract, in order that they might get, in conjunction with the other companies, the whole of the business between those points.

The complainants do not seem to be well advised as to by what means of combination, conspiracy, or contract, the injury complained of has been done; but they charge that, by the means alleged, their lines have, in a degree, been destroyed. They are only able to say that the business on their lines has been diverted by the Magnetic lines. And the equitable powers of the court are invoked against the injuries complained of.

The bill does not allege any direct infringement of the patent, owned by the Western Telegraph Company, by the Magnetic Company. Those lines are free to transmit any messages that may be forwarded on them. But the complaint seems to be, that at the points where the operations of the Western Telegraph cease, whether it be east, north, or west, the messages are not forwarded by the Western Telegraph, but they are, by the means used, diverted from those lines, and sent by circuitous routes, or at least by lines of increased length.

It must be expected that great competition will exist in the transmission of intelligence, where telegraphic lines have been established throughout the country. But it would be difficult to find a remedy for these evils, whether real or supposed, which are not founded on contract. It was in the power of the Western Telegraph Company to form connections with other lines, so as to secure uninterrupted communications. But if these precautions have not been observed, and a supposed convenience or dispatch has been deemed a sufficient security for the co-operation of the lines connected with the Western *Telegraph Company, and [*460 no contract, express or implied, is shown, the complainant is without remedy.

Men, unless legally bound to certain duties, may, from whim or caprice, indulge their supposed interests or resentments without responsibility. Unless certain rates of transmitting intelligence have been established, a reduction of such rates, whether done secretly or publicly, will affect the profits on other lines.

Nothing set up in the bill, in the form of a contract, entitles the complainant to relief. A choice of lines may well be exercised, if there be no violation of the patent, although the circuitous line passes over a greater distance, as this can be no ground of complaint. It violates no contract, and almost necessarily grows out of the competition in this branch of business.

From the facts stated in the bill, there seems to be no ground for relief.

Judgment affirmed.

THE WESTERN TELEGRAPH COMPANY,
Appt.,
v.
GEORGE C. PENNIMAN and John King.

(See S. C. 21 How. 460-463.)

Telegraph message—obligation to send by particular line.

The Western Telegraph Company filed their bill as the sole proprietors of the right to construct and use Morse's electro-magnetic telegraph between Baltimore and New York and Harrisburg, and pray for an injunction.

The principal ground of complaint in the bill is, that the business of the Western Telegraph Company has been diverted from it, upon other lines, greatly to its injury, and it would seem that circuitous routes have been selected, rather than the more direct one. This affords no ground for relief.

There is no obligation on a person sending a telegraphic message to select the shortest or the longest line, unless he has entered into a contract to forward all such messages on a particular line.

Argued Mar. 4, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The history and facts of this case are substantially the same as of the preceding case. The argument of counsel there given also applies to this case.

The case is further stated by the court.

Mr. **Cornelius McLean** for appellant.

Mr. **R. J. Brent** for appellees.

Mr. Justice **McLean** delivered the opinion of the court:

This case is before us by an appeal from the circuit court of the United States for the district of Maryland.

The Western Telegraph Company, a corporation incorporated by the states of Maryland, Virginia, and Pennsylvania, have filed their bill against George C. Penniman and John King, citizens of Maryland, and charges them with the violation of the patented rights of the **461***] Western Telegraph Company, *under a contract made with Morse, Vail, and Smith, dated the 8th of March, 1840. The above-named persons are alleged to be the sole proprietors of the right to construct and use Morse's electro-magnetic telegraph, by him invented and patented, on the route between Baltimore, in the state of Maryland, and New York, and Harrisburg, in the state of Pennsylvania, for and in consideration of $30 per mile, by the route on which the telegraph has been or may be constructed, between the points or places aforesaid. And said right, through their agent, Amos Kendall, was conveyed unto John C. Penniman and his assigns, to construct between the points of places aforesaid the said telegraph, with one or more wires, with the apparatus for working the same and the improvements therein. And the said Morse & Co. covenant not to grant to any other person or persons the right to construct any other line of telegraph under the patent aforesaid, within the aforesaid limits, either in a direct or indirect line.

The contract between Kendall, as attorney of Morse and Vail, with the Western Telegraph Company, granted to it in due form the privileges of said letters patent for lines of telegraph belonging to it, between Baltimore and Wheeling, with a branch therefrom to Washington city, and a branch from Brownsville to the city of Pittsburg, etc.; and the right of Francis O. J. Smith, which was also conveyed, was limited to the Western Telegraph Company's existing lines from Baltimore, in the state of Maryland, to Wheeling, in the state of Virginia, and in branches to Washington and Pittsburg cities; the right herein conveyed and so limited by said territorial termini being one fourth part of said invention and letters patent, etc.

The complainants pray for an injunction, and that an account may be taken, for a breach of its patent privileges.

The defendants procured an assignment of Morse's patented electro-telegraph between the cities of Baltimore and Harrisburg, and afterwards a like assignment from him between Baltimore and Wheeling, with the right of a branch to Pittsburg and Washington; and it is alleged that complainants claim the right to telegraphic business on the Morse plan between *those points; not only all that com- [*462 mences and ends at these several points, but all that, starting at remote points, has to reach either of those points by coming through either of the others.

There can be no doubt that the right of transmitting on the lines conveyed to the Western Telegraph Company are as full and ample as would have been the rights of the patentee, had he never assigned them.

The assignment of Morse's to a company from Pittsburg to Philadelphia, and from Washington to Baltimore, Philadelphia and New York, it is alleged, has enabled the defendants to take messages at Harrisburg from Wheeling, directed to Baltimore and Washington, and other southern points; and has also, in like manner, taken messages from the Magnetic Company between Washington and New York at Baltimore, and transmit them to Pittsburg, and to points west, through Pittsburg. And this was done, it is said, in conjunction with the said companies, in order to get the business which, but for said combination, would and ought to have come by the complainants' line.

The charges against Penniman and King are, substantially, the same combinations as charged against the agents of the Magnetic Company; and we can only say, as was said in the other case, the assignees may claim a protection in all the rights assigned to them; and if, in any respect, their patent has been infringed, a remedy is open to them. But it does not appear that the defendants were limited as to the use of the lines owned by the Western Telegraph Company, although the points on their lines were shortest. Each person, in using a telegraph line, is free to select his own conveyance. There are several things which recommend telegraphic lines. The machinery should be kept in proper order; strict attention should be given to the transmission of messages, and competent persons engaged in the office. Where there is much competition, great energy is required. And if this be wanting, success may not be expected.

The principal ground of complaint in the bill is, that the business of the Western Tele- 463*] graph Company has been diverted *from it, and thrown upon other lines, greatly to its injury, and it would seem that circuitous routes have been selected, rather than the more direct ones. If this be so, does it afford a ground for relief? There is no obligation on a person sending a telegraphic message to select the shortest or the longest line. He may consult his own interest or choice in such a matter, and he incurs no responsibility to anyone, unless he has entered into a contract to forward all such messages on a particular line. No such allegation is contained in the bill, and there is no charge that the Western Telegraph Company has been molested in the exercise of its patented rights, except by the transfer of its business to other lines; and it is not alleged that these lines are prohibited from carrying messages by reason of their contiguity to the plaintiffs' lines.

Judgment affirmed.

JAMES C. CONVERSE, Administrator of Philip Greely, Jr., Deceased, *Plff. in Err.*,

v.

THE UNITED STATES.

(See S. C. 21 How. 463-481.)

Agent to make purchases for light-house service —revenue officer may be—compensation—law forbidding, not applicable.

Notwithstanding the act of May 7, 1822, § 18, which provides that no collector shall ever receive more than $400 annually, exclusive of his compensation as collector, for any service he may render in any other office or capacity, and the act of 1839, embracing all persons holding office with a fixed salary, precisely similar in its principles, and subsequent legislation on this subject, the secretary had a right to employ an agent, instead of the collector or collectors of the several districts to make purchases for the light-house service; and if he did employ one, the law fixed the compensation and appropriated the money to pay it.

He was not forbidden to employ a revenue officer for this purpose; and, so far as his services were performed for other districts, he stood in the same relation to the government as any other agent.

The law forbidding compensation or reducing it to a small amount, did not apply to this service.

The agency was entirely foreign to his official duties, and far beyond the limits of the district to which the law confined his official duties and power.

And as the department appointed him to perform a duty required by law, for which the compensation was fixed by law, and the money appropriated to pay it, he is entitled to the compensation if he has performed the duty.

Court erred in refusing to admit the testimony in regard to such services and commissions of the collector.

Argued Mar. 4, 1859. Decided Mar. 11, 1859.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The history of the case, and a statement of the facts involved, appear in the opinion of the court.

Messrs. **C. T. Russell** and **C. Cushing** for the plaintiff in error.

Messrs. **J. S. Black**, *Atty. Gen.*, and **Edwin M. Stanton**, for defendant in error:

This case arose from a set-off pleaded to a suit of the United States against Greely, late collector of the port of Boston, and his securities.

The set-off was for $17,684.92, as commissions upon disbursements made by him in the purchase of oil, etc., for the light-house service of the United States. It is admitted that the disbursements were made by order of the Treasury Department, and that the amount claimed is correct, if defendant is entitled to commissions at all. It is also admitted that the defendant was superintendent of lights and disbursing agent for the district of Boston, and that as collector he received a salary of $6,000 per annum, and also the sum of $400 allowed by law.

The question turns wholly on the statutes of the United States.

By act of May 7, 1822 (§ 18, 3 Stat. at L. 696), it is enacted: "That no collector, surveyor or naval officer shall ever receive more than four hundred dollars annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States in any other office or capacity."

This act concludes the question, as it has never been repealed, except to forbid the payment even of the $400.

After citing other statutes mentioned in the opinion of the court, counsel concluded that Mr. Greely has already received more than the law allows, as the salary of $400 was stopped by the act of Sept. 30, 1850, if not before.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Massachusetts.

The pleadings and facts in the case, and the points in controversy, are briefly yet clearly stated in the exception and opinion of the court, as set forth in the transcript, in the following words:

"Be it remembered, that at a term of the circuit court of the United States, holden at Boston, within and for the district of Massachusetts, on the 15th day of May, 1857, by the Honorable Benjamin R. Curtis, circuit judge, and the Honorable Peleg Sprague, district judge, came the United States of America, and by an action of assumpsit declared against James C. *Converse, of Boston, in said district, [*465 as he is administrator of the goods and estate of Philip Greely, Jr., late of said Boston, deceased, and late collector of customs at said Boston, in said district, as by the writ and declaration of record will appear; to which the defendant pleaded the general issue, and filed certain claims in set-off, as by said set-off of record will appear; and the plaintiffs joined in said issue, and thereupon said cause came for trial before the said circuit court, at said May term, before a jury impaneled for that purpose, and the said defendant then and there claimed to be allowed, among other things, in set-off against the plaintiff's claim, the sum of seventeen thousand six hundred and eighty-four dollars and ninety-two cents ($17,684.92), as commission due him from the plaintiffs upon cer-

NOTE.—*Extra pay or compensation to officers*—see note to U. S. v. Macdaniel, 32 U. S. (7 Pet.) 1.

tain contracts, purchases and disbursements made by him for oil and other articles for the light-house service of the United States, under direction of the Secretary of the Treasury.

"At the trial it appeared by the transcript from the Treasury Department of the plaintiffs introduced by them in evidence, that said claims had been duly and properly presented by the defendant's intestate, Mr. Greely, at the Treasury Department, for credit and allowance, and had there been disallowed, and no objection was made by the plaintiff to the defendant's right to recover of the plaintiff upon this ground.

It also appeared that the defendant's intestate, as collector, had, during each year he was collector, received the compensation of $6,000, and also the sum of $400 allowed by law.

No question was made as to the amount of commissions claimed. The plaintiffs, in their transcripts, admit that the sum of $17,684.92 is two and a half per cent commission upon the defendant's disbursements for light-house purposes during his term of office, and no objection was made that that is not the proper commission, if the defendant is entitled to any.

It was further admitted that the defendant was, from May 1st., 1849, to April 1st., 1853, superintendent of lights and disbursing agent for the district of Boston.

The duties of this office, it was offered to 466*] prove, were the *charge and superintendence of all light-houses between Eastham and Plum Island, Newburyport, including the making of all necessary disbursements for the payment of the keeper's salaries, wages of men, repairs, and the necessary supplies, in the same manner as other superintendents and disbursing agents in their respective districts.

The defendant then offered to prove the following facts in regard to these disbursements upon which the aforesaid commission was claimed:

The Secretary of the Treasury, or the proper officer under him, during the whole term of the defendant's office, was accustomed, from time to time, to send specific orders to him to advertise for proposals, make contracts for and purchase all the oil, lamps, wicks, and supplies of every kind, required for the whole light-house service of the United States, as well that of the sea coasts as the lakes and rivers.

Agreeably to such orders or requests, the defendant did, from time to time, make all these contracts and purchases, draw the necessary contracts, and all payments and disbursements thereunder and therefor, take charge of the property when purchased, and distributed the same in such quantities and to such points, all over the United States, as were required or directed by the Treasury Department. These services involved much time, labor, and responsibility on the part of the defendant, and were performed at the request and upon the order of the Treasury Department. The defendant paid out no moneys which have not been allowed.

And it was upon all disbursements thus made that he claimed the aforesaid two and a half per cent commissions, amounting to $17,684.92.

The plaintiffs objected to this evidence, because they said, admitting all that was thus proposed to be proved, it gave the defendant no claim whatever to the commissions claimed.

The court thereupon, after consideration, ruled and decided that, admitting all that the defendant thus offered to prove to be true and as alleged, yet the defendant had no rightful claim against the plaintiffs to the said commissions, or any part thereof, and could not recover the same in set-off, but that the defendant, *being the collector of customs, and [*467 as such, having received the aforesaid compensation of $6,000 and of $400 each year, could not recover any sum whatever for the commissions claimed as aforesaid; and the court thereupon refused to admit the evidence offered, and instructed the jury, in accordance with said ruling, and for the reasons therein stated, that the defendant could not recover for said commission.

To which ruling, decision and instruction, the defendant then and there excepted.

The question to be decided on this exception is undoubtedly one of some difficulty. But the difficulty arises not so much from ambiguity of language in any one of the acts of Congress as from the great number of acts passed from time to time on this subject, which have been referred to in the argument. They, for the most part, differ in language in some degree from one another, and are generally introduced in some clause or proviso of the usual annual appropriation law, or an appropriation to provide for previous expenditures, and yet all bear, with more or less force, on the question before us.

The acts referred to are: 1822, 3 Stat. 696; 1839, 3 Stat. 439; 1841, 5 Stat. 432; 1842, 5 Stat. 510; 1845, 5 Stat. 736; 1848, 9 Stat. 297; 1849, 9 Stat. 365, 367; 1850, 9 Stat. 504, 542, 543; 1851, 9 Stat. 629; 1852, 10 Stat. 97, 100; 1852, 10 Stat. 119, 120.

It is obvious, therefore, that in order to carry into execution the intention of the Legislative Department of the government, these various laws on the same subject-matter must be taken together and construed in connection with each other. And we should defeat instead of carrying into execution the will of the law-making power, if we selected one or two of these acts, and founded our judgment upon the language they contained, without comparing and considering them in association with other laws passed upon the same subject.

It would extend this opinion to an unreasonable length to quote at large the language of the various acts and provisos above mentioned; nor, indeed, do we deem it necessary, because the object and policy of this whole legislation, when taken together, will be made evident by looking to the state *of the law before [*468 and at the time the different laws were passed, and the defects which then existed, and which they were intended to remedy. A particular reference to a few of them, in chronological order, will be sufficient for this purpose, and we shall refer to those which have been mainly relied on by the circuit court, or by the counsel for the United States, in order to support the judgment of the court below.

The first law upon this subject is the act of May 7, 1822, § 18, which provides that "no collector, surveyor, or naval officer shall ever re-

ceive more than $400, annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity."

At the time this law was passed, the collectors, surveyors, and naval officers were, in certain contingencies mentioned in the act of March 2, 1799, required to do the duties of the offices of each other; and, without any special law upon the subject, it was the settled practice and usage of the government to require collectors to superintend lights and lighthouses in their respective districts, and to disburse money for marine hospitals and the revenue-cutter service, for which, by the practice and regulations of the Treasury Department, they were allowed certain commissions. But there was no act of Congress imposing these duties on the collector, or fixing his commissions for these services and disbursements. They were charged as extra services—that is, as not belonging to the office of collector, and the amount of his compensation depended altogether upon the discretion of the Secretary of the Treasury for the time being. These extra allowances in some instances amounted to very large sums; and it appears that the attention of Congress was at length attracted to this subject, and it was deemed right, and more consistent with the nature and character of our institutions, to fix by law the compensation for these services, and not leave it in every case to depend upon the discretion of the Secretary; and the act of 1822 was accordingly passed for that purpose, and for that purpose only. The language is clear, precise, and appropriate, and no multiplication of words could more 469*] plainly indicate its *object. The words "any other office" were evidently used with reference to the contingencies in which one of these officers might be required to perform the duties imposed by law on one of the others. And the words "or other capacity" were equally essential, in order to embrace the extra allowances made for the agency of which we have spoken, as they were not the duties of an office created by law, but a mere agency of one of the departments of the government. The law does not forbid compensation for extra services which have no affinity or connection with the duties of the office he holds. On the contrary, it recognizes his right, and gives the collector or other of these revenue officers an additional sum, over and above their salaries as officers, for extra services rendered as agents, which had no legal connection with their respective offices.

The duties for which this certain compensation was fixed were well known in the usages and practice of the government, and Congress could, therefore, act advisedly and with knowledge, and judge what amount of money would be a fair compensation. But it will hardly be supposed that Congress, by this law, intended to fix this amount for every unforeseen and possible service, or the duties of every possible office which one of these revenue officers should be directed or requested by the Secretary in some emergency to fill; for, as Congress could not foresee what might be the character and importance of such a duty, there was no basis on which a judgment of its value could be formed. Nor can it be supposed that they intended to regulate in advance its compensation or value without some *data* to act upon.

Besides, no other salaried officer is mentioned in this law but collectors, surveyors and naval officers; and it would hardly be just to the legislative body to impute to it the design of dealing more harshly with these revenue officers than any other officers of the government who have certain salaries, or to suppose they would deny to them compensation in cases where every other salaried officer was allowed to claim and receive it.

We have dwelt more particularly on this act of Congress, *because the principles and [*470 policy on which it was passed form the basis of all the subsequent legislation on this subject, and will be found, with some modification, in every law. The great object has been to establish, by law, the compensation for public services, whether in offices or agencies, where the nature and character of the duties to be purformed were sufficiently known and definite to enable Congress to form an estimate of its value, and not leave it to the discretion of the head of an executive department.

After this act of 1822, there is no act of Congress bearing upon this question until 1839. In the meantime, about the year 1833, and subsequently to that time, several cases came before the supreme court, in which officers who were not named in the act of 1822, but who received a fixed salary as a clerk in a department, or a fixed compensation as an officer in the army, or in some other office, claimed the right to set off against the United States compensation for extra services undertaken by the direction of the Secretary, and for which there was no fixed compensation by law. And in these cases this court held that such compensation might be claimed and set off under the act of Congress allowing set-offs against the United States; and that, where the extra service had been required by the head of the proper department, the officer was entitled to a reasonable compensation, to be allowed by the jury upon the evidence, even if there was no law expressly requiring the service or fixing compensation for it; and that it might be ascertained and allowed by the jury in proper cases, under the direction of the court, even if the head of the department had fixed no compensation, and refused to allow the claim.

Under these decisions, claims of this description were frequently made, and the United States involved in inconvenient controversies in court. These controversies again attracted the attention of Congress to the subject of compensation for extra services; and in 1839 they passed an act, embracing all persons holding office with a fixed salary, precisely similar in its principles with the act in relation to custom-house officers—that is to say, they took away from the heads of departments, *and from courts and juries, the right [*471 to fix the compensation in any case where it was not fixed by law; and if there was no law ascertaining the compensation or allowance for the particular service, the party was entitled to none. It carries out the principle and policy of the act of 1822, and provides that there shall be no compensation in addition to the salary, "unless said extra allowance or compensation be authorized by law."

Nor does the act of August 23, 1842 (5 Stat. 510), go further than the act of 1839, except only in declaring that, in order to entitle the party to demand compensation, it must not only be fixed by law, but that the law appropriating it shall explicitly set forth that it is for such additional pay, extra allowance, or compensation. Now, these words, added to the provisions in the act of 1839, only show that the legislature contemplated duties imposed by superior authority upon the officer as a part of his duty, and which the superior authority had in the emergency a right to impose, and the officer was bound to obey, although they were extra and additional to what had previously been required. But they can by no fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and where the service to be performed is of a different character, and for a different place, and the amount of compensation regulated by law.

This provision is introduced in the annual appropriation law for the support of the Army and Military Academy. And although the words are general, and undoubtedly include officers in every branch of the public service, yet, from the general character and objects of this law, it is manifest that the attention of Congress must have been mainly directed to officers in the military service, who, from the position in which unforeseen events often place them, are called upon and required to perform duties not specified by law or regulation, but which grow out of, and are associated with, military service.

We pass on to the acts of 1848 and 1849, which are the more important because they were passed about the time this collector came into office, and apply particularly to the reve- [*472] nue officers of which we are speaking. The clauses which bear upon this question in each of these laws is inserted in the annual civil and diplomatic appropriation law, by way of proviso to the clause making appropriations to the maintenance of the light-house service. The act of 1848 appropriates $11,640.35, being a commission of two and a half per cent on the whole amount appropriated for that service, with a proviso that no part of the sum thereby appropriated should be paid to any person who received a salary as an officer of the customs; and that from and after the 1st day of July, 1849, the disbursements should be made by the collector of the customs, without compensation. And if this law still remained in force, it is very clear that the agency of which we are speaking would not have been authorized by law, and the set-off claimed by the plaintiff in error could not be allowed.

But this proviso in the act of 1848 is recited at large in the appropriation of 1849, and repealed without any saving or qualification; and this repealing clause is immediately preceded by an appropriation for superintendents' commissions of $11,673.25, being two and a half per cent on the whole amount appropriated for light-house purposes. There is no restriction in these commissions in relation to revenue officers. The commissions are to be paid on the whole amount, without any reference to the person or officer who performs the service; consequently, under this law the revenue officer who performed this duty within his own district was entitled to two and a half per cent commission on the amount disbursed; and previous acts of Congress restricting this allowance were repugnant to this law, and thereby repealed. The repeal of the act of 1848 could not, upon any sound principle of law, revive any previous act which was repugnant to the provisions contained in the repealing act of 1849. And this act allowed the commission of two and a half per cent in all cases, and appropriated the money to pay it, leaving it to the Secretary of the Treasury to select as agent each collector for his collection district, or any other agent that he might deem more suitable for the trust.

The act of September 28, 1850, however, restored the provisions contained in the first act referred to—that is, the act of 1822— [*473] and provides that no collector shall receive for his services as superintendent of light-houses over the sum of $400 per annum. But this act was followed by the civil and diplomatic appropriation law, passed at the same session, September 30, 1850, only two days after the law above mentioned, in which the compensation is again modified in amount, and collectors whose salary exceeds $2,500 can receive no compensation as superintendent of lights or disbursing agent. Yet this law, like the preceding appropriation laws, appropriates a sum equal to two and a half per cent commission upon the whole amount appropriated for light-house service, and the Secretary might therefore employ any agent he pleased; and if he was not the collector, he would be entitled to full commissions. The same provisions are contained in the appropriation acts of 1851 (9 Stat. 608), 1852 (10 Stat. 86), and 1853 (10 Stat. 200).

It will be seen, from this history of the complicated legislation on this subject, that, however varying the provisions may be in some particulars, they are yet all founded on the principles and policy of the acts of 1822 and 1839, and that all the provisos respecting the commissions to a revenue officer are confined to his collection district, and its extra customary duties therein as agent.

The just and fair inference from these acts of Congress, taken together, is, that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws, and the remuneration for them fixed by law. It was undoubtedly within the power of the department to order this collector, and every other collector in the Union, to purchase the articles required for light-house purposes in their respective districts, and to make the necessary disbursements therefor. And for such services he would be entitled to no compensation beyond his salary as collector, if that salary exceeded $2,500.

But the Secretary was not bound to intrust this service to the several collectors. He had a right, if he supposed the public interest required it, to have the whole service performed by a single agent; for while the law au- [*474] thorizes him to exact this service from the several collectors, it at the same time evidently authorizes him to commit the whole to an agent

or agents other than the collectors, by regulating the commission which an agent shall receive, and appropriating money for payment of commissions of two and a half per cent upon the whole amount authorized to be expended in this service. And as the collectors would by law be entitled in some cases to nothing, and in others to the small sum above mentioned, if the service was performed by them in their respective districts, it is very clear, from the commissions allowed, and the appropriation to pay them, that he was at liberty to employ a different agency, and pay the commissions given by the law whenever he supposed the public would be better served by this arrangement.

And the case as assumed in the record is precisely that case. The Secretary had no right, under the laws upon this subject, to order this or any other collector to perform this duty for all the light-house and collection districts. The law has divided it among them, and the Executive Department had no right to impose it upon one. But he had a right, as we have said, to employ an agent, instead of the collector or collectors of the several districts; and if he did employ one, the law fixed the compensation, and appropriated the money to pay it. He was not forbidden to employ a revenue officer for this purpose; and, so far as his services were performed for other districts, he stood in the same relation to the government as any other agent. The law forbidding compensation, or reducing it to a small amount, did not apply to this service. The agency was entirely foreign to his official duties, and far beyond the limits of the district to which the law confined his official duties and power. And as the department appointed him to perform a duty required by law, for which the compensation was fixed by law, and the money appropriated to pay it, he is entitled to the compensation given by law, if he has performed the duty; for the Secretary has no more discretionary power to withhold what the law gives, than he has to give what the law does not authorize. The **475***] *agency and services performed in this instance had no more connection with his official duties and position than the purchase of a supply of shoes for the troops in Mexico, in the late war would have been, in the absence of any other person authorized to make such a purchase. And if such a duty was requested or required of him by the head of the proper department, and performed, nobody would deny his right to compensation, if the law authorized and required the service to be done, and fixed the compensation for it.

Upon the case, therefore, as the plaintiff in error offered to prove it, we think the court erred in refusing to admit the testimony.

Undoubtedly, Congress have the power to prohibit the Secretary from demanding or receiving of a public officer any service in any other office or capacity, and to prohibit the same person from accepting or executing the duties of any agency for the government, of any description, while he is in office, and to deny compensation altogether, if the officer chooses to perform the services; or they may require an officer holding an office with a certain salary, however small, to perform any duty directed by the head of the department, however onerous or hazardous, without additional compensation. But the Legislative Department of the government have never acted upon such principles, nor is there any law which looks to such a policy, or to such unlimited power in the head of an Executive Department over its subordinate officers.

No explanation is given of the principle upon which the $400 additional compensation was allowed. If the services were regarded as extra and additional, and within the prohibition of the law, then he was not entitled to this additional allowance, because his salary exceeded $2,500, and nothing more than the salary fixed ought to have been allowed him. But if they were not within the prohibition, but for services in a different agency, then he was entitled, not merely $400, but to the commissions fixed by law. This sum could not have been allowed for supplies in his own district, excluding those for other districts, because, as regards his own district, there is an express prohibition *as above stated. We, however, express [***476** no opinion upon that particular item; and whether it is a proper allowance or not, must be determined by the circuit court, when it hears the evidence at the trial.

For the reasons above stated, the judgment of the Circuit Court must be reversed.

Dissenting, Mr. Justice **Campbell**, Mr. Justice **Grier**, and Mr. Justice **Catron**.

Mr. Justice **Campbell**, dissenting.

I dissent from the opinion and judgment of the court in this case. The opinion of the presiding judge of the circuit court, in my judgment, contains an exact exposition of the law of the case. Justices Catron and Grier authorize me to say they concur in this dissent, and we adopt that opinion as our opinion, which is in the following words:

This is an action for money had and received to the use of the United States, by Philip Greely, Jr., the defendant's intestate, while collector of the customs for the port of Boston and Charlestown.

A number of items were in question when the case was opened, but in the progress of the trial all were disposed of to the satisfaction of both parties, save a charge made by the intestate, of $17,968.92, as commissions on disbursements made by him under the orders of the Secretary of the Treasury, in the purchase of oil and other materials for light-houses. The question is, whether the collector was entitled, by law, to make this charge against the United States for that service. Mr. Greely held the office of collector from May 1, 1849, to May 1, 1853.

By the act of March 3, 1841, § 5 (5 Stat. at L. 432), it was enacted that "no collector shall, on any pretense whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than $6,000 per year, including all commissions for duties, and all fees for storage, or fees or emoluments, or any other commissions, or salaries, which are now allowed by law."

*The act of August 23, 1842, § 2 (5 [***477** Stat. at L. 510), is as follows: "That no officer in any branch of the public service, or any other person, whose salary, pay, or emoluments, is or are fixed by law or regulations, shall receive

any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth, that it is for such additional pay, extra allowance, or compensation."

It being admitted that Mr. Greely was an officer whose salary, pay, or emoluments was or were fixed by the law, and that he had received its full amount of $6,000, independent of the charge in question, it is incumbent on the defendant to show, not only that the service was authorized by law, but also that the appropriation for that service explicitly sets forth that it is for such additional pay, extra allowance, or compensation. It is not enough to find an act of Congress authorizing a service, and making an appropriation to pay for it. This would be sufficient, provided the person rendering the service were not an officer, or other person, entitled to a fixed compensation. If he be, and he claims an extra compensation for an extra service, he must produce an appropriation which explicitly sets forth that it is made for such additional compensation; that is, he must show not only that Congress contemplated and provided for a service, and payment therefor, but that they contemplated and explicitly provided that if it should be rendered by one already entitled to a fixed compensation, he should, nevertheless, receive, in addition thereto, the compensation provided for such service. And the addition of such compensation to a fixed compensation is not to be inferred from any equitable considerations, but must be found explicitly declared in the law itself.

Such, in my judgment, is the fair interpretation of the language of this act; and the history of the legislation of Congress upon this subject of the extra compensation of officers makes the interpretation, if possible, still more plain and necessary.

The defendant relies on the following clause in the appropriation act of March 3, 1849 (9 [*478] Stat. at L. 367): "For *superintendents' commissions, at two and one half per cent on the $466,930.08 appropriated above for light-house purposes, $11,673.25. And the proviso contained in the act making appropriation for the civil and diplomatic expenses of the government, for the year ending the 30th day of June, 1849, and for other purposes, approved, etc., which proviso is in the following words: 'Provided, that no part of the sum hereby appropriated shall be paid to any person who receives a salary as an officer of the customs; and from and after the 1st day of July, 1849, the said disbursements shall be made by the collectors of the customs without compensation, is hereby repealed.'"

The argument of the defendant's counsel is, that the express repeal of this proviso is equivalent to an explicit declaration that parts of the sum appropriated by this act might be paid to persons who receive salaries as officers of the customs, and that it was not to be disbursed by collectors without compensation.

But, certainly, this appropriation does not "explicitly set forth that it is for additional pay extra allowance, or compensation." If this appears at all, it is only inferentially; and the inquiry is, whether it be a necessary inference that some part of this sum was appropriated as additional pay or extra compensation to collectors who should perform the service of superintendents of lights.

Now, the proviso which was repealed consisted of two parts. The first related exclusively to commissions in the disbursement of the appropriation for light-house expenses made for the fiscal year ending on the 30th day of June, 1849; and it prohibited the payment of any commissions out of the sum thus appropriated, to any officer of the customs who received a salary.

The second part of the proviso positively required the service of making disbursements as superintendents of lights to be performed by collectors of customs, after July 1, 1849, without compensation. It left no discretion with the Secretary of the Treasury to appoint any other person to discharge this duty.

*The repeal of the proviso left the [*479] right of officers of the customs to participate in the commissions for disbursing the appropriation made for the year ending June 31, 1849, to stand upon the law as elsewhere found; and restored to the Secretary of the Treasury the power to appoint persons other than collectors to make the disbursements; and if collectors should be appointed, it left their right to commissions to depend on the law as elsewhere found.

It must be admitted that this repeal might, under some circumstances, indicate an intention to have collectors participate in these commissions. If they have been for the first time deprived of them by the proviso, its repeal would quite clearly show that their former title was restored. But the contrary is true. Independent of the proviso, they had no title to this or any other extra compensation, and, by force of the act of August 2, 1842, could have none, unless explicitly granted by the act making the appropriation; so that, unless I can say that the repeal of the proviso either repeals the 2d section of the act of 1842, or satisfies its requirements by an explicit appropriation to pay an extra compensation for an extra service, the defendant has no title to the commission. That the 2d section of the act of 1842 is not repealed by implication, by the repeal of the proviso, is clear. There is no repugnance between this repeal and the act of 1842. The reasons for repealing the entire proviso may have been that the act of 1842 was broad enough to cover the cases of extra compensation contemplated by the proviso, and so it was not necessary, in so far as its object was to provide for those cases; and in so far as it required the service to be performed by collectors only, that it was inexpedient. But to amount to a compliance with the 2d section of the act of 1842, it should have superadded to the repeal of the proviso, an explicit declaration that the appropriation was intended as extra compensation to those officers, having fixed salaries, who might be selected to render the service.

There are two other views of this subject, either of which would, in my judgment, be sufficient to show that there is no lawful claim to these commissions.

480*] *The first is, that although Mr. Greely was superintendent of lights within a certain district, extending round the Massachusetts bay, yet these commissions are charged on disbursements made by him in the purchase, under the orders of the Secretary of the Treasury, of oil and some other materials for the whole light-house service of the United States. Now, the appropriation made is for "superintendents' commissions." If he did not render this service as superintendent, but, aside from that employment, acted under the orders of the Secretary of the Treasury in making large purchases for this service, no appropriation is made for paying him. It was, no doubt, an onerous and responsible duty, imposed upon him because he happened to be at a place favorable for making these purchases; and this may constitute a claim on the equitable consideration of Congress, especially if the imposition of this onerous duty on him, instead of distributing it among all or most of the superintendents of lights, was advantageous to the government. But this is for the consideration of Congress. It does not enable me to say an appropriation to pay commissions by way of extra compensation was actually made.

Besides, if the repeal of the proviso in the act of 1848 were held to amount to an explicit declaration that collectors might participate in the commissions of superintendents; by way of extra compensation, the inquiry would still remain, to what extent may they receive such extra compensation? And this seems to me to be answered by the act of May 7, 1822, § 18 (3 Stat. at L. 696): "That no collector, surveyor, or naval officer, shall ever receive more than four hundred dollars annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States in any other office or capacity." In the case of *Hoyt* v. *United States*, 10 How. 141, the Supreme Court considered this section in force, and applied it to the case of a collector who held office from March, 1838, to March, 1841, and I am not aware of its having been since repealed. It was admitted that, aside from the charge now in question, Mr. Greely had received extra compensation to the extent of $400 annually, for 481*] *services performed for the United States in a capacity other than that of collector. It follows that for services performed in making these contracts and disbursements, which were not within his duties as collector, he can make no further charge.

What has thus been said relates exclusively to the defendant's claims under the act of 1849. The subsequent acts are so much more unfavorable to these claims, that I do not deem it necessary to enter into a particular discussion of them. They are the acts of September 30, 1850 (9 Stat. at L. 533), March 3, 1851, (9 Stat. at L. 608), and August 31, 1852 (10 Stat. at L. 86). I have examined these acts, and am satisfied each of them deprives every collector, whose compensation exceeds $2,500, of all participation in these commissions, though they are required to render the services of superintendents of lights or disbursing agents in procuring supplies for them.

WILLIAM FENN, *Plff. in Err.*,
v.
PETER H. HOLME.

(See S. C. 21 How. 481-488.)

In ejectment, plaintiff must show legal title—equitable title not sufficient — documentary evidence or possession—distinction between legal and equitable remedies — until patent issues, fee is in government—Missouri practice.

The plaintiff in ejectment must in all cases prove a legal title to the premises, in himself, at the time of the demise laid in the declaration; and evidence of an equitable estate will not be sufficient for a recovery.

This legal title the plaintiff must establish, either upon a connected documentary chain of evidence, or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title.

The Constitution of the United States, in creating and defining the judicial power of the general government, establishes the distinction between law and equity; and a party who claims a legal title must proceed at law, and may proceed according to the forms of practice in the state court.

But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States.

The authorities are decisive against the right of the plaintiff in the court below to a recovery upon the facts disclosed in this record, which show that the action in that court was instituted upon an equitable and not upon a legal title.

The legal title to the land in question remains in the original owner, the government, until it is invested by the government in its grantee.

The patent is the superior and conclusive evidence of the legal title.

Until it issues, the fee is in the government, which by the patent passes to the grantee, and he is then entitled to enforce the possession in ejectment.

A practice which has prevailed in some of the states, and amongst them the state of Missouri, of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their character, can in nowise affect the jurisdiction of the courts of the United States, which, both by the Constitution and by acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decision appropriate to each.

Argued Feb. 18, 1859. Decided Mar. 11, 1859.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

The history of the case, and a statement of the facts involved, appear in the opinion of the court.

Messrs. **H. R. Gamble** and **C. Gibson** for plaintiff in error.

Messrs. **A. Leonard** and **S. T. Glover** for defendant in error.

Mr. Justice **Daniel** delivered the opinion of the court:

The defendant in error, as a citizen of the state of Illinois, instituted an action of ejectment against the plaintiff in the court above mentioned, and obtained a verdict and judgment against him for a tract of land, described in the declaration as a tract of land situated in St. Louis county, being the same tract of land known as United States survey No. 2,489, and located by virtue of a New Madrid certificate No. 105, and containing 640 acres.

Both the plaintiff and defendant in the cir-

NOTE.—*What title or interest will support ejectment*—see note, 18 L. R. A. 781.

cuit court trace the origin of their titles to the settlement claim of one James Y. O'Carroll, who it is stated, obtained permission as early as the 6th of September, 1803, from the Spanish authorities, to settle on the vacant lands in Upper Louisiana, and who, in virtue of that permission, and of proof by one Ruddell of actual inhabitancy and cultivation prior to the 20th of December, 1803, claimed the quantity of one thousand arpents of land near the Mississippi, in the district of New Madrid. Upon this application, the land commissioners, on the 13th of March, 1806, made a decision by which they granted to the claimants one thousand arpents of land, situated as aforesaid, provided so much be found vacant there.

On the 14th of December, 1810, the commissioners, acting again on the claim of O'Carroll for one thousand arpents, declare that the board grant to James Y. O'Carroll three hundred and fifty acres of land, and order that the same be surveyed as nearly in a square as may be, so as to include his improvements. The claim thus allowed by the commissioners was, by the operation of the 4th section of the act of Congress approved March 3, 1813, enlarged and extended to the quantity of six hundred and forty acres. *Vide* Stat. at L. p. 813, Vol. II.

In the year 1812, a portion of the lands in the county of New Madrid having been injured by earthquakes, Congress, by an act approved on the 17th of February, 1815, provided that 483*] *"any person or persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the 10th day of November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they hereby are authorized to locate the like quantity of land on any of the public lands of the said territory, the sale of which is authorized by law." Stat. at L. Vol. III. p. 211.

On the 30th of November, 1815, the recorder of land titles for Missouri, upon evidence produced to him that the six hundred and forty acre grant to James Y. O'Carroll had been materially injured by earthquakes, in virtue of the act of Congress of 1815, granted to said O'Carroll New Madrid certificate No. 105, by which the grantee was authorized to locate six hundred and forty acres of land on any of the public lands in the territory of Missouri, the sale of which was authorized by law. Upon the conflicting claims asserted under this New Madrid certificate, and upon the ascertainment of the locations attempted in virtue of its authority, this controversy has arisen.

Each party to this controversy professes to deduce title from the settlement right of O'Carroll, through mesne conveyances proceeding from him. With respect to the construction of these conveyances, several prayers have been presented by both plaintiff and defendant, and opinions as to their effect have been expressed by the circuit court; but as to the rights really conferred, or intended to be conferred, by these transactions, it would, according to the view of this cause taken by this court, be not merely useless, but premature and irregular to discuss, and much more so to undertake to determine them.

This is an attempt to assert at law, and by a legal remedy, a right to real property—an action of ejectment to establish the right of possession in land.

That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them. Such authority may, *however, be seen in the cases of [*484 *Goodtitle* v. *Jones*, 7 T. R. 49; of *Doe* v. *Wroot*, 5 East. 132; and of *Roe* v. *Reade*, 8 T. R. 118. This legal title the plaintiff must establish either upon a connected documentary chain of evidence, or upon proofs of possession of sufficient duration to warrant the legal conclusion of the existence of such written title.

By the Constitution of the United States, and by the acts of Congress organizing the Federal courts and defining and investing the jurisdiction of these tribunals, the distinction between common law and equity jurisdiction has been explicitly declared and carefully defined and established. Thus, in § 2, art 3, of the Constitution, it is declared that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States." etc.

In the act of Congress "to establish the judicial courts of the United States," this distribution of law and equity powers is frequently referred to; and by the 16th section of that act, as if to place the distinction between those powers beyond misapprehension, it is provided "that suits in equity shall not be maintained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," at the same time affirming and separating the two classes or sources of judicial authority. In every instance in which this court has expounded the phrases, proceedings at the common law and proceedings in equity, with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter, as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the court of chancery in England.

In the case of *Robinson* v. *Campbell*, 3 Wheat. on page 221, this court has said: "By the laws of the United States, the circuit courts have cognizance of all suits of a civil nature at common law and in equity, in cases which fall within the limits *prescribed [*485 by those laws. By the 24th section of the judiciary act of 1789 it is provided, that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. The act of May, 1792, confirms the modes of proceeding then used at common law in the courts of the United States, and declares that the modes of proceeding in suits in equity shall be according to the principles, rules, and usages, which belong to

courts of equity, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States. It is material to consider whether it was the intention of Congress by these provisions to confine the courts of the United States in their mode of administering relief, to the same remedies, and those only, with all their incidents, which existed in the courts of the respective states; in other words, whether it was their intention to give the party relief at law, where the practice of the state courts would give it, and relief in equity only when, according to such practice, a plain, adequate, and complete remedy could not be had at law? In some states in the Union no court of chancery exists to administer equitable relief. In some of those states, courts of law recognize and enforce in suits at law all equitable rights and claims which a court of equity would recognize and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law. A construction, therefore, that would adopt the state practice in all its extent, would at once extinguish in such states the exercise of equitable jurisdiction. The acts of Congress have distinguished between remedies at common law and equity, yet this construction would confound them. The court, therefore, think that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be at common law or in equity—not according to the practice in the state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

486*] *In the case of *Parsons* v. *Bedford*, 3 Pet. on pp. 446, 447, this court, in speaking of the seventh amendment of the Constitution, and of the state of public sentiment which demanded and produced that amendment, says:

"The Constitution had declared, in the 3d article, that the judicial power should extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority, etc. It is well known that in civil suits, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that the distinction was present in the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the 3d article law, not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered."

The same doctrine is recognized in the case of *Strother* v. *Lucas*, in 6 Pet. pp. 768, 769, of the volume, and in the case of *Parish* v. *Ellis*, 16 Pet. pp. 453, 454. So, too, as late as the year 1850, in the case of *Bennett* v. *Butterworth*, reported in the 11th of Howard, 669, the Chief Justice thus states the law as applicable to the question before us:

"The common law has been adopted in Texas, but the forms and rules of pleading in common-law cases have been abolished, and the parties are at liberty to set out their respective claims and defenses in any form that will bring them before the court; and as there is no distinction in its courts between cases at law and in equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or a bill in equity. Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States; and, although the forms of proceedings *and [*487 practice in the state courts have been adopted in the district court, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity, and a party who claims a legal title must proceed at law, and may, undoubtedly, proceed according to the forms of practice in such cases in the state court. But if the claim be an equitable one, he must proceed according to the rules which this court has prescribed, regulating proceedings in equity in the courts of the United States."

The authorities above cited are deemed decisive against the right of the plaintiff in the court below, to a recovery upon the facts disclosed in this record, which show that the action in that court was instituted upon an equitable and not upon a legal title. With the attempt to locate O'Carroll's New Madrid warrant No. 150, in addition to its interference with what was called the St. Louis common, there were opposed five conflicting surveys. In consequence of this state of facts, the commissioner of the General Land Office, on the 19th of March, 1847, addressed to the surveyor general of Missouri the following instructions: "If, an examination, it should satisfactorily appear to you that the lands embraced by said surveys were at the date of O'Carroll's location reserved for said claims, the O'Carroll location must yield to them, because such land is interdicted under the New Madrid act of the 17th of February, 1815; but if, at the time of location, either of the tracts was not reserved, but was such land as was authorized by the New Madrid act to be located, the New Madrid claim No. 105 will of course hold valid against either tract in this category. The fact on this point can be best determined by the surveyor-general from the records of his office, aided by those of the recorder. If there be no valid claim to any portion of the residue of the O'Carroll claim, and such residue was such land as was allowed by the New Madrid act of 17th of February, 1815, to be located, on the return here of a proper *plat and patent certifi- [*488 cate for said residue, a patent will issue."

At this point the entire action of the Land Department of the government terminated. No act is shown by which the extent of the St. Louis common, said to be paramount, was as-

certained; no information supplied with respect to the validity or extent of the conflicting surveys, as called for by the commissioner; no plat or patent certificate, either for the whole of the warrant or for any residue to be claimed thereupon, ever returned to the General Land Office, and no patent issued. The plaintiff in the circuit court founded his claim exclusively and solely upon the New Madrid warrant.

The inquiry then presents itself, as to who hold the legal title to the land in question. The answer to this question is, that the title remains in the original owner, the government, until it is invested by the government in its grantee. This results from the nature of the case, and is the rule affirmed by this court in the case of *Bagnell* v. *Broderick*, in which it is declared, that "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of the legal title. Until it issues, the fee is in the government, which by the patent passes to the grantee, and he is entitled to enforce the possession in ejectment." 13 Pet. p. 436.

A practice has prevailed in some of the states (and amongst them the state of Missouri) of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their character; but this practice, as was so explicitly ruled in the case of *Bennett* v. *Butterworth*, 11 How. can in nowise affect the jurisdiction of the courts of the United States, who, both by the Constitution and by the acts of Congress, are required to observe the distinction between legal and equitable rights, and to enforce the rules and principles of decision appropriate to each.

The judgment of the Circuit Court is to be reversed, with costs.

489*] *HIRAM CLEARWATER, *Plff. in Err.*,
v.
SOLOMON MEREDITH, Pleasant Johnson, and Thomas Tyner.

(See S. C. 21 How. 489-493.)

Defendant in state may be sued, though others in other states, interested—latter not prejudiced—defendant citizen of same state with plaintiff—demurrer to counts on guaranty.

Where one or more defendants sued were citizens of the state, and were jointly bound with citizens of other states who did not appear, the plaintiff had a right to prosecute his suit to judgment against those served.

But such judgment not to prejudice parties not served or who do not voluntarily appear.

The plaintiff may sue in the circuit court any of the defendants, although others may be jointly bound by the contract, who are citizens of other states.

Defendants who are citizens of other states are not prejudiced by this procedure, but only those on whom process has been served.

If one of the defendants be a citizen of the same state with the plaintiff, no jurisdiction can be exercised as between them, and no prejudice to the rights of either can be done.

A demurrer, filed to counts on a guaranty, does not bring up the validity of that instrument for decision. It must be specially pleaded, with suitable averments.

Argued Mar. 3, 1859. Decided Mar. 11, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This action was brought in the court below, by the plaintiff in error, to enforce a certain contract of guaranty in writing.

The defendants having demurred to the declaration, the court below sustained the demurrer and entered a judgment in their favor; whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **G. E. Pugh**, for plaintiff in error:

The first cause of demurrer is not well taken. The declaration declares that the plaintiff is a citizen of Ohio, and that the defendants are citizens of Indiana. No question could arise except in regard to the nonjoinder of Caleb B. Smith, as defendant, but that is excused by the 1st section of the act approved February 28, 1839.

5 U. S. Stat. at L. 321, 322; *Commercial Bank* v. *Slocomb*, 14 Pet. 60.

Besides, the nonjoinder of a party defendant must be pleaded in abatement.

1 Chit. Pl. 46.

It cannot be objected by demurrer.

Again; if this nonjoinder were fatal to the jurisdiction of the court, as the demurrer, alleges there should have been no judgment for costs. That is palpably erroneous.

Mr. **R. W. Thompson**, for defendants in error:

This action is brought upon a joint contract executed by the defendants in error and Caleb B. Smith. But three of these parties are sued —Smith not being joined. This omission is fatal, inasmuch as the declaration does not show a case of which the circuit court had jurisdiction.

The rule is this: When there are two or more joint plaintiffs or defendants, each of the plaintiffs must be capable of suing, and each of the defendants of being sued, in order to support the jurisdiction. *Bank of Vicksburg* v. *Slocomb*, 14 Pet. 64, where this interpretation is given to act of February 28, 1839 (5 Stat. at L. 321). The declaration here should show that Smith is a citizen of a different state from the plaintiff: for, in the Federal courts, jurisdiction must be shown. If it is not shown, the objection is fatal at any stage of the case. It needs no plea. And this is the ground, evidently, upon which the demurrer was sustained below.

Mr. Justice **McLean** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Indiana.

The plaintiff, who is averred to be a citizen of the state of Ohio, brought his action against Solomon Meredith and Thomas Tyner, citizens of Indiana, on the 12th July, 1853, together with Caleb B. Smith, who, at the time of the commencement of this suit, was not a citizen

of the state of Indiana, and is therefore not joined as a defendant herein, etc.

491*] *The declaration has three counts, one of which contains the following guaranty:

"Whereas Hiram Clearwater, of the city of Cincinnati, on the 6th of May, 1853, contracted with the Cincinnati, Cambridge, & Chicago Short Line Railway Company for the sale of a tract of land situate in Wayne county, Indiana, lying on the national road, about four miles east of Cambridge city, and adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the consideration of $10,000, to be paid in the capital stock of said company at par; and whereas, in such contract of sale, it was agreed that said company should furnish to said Clearwater a guaranty that the capital stock of said railway company should be at par within one year from the completion of the entire line of said road: Now, in consideration that the said H. Clearwater has, with the consent of the said company, and at our request, executed a deed of conveyance to Solomon Meredith for said land, to whom the same has been sold by the said company, we, the undersigned, hereby guaranty that the said stock of said company, which has been issued to said Clearwater in pursuance of said contract, shall be worth par in the city of Cincinnati within one year from the time the said railroad shall be completed from Cincinnati to Newcastle, Indiana, and that said road shall be completed within two years from the 1st day of October, 1853, and signed by Pleasant Johnson, S. Meredith, Caleb B. Smith, and Thomas Tyner."

The defendants, by counsel, come and say the declaration of the said plaintiff, and the counts therein contained, are severally insufficient in law to enable said plaintiff to have and maintain his action against said defendants; and for cause of demurrer shows to the court the following:

1. The jurisdiction of the court is not shown by proper averment.

2. No consideration is shown for the undertaking.

3. The several counts do not contain facts sufficient to constitute a cause of action; wherefore the defendants pray judgment, etc.

If this be regarded as a plea to the jurisdic-
492*] tion of the court, *it is argued that the suit is brought on a joint contract executed by the defendants in error, when only two of them were served with process, and the third one, Caleb B. Smith, who, at the time of the commencement of the suit, was not a citizen of the state of Indiana, and is therefore not joined as a defendant herein, etc.

The 1st section of the act of February 28th, 1839, provides that "where, in any suit at law or in equity commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer."

In the case of *The Bank of Vicksburg* v. *Slocomb*, 14 Pet. 65, it is said the 11th section of the judiciary act declares that no civil suit shall be brought, before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

It has been held that this is a personal privilege of not being sued out of the district in which the defendant may live, or in which he shall be found on serving the writ, and that it may be waived by the defendant. And it is said, in the above opinion, "that it did not contemplate a change in the jurisdiction of the courts, as it regards the character of the parties, as prescribed by the judiciary act, and expounded by this court—that is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued; which is not the case in this suit, some of the defendants being citizens of the same state with the plaintiffs."

It is well known that the act of 1839 was intended so to modify the jurisdiction of the circuit court as to make it more practical and effective. Where one or more of the defendants *sued were citizens of the state, and [*493 were jointly bound with those who were citizens of other states, and who did not voluntarily appear, the plaintiff had a right to prosecute his suit to judgment against those who were served with process; but such judgment or decree shall not prejudice other parties not served with process, or who do not voluntarily appear.

Now, it is too clear for controversy, that the act of 1839 did intend to change the character of the parties to the suit. The plaintiff may sue in the circuit court any part of the defendants, although others may be jointly bound by the contract, who are citizens of other states. The defendants who are citizens of other states are not prejudiced by this procedure, but those on whom process has been served, and who are made amenable to the jurisdiction of the court.

And in regard to those whose rights are in no respect affected by the judgment or decree, it can be of no importance of what states they are citizens. If one of the defendants should be a citizen of the same state with the plaintiff, no jurisdiction could be exercised as between them, and no prejudice to the rights of either could be done.

The plea to the jurisdiction seems not to be well taken, and it cannot be sustained.

In the case of *Hill* v. *Smith et al.*, decided at the present term, this court held that the demurrer filed to the counts on the guaranty did not bring up the validity of that instrument for the action of the court, and that it must be specially pleaded, with suitable averments. And the court reversed the judgment, and remanded it to the circuit court, with leave, on the payment of costs, to move to amend the pleadings, so as to raise the questions on the guaranty. The same order is made in the present case.

Judgment reversed.

WILLIAM P. LEA, *Appt.*,
v.
THE POLK COUNTY COPPER COMPANY
et al.

(See S. C. 21 How. 493-506.)

Imperfect acknowledgment—alteration in instrument, not sufficient to put purchaser on inquiry—presumption of performance of official duty—where important rights have grown up under legal title, it will not be interfered with—innocent purchasers protected.

Where, in the certificate of proof of deed, the subscribing witness does not say that the grantor acknowledged the same on the day it bears date; but the deed shows the date the probate is covered by the provisions of Tennessee act of 1846.

The letters "ark," crowded after the letter "P," in William Park Lea's name, at the various places where this alteration is found in the patent, are not sufficient to put the purchasers on inquiry.

When the register put those letters there, the presumption is that he did so in the course of his official duty. He who impeaches the act as illegal, must prove it to be so.

All the incipient steps, authorising the register to issue the grant, the governor to sign it, and the Secretary to attach the great seal, are presumed to have been regular; nor is the purchaser required to look behind the patent.

Where the legal title was vested by the grant, and has thus stood for a number of years, and important rights have grown up under it, a court of equity will not interfere, on general principles of justice.

If the equity conferred by the entry was in William Pinkney Lea, the complainant, and the patent issued in the name of William Park Lea, and the mining company, or those under whom they claim, innocently and ignorantly purchased from the latter and paid for the property, and took legal conveyances for it from him, with an honest belief that they were acquiring a legal title from the true owner, then the complainant cannot be heard to set up his equity behind the grant to overthrow the purchase.

And the respondents, the mining company, might buy in the legal title after they had notice, if they were innocent purchasers, holding under others.

Although the deed was not registered, adverse possession was in itself notice that the grantee held the land under a title, the character of which the complainant was bound to ascertain.

By the settled construction of the Tennessee act of limitations, an unregistered deed is a sufficient title on which the bar can be founded.

If two possessions were continuous for the whole term required by the act of limitation, then the bar was formed, and the defense complete.

The Tennessee act of limitation was intended to protect and confirm void deeds purporting to convey an estate in fee simple, where seven years' adverse possession had been held under them.

Argued Mar. 3, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee.

The bill in this case was filed in the court below, by the appellant, to recover 80 acres of land, which he claims as general enterer from the state of Tennessee.

The court below having dismissed the bill, with costs, the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

NOTE.—*Requisites of adverse possession*—see note to Ricard v. Williams, 5 L. ed. U. S. 398, and note to United States v. Chaves, 40 L. ed. U. S. 215.

Occupancy necessary to constitute adverse possession—see note to Ewing v. Burnet, 9 L. ed. U. S. 624.

Messrs. **J. M. Campbell, Chas. Ready, S. S. Baxter,** and **F. P. Stanton,** for the appellant:

1. As to the statute of limitations. The only color of title that can be set up, is the deed of Park Lea to John Davis of June 18, 1846. But if William Pinkney Lea was in fact the grantee of the land in dispute, and if the grant was made to him and not to Park Lea, it will be shown then by force of the grant that Pinkney was in possession and seised at the time the deed was executed, and the deed is void in Tennessee as champertous.

U. S. v. *Arredondo*, 6 Pet. 691, 743; *Jackson* v. *Sellick*, 8 Johns. 269.

It is void on the same ground, because of Nelson Carter's possession at the time of the date of the deed of the upper part or northern 40 acres claimed by the trustees of the Mary's Company. The writing claimed to be color of title, must be supposed by the party holding it to communicate title.

Dyche v. *Gass*, 3 Yerg. 399; *Gregg* v. *Sayre*, 8 Pet. 253; *Wright* v. *Mattison*, 18 How. 50.

The circumstances make it very doubtful if Davis supposed this deed gave him title.

Counsel then examined the proof of seven years' continuous adverse possession subsequent to the deed, and argued that the evidence did not sustain the claim.

2. As to the defense that the appellees are purchasers for a valuable consideration without notice. The grant from the state of Tennessee to William Park Lea is admitted to bear on its face conclusive evidence that it had been tampered with in a vital part. Parties taking a title upon the face of which such a material alteration appears, cannot claim to be innocent purchasers.

Markham v. *Gonaston*, Cro. Eliz. 626; *Chew* v. *Barnet*, 11 Serg. & R. 389; *Polk* v. *Wendell*, 5 Wheat. 309.

Moreover, the defense of Park for consideration without notice, is misconceived in its application to this case. The party setting up the defense claimed under an alleged grant to William Park Lea. The grant was to William P. Lea, and was by alteration made to read to William Park Lea. If, however, the William P. Lea was William Pinkney Lea, then a conveyance by William Park Lea, not only does not convey the legal title, but does not convey the equitable title. The case, therefore, comes within the scope of *Vattier* v. *Hinde*, 7 Pet. 252.

See, also, *Hallett* v. *Collins*, 10 How. 174.

It is quite certain that the defendants were not innocent purchasers. The interpolated grant put them on inquiry.

Kennedy v. *Green*, 3 Myl. & K. 719.

Counsel then reviewed the evidence in the case, and endeavored to show that the William P. Lea of the deed was William Pinkney Lea, and concluded. The above conclusively shows that the complainant entered the land in dispute, and that the grant was made to him, and knowledge of this fact is to be imputed to the defendants, for reasons already set forth.

Messrs. **R. H. Smith, Thomas C. Lyon,** and **Horace Maynard,** for the appellees:

1. The proof, it is respectfully submitted, does not by any means support the main fact relied on by the complainant, namely: that he entered the land.

2. The title aside, the defendants are fully protected by the statute of limitations of 1819, ch. 28, §§ 1 and 2. C. & N. 442.

The evidence shows adverse possession for seven years and upwards. That the deed from Park Lea to John Davis is genuine and bears on its face the true date, admits of no doubt.

1. In addition to its probate by the subscribing witnesses, it is proved in common law form to be genuine, by several unimpeachable witnesses. It is exhibited and has no erasures or alterations. The answers of the respondent are responsive to the bill. They each and all say it was genuine, and was executed, as they believe, at the time it bears date.

3. The deed being proved to be unquestionably genuine, the small consideration is most pregnant proof that it was executed previous to the discovery of copper ore in that vicinity. As to the validity of this defense, it is not in the least degree material that there should be subscribing witnesses or probate and registration. It may be forged, invalid, or void, yet possession under it for seven years, vests the title in the holder to the extent of the boundaries described in it.

Wallace v. *Hannum*, 1 Humph. 450; *Jones* v. *Perry*, 10 Yerg. 81, 83; *Whiteside* v. *Singleton*, Meigs, 224; *Williams* v. *Wilson*, M. & Yerg. 248, 254.

The complainant is not within any saving clause of the statute of 1819, and is therefore barred, if he had even proved his entry and equitable right. This defense, then, everything else aside, is, by an unbroken series of adjudications in Tennessee, absolute and complete.

Love v. *Love*, 2 Yerg. 288; *Wallace* v. *Hannum*, 1 Humph. 448; *Vance* v. *Johnson*, 10 Humph. 214; *Blantin* v. *Whittaker*, 11 Humph. 313; *Marr* v. *Chester*, 1 Swan. 416; *Keaton* v. *Thomasson*, 2 Swan. 138; *Norris* v. *Ellis*, 7 Humph. 463.

3. It is a well-established principle of equity jurisprudence, that when one has purchased under an apparently legal title for a full, valuable consideration actually paid, without notice, either actual or constructive, of any outstanding equity, his title shall not by such equity be defeated. The equities being equal, the legal title shall prevail.

1 Story, Eq. Jur. 7th ed. § 64, ch. 108, 165; *Warrick* v. *Warrick*, 3 Atk. 290; *Malden* v. *Mennill*, 2 Atk. 13; *West* v. *Errissey*, 2 P. Wms. 349; *Powell* v. *Price*, 2 P. Wms. 533.

Admitting, for the sake of argument, that the respondents were put on their inquiry by the face of the original grant, to what would that inquiry have led? If they had gone to the register, he would have informed them that he made the alteration at the instance and request of the parties in interest. He would have shown them alterations of other grants in favor of the complainant, accepted by him. If they had gone to the entry taker's office, they would have discovered that the location was made in the name of William P. Lea, and that this designation was equally applicable to William Park Lea as to complainant. They would have found in books B and C, that William Park Lea was the true enterer. If they had inquired of complainant himself, what answer could he have returned?

Mr. Justice **Catron** delivered the opinion of the court:

There stood on the record book an entry for 80 acres, in the name of William P. Lea, No. 5446, dated April 5, 1842.

A patent issued, founded on this entry, dated 21st August, 1842, No. 5744.

This patent is in the name of William Park Lea. It was signed by the Governor, countersigned by the secretary of state, and sealed with the great seal of the state.

As originally filled up, it was in the name of William P. Lea, and was altered to William Park Lea, by adding the letters "ark" to the "P." This was done by the register of the land office, whose duty it was to prepare the patent for the signatures of the governor and secretary; and the act of affixing the great seal to it, which gave it validity as against the state, devested her title, and vested it in the grantee, on the patent thus executed being delivered to him.

William Park Lea and William Pinkney Lea wrote their names alike, William P. Lea; the latter always, and the former frequently, although he often signed his name William Park Lea. The registrar added the letters "ark" to the middle name, to distinguish between them, as both had entered lands in the entry taker's office, and confusion prevailed as to who was the proper owner. This is the effect of the registrar's evidence. In filling up grants Nos. 6260, 6258, and 5764, they were made out in the name of William Park Lea; but the register scraped out the letters "ark," and issued the patents in the name of William P. Lea, because the lands had been entered by William Pinkney Lea.

No. 5764 of these patents was filled up on the same day (21st August, 1842) that the one (No. 5744) here in dispute was filled up, and the letters "ark" added to the letter "P;" the other two (Nos. 6260 and 6258) were filled up December 8th, 1842. Five other patents were filled up properly in the name of William P. Lea. This was all done in the latter six months of 1842, and the grants were founded on entries made *in April of that year, in the [*496 Ocoee land office. The respective claimants were related to each other, and familiarly known to the register. The entries had all been made and were recorded in the name, "William P. Lea."

That this was honestly done by the registrar is not open to dispute. He has given a deposition in great detail, and accounts for his course of proceeding entirely to our satisfaction, so far as his integrity is concerned.

This patent (No. 5744) the bill seeks to have reformed so as to stand in the name of William P. Lea, the complainant, and to be used in an action of ejectment pending in the court below, by the complainant, against the respondents; and second, if said grant shall be found to have been issued to the person not entitled to the land, that then the court will devest the title to the respondents, and vest it in the complainant, so that he may use the decree on the trial of his action of ejectment.

3. The bill also prays, that the court may remove impending clouds from the complainant's title by declaring all the alleged titles of the respondents, or either of them void, and

direct the possession of said lands to be surrendered to the complainant, together with a prayer for further and general relief.

To the relief sought, among other defenses (set up in their answers), the respondents rely on the fact that they claim under one John Davis, who purchased from William Park Lea, and took title by a deed in fee with a general warranty of title for the land in dispute, and that Davis, their vendor, purchased and paid for the land to said William Park Lea, without any notice or knowledge that the complainant had any equity in the land or set up claim thereto.

This deed is produced, dated June 18th, 1846, and appears to have been duly executed by William Park Lea, and the consideration money was paid to him by John Davis. It is not pretended that John Davis had any notice of the complainant's claim when the deed was executed; the complainant had then no knowledge himself that he had any interest in the land.

One objection to this deed is, that it was not duly proved, and could not be lawfully regis- 497*] tered according to the laws of *Tennessee. In the certificate of probate of Elias Davis, one of the subscribing witnesses, the clerk does not say the witness swore that the grantor acknowledged the same on the day it bears date. The other witness so proves. Now, as the deed shows the date, and the certificate of probate says the grantor acknowledged it for the purposes therein contained, the probate is covered by the provisions of the act of 1846 (chap. 78 Nicholson's Statute Laws, 242).

Caldwell, Keith, & Mastin, purchased from John Davis in the year 1852, paid the purchase money ($6,000), and took a deed in fee simple, with a covenant of general warranty of title for the land in dispute; and they also rely on the plea that they were bona fide purchasers of the legal title, or what purported to be so; and this allegation is established by the proof, unless it be true that the letters "ark." crowded after the letter "P," in William Park Lea's name, at the various places that this alteration is found in the patent, was sufficient to put the purchasers on inquiry. Now, if they had inquired of the register, he could only have told them that he put the letters there in the course of his official duty; but when, he could not say, this being what he proves here. Then the presumption comes in, that, as a public officer, the register did his duty, and he who impeaches the act as illegal must prove the allegation. On this assumption, the register filled up the patent as it is now found, before the governor signed it, and the seal of state was attached—that is to say, when the patent bears date.

Then, again, all the incipient steps authorizing the register to issue the grant, the governor to sign it, and the secretary to attach the great seal, are presumed as having been regular; nor was the purchaser required to look behind the patent. *Bagnell* v. *Broderick*, 13 Pet. 448.

The bill, of necessity, admits that the legal title was vested in William Park Lea by the grant as it now stands; as, on any other assumption, the complainant would have his remedy at law, and must be turned out of court. The title has thus stood since 1842; important rights have grown up under it, with which a court of equity cannot interfere, on general principles of justice. 1 Story's Com. on Eq. § 64, chap. 64 *d*. *We mean to say, [*498 that if the equity conferred by the entry was in William Pinkney Lea, and the patent issued in the name of William Park Lea, and the mining company, or those under whom they claim, have innocently and ignorantly purchased and paid for the property, and took legal conveyances for it, with an honest belief that they were dealing for and acquiring a legal title from the true owner, then the complainant cannot be heard to set up his equity behind the grant to overthrow the purchase. 1 Story, Eq. 454. And so the respondents, the mining company, might buy in the legal title of William Park Lea, after they had notice, if they were innocent purchasers, holding under John Davis, and Mastin, Keith, & Caldwell. 1 Story, Eq. § 411.

But it is insisted that the deed from Lea to Davis was not registered, and fraudulently concealed from the complainant, so that he could not proceed to assert his rights. Davis had possession of the land when he took William Park Lea's deed, claiming for himself, and adversely to all others; and he so continued in possession till he sold the land in December, 1852. This adverse possession was in itself notice that he held the land under a title, the character of which the complainant was bound to ascertain. *Landis* v. *Brant*, 10 How. 375.

Furthermore, Caldwell, Keith, & Mastin, purchased from Davis in December, 1852; they caused the deed from William Park Lea to Davis, and the one from the latter to them, to be duly registered, without having any knowledge of the complainant's claim, and without the existence of any circumstance to put them on inquiry respecting it. They were clearly bona fide purchasers of a legal title, that the complainant cannot assail in equity.

2. The respondents rely on the act of limitations of the state of Tennessee as a protection to their title and possession. The act declares "that where any person shall have had seven years' possession of any lands which have been granted by this state, holding or claiming the same by virtue of a deed of conveyance or other assurance, purporting to convey an estate in fee simple, and no claim by suit in law or equity, effectually *prosecuted, shall [*499 have been set up or made to said lands within the aforesaid time, then, and in that case, the person or persons, their heirs or assigns, so holding possession, shall be entitled to keep and hold possession of such quantity of land as shall be specified and described in the deed, etc., in preference to, and against all, and all manner of person or persons whatever."

By the settled construction of the foregoing act, an unregistered deed is a sufficient title on which the bar can be founded; and when John Davis's deed from William Park Lea was recorded, it related to its date, and was good to draw the better title to it by force of the statute.

The possessions of John Davis, and Caldwell, Keith, & Mastin, made one possession; and if the two were continuous for the whole term of seven years, then the bar was formed, and the defense complete. This brings us to the fact of actual possession held by Davis,

for after he sold to Caldwell, Keith, & Mastin, no one disputes their actual possession.

Davis purchased the improvements on the land from Wallace, 25th February, 1842, for the sum of $40; and by the agreement, Wallace was to hold under Davis and occupy the premises for three years, which Wallace proves he did. He then left the place, and Wilson Abercrombie went into possession under Davis, and occupied the cabin one year. It being in the midst of a small field which was annually cultivated in grain crops, Davis removed the cabin beyond the field, and put it up again on the forty-acre lot, and Abercrombie occupied it another year. He was succeeded by Bailey McCoy as tenant of the cabin under Davis; McCoy occupied it for a year or more. Wallace's field could not have included more than some three acres, and had an orchard of peach trees on it. After the cabin was removed, Davis enlarged the field, and extended it across the southern line of the forty-acre lot, and also enlarged it, from time to time, by small clearings at the other end (which were made for turnip patches), until the field included about twelve acres, and which was annually cultivated by Davis, whose residence was within a few hundred yards of the field, on the adjoining 500*] section of land. This field *was obviously an important part of his plantation. That portion of the twelve-acre field lying on the forty-acre lot embraced, when this suit was brought, about five acres. Mann, the county surveyor, who run the lines of the forty-acre lot, in September, 1855, so states. He proves that the *debris* and ground plan of the cabin Wallace built and occupied were quite apparent; that the peach trees were there, and that the old and worn land was plainly distinguishable from that more recently cleared up, and which was on its different sides.

To overcome the evidence of continued possession on the part of Davis, two witnesses were produced by the complainant, to wit, Crawford Braswell and Jesse Shubird. The former swears that he resided in Ducktown from June, 1845, to October, 1850; that he knew John Davis, and the place Wallace improved. "I at one time (says he) purposed purchasing that eighty acres where the Wallace improvement was. Davis told me that he had only the occupant of Luther Wallace; that he did not own the land, and that he had moved the improvements off to another place; and having asked him who owned the land, he stated it was entered by a man by the name of Lea. He stated he had moved off the house and fruit trees, and I think he also named the time." Says he thinks the conversation took place in July, 1848.

In answer to another question, the witness says: "Mr. Davis showed me where he had moved the house from, and I understood he had moved all the improvements off that place, and the stock was running on the land that had been inclosed, and if any of the fencing was left, I did not notice it. The place was grown up very much with bushes. There might have been some rotten rails scattered where the fence was put, lying among the bushes and saplings."

This is represented, also, as having taken place in July, 1848; and the witness swears that in the succeeding August, Davis showed him where the Wallace house had stood. He was interrogated, on the part of the complainant, as follows:

Please state whether or not you afterwards heard John Davis set up claim to the Wallace eighty-acre tract; and if so, state when it was, and fully what he said to you on the subject.

Answer. In the winter of 1849, there [*501 was a man there from Bradley county, looking at Davis's land, and talking of buying him out. I happened at Davis's at the time, and he requested me not to mention the conversation to any person, that had passed between us, about the land; that if he sold his land to that man, he should sell the Wallace place also.

Question by same. Please state whether that was the first time you heard him assume to own the eighty-acre Wallace tract.

Answer. He did not profess to own it then, but said he should sell it with the balance, if he sold at all.

Interrogatory by same. State whether or not John Davis had the Luther Wallace place inclosed at any time; and if so, state when he had it done.

Answer. If he had it inclosed at any time, it was since I left that country.

To the cross-interrogatories, the witness stated:

Do you say there was no land on the Wallace tract inclosed and in cultivation during the years 1848, 1849, and 1850?

Answer. None in 1848, and none afterwards, that I know of.

Are you acquainted with the boundaries of the Wallace land, and can you say, positively, that there was no land on said tract in cultivation during the aforesaid years?

Answer. I was not acquainted with the lines of the tract, and, if there was any in cultivation on the tract, I did not know it.

Can you, then, say positively that no part of the field, about where the old Wallace house stood, was in cultivation during the time mentioned?

Answer. No part of it was in cultivation during the time I lived there.

In your answer to complainant's sixth question, you say he (John Davis) stated that Lea had entered the land. State where that conversation took place, when, and if any person was present, give the name or names.

Answer. This conversation took place at Davis's mill, in the month of July, 1848, and there was no person present.

In your answer to complainant's third question, you say that John Davis told you he had only the occupant right, which he *had [*502 purchased from Wallace, and that he did not own the land; state exactly what he told you, and at what time.

Answer. In the month of July, 1848, he made the statements I have made in that answer, that he had only bought the improvements from Wallace, and that he did not own the land, and would not sell it, and make a title to it.

Shubird swears that he went to Ducktown to reside in 1848, and lived there about three years; says he knew John Davis, and the Luther Wallace improvement.

The succeeding questions propounded for the

complainant and the answers to them, will best present the material statements of this witness:

State whether or not the Luther Wallace improvement was moved from the place where he first put it up; and if so, state who had it moved, and where it was moved to.

Answer. The houses, fencing, and peach trees were moved from the place they were first put on the Luther Wallace place. They were moved by John Davis, and put on his own land.

How far were these improvements taken from where Luther Wallace had put them up?

Answer. I can't exactly say, but suppose a half mile or three quarters.

Please state why John Davis removed these improvements. Tell all you may have heard John Davis say on that subject.

Answer. He (John Davis) stated to me that the reason he moved them was, that he was afraid he would lose his labor, as he had understood a man by the name of Lea had entered the land, and stated that he did not own the land.

State whether or not you ever heard John Davis claim the land where the Luther Wallace improvement was, at any time while you lived with him.

Answer. The Luther Wallace place is now called Copper Hill. I think in about the year 1849, after the copper property came into notice, John Davis set up a claim, and said it.

Do you know whether or not the Luther Wallace improvement or property was left vacant and turned out at the time Davis removed the fencing, etc., away? And if so, state how long it was left vacant.

503*] *Answer.* The property was left vacant —how long, I can't say, but until Davis set up his claim; he then commenced fixing up the fencing again.

On cross-examination, the witness states that he went to Ducktown in March, 1848; that the Wallace house had been removed before; nor was there any inclosed land on the Copper Hill tract when he went there.

He is then further interrogated, and answers:

How can you say, then, as in your answer to complainant's third interrogatory, that the house, fencing, and peach trees, were removed by John Davis, and put upon his own land?

Answer. I heard John Davis say so.

At what time did Davis tell you this, and how did he happen to speak to you on this subject?

Answer. Shortly after I went there—I can't say exactly what time. John Davis and myself, after passing through his farm, passed upon the vacant place of Luther Wallace. He mentioned the subject himself, and told what I have heretofore stated.

On which side of Davis's mill creek was the improvement of which you have been speaking situated?

Answer. It was situated on the left hand when going up the creek.

Was there not, at that time, a small field inclosed between the mill creek and the Copper Hill?

Answer. Not to my knowledge, as I don't know whether there was or not, as I know nothing about it, only as Davis told me that he had taken all off.

Was there any person present when this conversation occurred between you and Davis? If so, state who it was.

Answer. There was no person present.

If the evidence of these two witnesses be true, then there was no continuous adverse holding; and the question is, whether it is entitled to credit. Braswell swears that the entire improvements were removed, including the fruit trees; and that the land where the Wallace improvement had been made was grown up and overrun with bushes and saplings; that this was the condition of the place in 1848. Shubird proves the same, with the exception that he says nothing as *respects the under- [*504 growth. So far as conversations with John Davis are given, they may be dismissed, with the remark, that he had obtained William Park Lea's deed for the land in June, 1846, and was not at all likely to carefully disavow all title, and say the land belonged to one Lea.

In 1856, when these depositions were taken, John Davis was dead, and courts of justice lend a very unwilling ear to statements of what dead men had said.

Many witnesses have been examined to prove that Braswell and Shubird are not entitled to credit on oath as witnesses, and many prove the reverse. That they are men of no substantial worth, and of little respectability, is manifest enough, and confidence in their integrity is certainly impaired. But in this case, as in most others, the integrity of the witnesses is easily ascertained. If the land was grown up in bushes and saplings in 1848, it must have been thrown out as a waste place six or eight years before that time. Davis purchased Wallace's possession in February, 1842. Wallace remained there three years, by agreement with Davis. Then Abercrombie came in, and occupied the house one year whilst it stood in the field. It was then removed beyond the field, and had no connection with it. Davis himself took possession of the cleared land, and cultivated it. It was rented by Davis to Dugger, either in 1849 or 1850, and he raised a crop on it. The orchard was there then, and continued there, till 1855, after this suit was brought, as Mann, the county surveyor, proves, who traced the lines of the Copper Hill tract, and examined the cleared land in the twelve-acre field, and especially that part north of the southern line of the forty-acre lot. Mann states that the marks of the old house built by Wallace were plainly visible, and so was the old worn land cleared by Wallace, and that the peach trees were there. Substantially the same facts are proved by nearly all of the witnesses examined on part of the respondents. It is the most familiar fact in the cause.

That the Wallace field and orchard were constantly under fence from the time Davis purchased of Wallace, and certainly never abandoned nor overrun with brushwood and saplings, is fully established.

*And our opinion is, that when Bras- [*505 well and Shubird deposed to the reverse, they stated what was untrue.

The complainant in his amended bill does not controvert the fact that adverse possession, for more than seven years, had been holden of the land in dispute, but relies on the following allegations to avoid the bar, to wit:

Your orator shows the defendants, in their answers on file, charge that the said John Davis and those claiming under him had seven years' peaceable, uninterrupted, adverse possession of the land in dispute, previous to the filing of the original bill, and previous to the suit at law; as to which facts no answer is asked herein from defendants; but if any such possession existed, your orator charges, and which charge your orator does require to be answered. that it was a fraudulent possession, under a fraudulent grant and fraudulent deed, the registration of which was postponed until within about the last two years; that the possession of your orator's grant, first by the said William Park Lea, and then by the said John Davis, was fraudulently concealed from him by them; that he never had any knowledge or information thereof until about the time stated in his original bill, and within the last twelve months; and that, as his cause of action was thus fraudulently concealed, the statute of limitations cannot apply.

These allegations are specially denied by the answer of the respondents, except as to the fact that the deed from William Park Lea to John Davis was not registered, which is admitted. Of the other allegations there is no proof, and, of course, they are not in the case.

Whether Lea had title or not at the time he conveyed to Davis is altogether immaterial, as the Tennessee act of limitation intended to protect and confirm void deeds purporting to convey an estate in fee simple, where seven years' adverse possession had been held under them. Nor was Davis bound to register his deed from Lea; between them, as grantor and grantee, it was valid without registration. Neither can the complainant be heard to say that he had no notice of the fact that Davis claimed title to the land. His possession and adverse holding was notice to the world, as will be seen by the case of *Landis* v. *Brant*, above cited.

506*] **On the two grounds above stated, we order that the decree of the Circuit Court dismissing the bill be affirmed.*

Mr. Justice **Daniel**, dissenting:

In the case of *Lea* v. *The Coppermine Company*, it is my opinion that the company, as a corporation. could neither plead nor be impleaded in a court of the United States.

LLOYD N. ROGERS. Admr. of Eliza Park Curtis; Edmund L. Rogers, in his own Right, and as Admr. of Eliza L. Rogers, and Eleanor A. Rogers, *Appts.*,

v.

JOSEPH E. LAW, by Mary Robinson, his Next Friend.

(See S. C. 21 How. 526, 527.)

Appeal dismissed, cannot be heard.

Where the appeal was dismissed 27th February, 1857, the appellants filed the record and docketed the case, 3d April, 1857, and there is no statement of any other appeal, and this seems to be the appeal that was docketed and dismissed; held, that this appeal cannot be sustained.

Argued and held under advisement May 18, 1858. Reargued Mar. 4, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the District of Columbia. On motion to dismiss.

The case is stated by the court.

Messrs. **R. S. Coxe** and **T. P. Scott** for appellants.

Mr. **R. J. Brent** for appellee.

Mr. Justice **McLean** delivered the opinion of the court:

The facts, as they appear of record, on the motion to dismiss this appeal, are as follows:

The decree of the circuit court was pronounced 21st January, 1856. An appeal was prayed from said decree, and granted the same day, 21st, January, 1856. This appeal was docketed and dismissed under the 63d rule of this court, at December term, 1856, to wit, 27th February, 1857; and a writ of *procedendo* was issued 19th May, 1857.

The appellants filed this record and docketed the case 3d April, 1857. The record in this case stated that an appeal had been prayed and allowed, but does not give any date. There is no statement of any prior appeal in this record. The appeal bond is dated 4th February, 1856. There is no citation in this record.

The appellants filed the citation and bond, 30th April, 1857, and directed the clerk to docket this case, to transfer the record filed in the last case to this, to attach said citation and bond to said record, and to print all the papers in this case. There is no statement of any other appeal than that set out; and this seems to be the appeal that was docketed and dismissed 27th February, 1857.

As the record now stands, it is not perceived how this appeal can be sustained.

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*THE BOARD OF COMMISSIONERS [*539 OF THE COUNTY OF KNOX, *Plffs. in Err.*,

v.

WILLIAM H. ASPINWALL, Joseph W. Alsop, Henry Chauncey, Chas. Gould, and Sam'l L. M. Barlow.

(See S. C. 21 How. 539–546.)

County bonds — prerequisites of, question for commissioners—innocent holders—if bonds import validity, purchaser protected — suit on coupons detached.

Where bonds of a county were issued in pursuance of a public statute of a state, any person dealing in them is chargeable with a knowledge of it.

When full power is conferred upon the board of commissioners to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election; whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription, is a question for the board.

After the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it is too late, even in a direct proceeding, to call in question the decision of the board.

NOTE.—*Recitals in negotiable bonds or securities as evidence of the fact recited and as an estoppel*—see note to Mercer County v. Hackett, 17 L. ed. U. S. 548.

Much less can it be called in question in a collateral way to the prejudice of a bona fide holder of the bonds.

Where the bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further for evidence of a compliance with the conditions to the grant of the power.

A suit can be maintained upon the coupons, without the production of the bonds to which they had been attached.

Argued Feb. 24, 1859. Decided Mar. 11, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit brought in the court below, by the defendants in error, to enforce payment of certain coupons.

The trial in the court below resulted in a verdict and judgment in behalf of the plaintiffs, for $17,832.36, with costs; whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **McDonald & Porter, R. W. Thompson,** and **Reverdy Johnson** for plaintiffs in error.

Messrs. **J. P. Benjamin, S. Judah,** and **S. F. Vernon** for defendant in error.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Indiana.

The suit was brought in the court below against the board of commissioners of Knox county, to recover the amount due upon two hundred and eighty-four coupons, each for the sum of $60, the whole amounts to the sum of 541*] $17,400. *The coupons were payable at the North River Bank, in the city of New York —one hundred and forty-two of them on the 1st of March, 1856, and the remaining number on the 1st of March, 1857. These coupons were originally attached to one hundred and forty-two bonds issued by the defendants, for $1,000 each, the bonds payable at the bank above mentioned, twenty-five years from date, to the Ohio & Mississippi Railroad Company, or bearer, with interest at the rate of 6 per cent per annum, payable annually on the 1st of March, at the bank, upon presentation and delivery of the proper coupons hereto attached, by the auditor of said county.

The coupons declared upon and sought to be recovered are those which were attached to these one hundred and forty-two bonds, and represented the interest due thereon on the 1st of March, 1856 and 1857. The plaintiffs are the holders and owners of these coupons.

The main ground of the defense set up and relied on to defeat the recovery is, that the defendant, the board of commissioners, possessed no authority to execute, or to authorize to be executed, the bonds or coupons in question; and hence, that they are obligations not binding upon the county of Knox, which this board represents. Our chief inquiry, therefore, will be, whether or not these several obligations were executed and put into circulation, as evidences of indebtedness, by competent and legal authority.

The defendant is a body corporate, under the laws of the state of Indiana, by the name of the board of commissioners of the county, and very large powers are conferred upon it in matters relating to the police and fiscal concerns of the county. The auditor of the county is to act as its clerk, and the sheriff was to attend its meetings and execute its orders. It has a common seal, and copies of its proceedings, signed and sealed by the clerk, are evidence in courts of justice. It has power to dispose of the property of the county; to adjust accounts against it; to raise revenue, and examine accounts of disbursing officers; and an appeal lies from its decisions to the circuit court. 1 R. S. of Ind. 180, 187.

*On the 14th February, 1848, the [*542 legislature of Indiana incorporated the Ohio & Mississippi Railroad Company, and by the 12th section of the charter provided as follows:

"It shall be lawful for the county commissioners of any county in the state of Indiana through which said railroad passes, for and in behalf of said county, to authorize, by order on their records, so much of the said stock to be taken in said railroad as they may deem proper, at any time within five years after opening the books of subscription to said stock: Provided, however, that it shall be, and is hereby made, the duty of said county commissioners, in any county through which said railroad may pass in the state of Indiana, to subscribe for stock for and on behalf of said county, if a majority of the qualified voters of said county, at any annual election within five years after said books are opened, shall vote for the same." Sess. Laws 1848, p. 619.

This act was amended on the 15th of January, 1849, and in the 2d section it was declared to be the duty of the sheriffs of the counties—and among others, Knox county, the one in question—forthwith give notice of an election to be held on the first Monday in March then next, to determine whether said county would subscribe for the stock of the Ohio & Mississippi Railroad Company, etc.; and if a majority of the votes shall be given in favor of the subscription, the county board of commissioners shall subscribe to said stock, etc., for the county, to an amount not less $100,000. Provided, that the county board of any of said counties may, within one week prior to the said election, increase or lessen the amount to be subscribed, of which notice shall be given at the different precincts of said county on the day of election, etc.

The 3d section provided that the county subscription shall be payable in county bonds, bearing interest at the rate of 6 per cent per annum, payable annually on the 1st day of March, redeemable at such time and place as the directors of the company may determine, within thirty years of the date of the subscription. The section then provides for the levying of a tax annually upon the county by the board of commissioners, to meet the accruing interest on the bonds.

*The plaintiff gave in evidence, on [*543 the trial, that at a meeting of the board of commissioners of the county of Knox, on the 26th February, 1849, it ordered, under the power given in the 2d section above referred to, that the county subscribe $200,000 of the capital stock of the Ohio & Mississippi Railroad Company. And also that at a meeting on the 25th October, 1850, after reciting that, in accordance with the wishes of the voters of the county, as

expressed at the election held for that purpose in the several townships on the first Monday of March, 1849, it is ordered that the auditor, in the name and for the county of Knox, subscribe to the capital stock of the Ohio & Mississippi Railroad Company four thousand shares of $50 each, or the sum of $200,000; and that the auditor be authorized to vote at all elections and meetings of stockholders, or to appoint a proxy in his stead. And that, in pursuance of this direction, the auditor subscribed the four thousand shares, and received certificates in the name of the board of commissioners of the county for the same; and also executed and delivered the bonds of the county as provided for in the 3d section of the act of 1839, attaching thereto coupons for the interest. The bonds and coupons in question were issued under this authority.

This is the substance of the case, as presented on the record.

The ground upon which the want of authority to execute the bond in question is placed, is the alleged omission to comply with the requisition of the statute of 1849, in respect to the notices to be given of the election to be held on the first Monday of March, at which a vote was to be taken for or against a subscription of stock to the railroad company.

It is insisted that an irregularity or omission in these notices had the effect to deprive the board of this authority, or rather furnish evidence that the power had never vested in it under the act; and, further, that the plaintiffs are chargeable with a knowledge of all substantial defects or irregularities in these notices of the election, and not, therefore, entitled to the character of bona fide holders of the securities.

The act, in pursuance of which the bonds were issued, is a public statute of a state, and 544*] it is undoubtedly true that any *person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, he must show that the authority has been properly conferred. The court must, therefore, look into the statute for the purpose of determining this question; and upon looking into it, we see that full power is conferred upon the board to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of the election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law.

This view would seem to be decisive against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast in favor of the subscription. Is it to be determined by the court, in this collateral way, in every suit upon the bond, or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription?

The court is of opinion that the question belonged to this board. The act makes it the duty of the sheriff to give the notices of the election for the mentioned, and then declares, if a majority of the votes given shall be in favor of the subscription, the county board shall subscribe the stock. The right of the board to act in an execution of the authority is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depositary of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests.

We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously *to the [*545 execution of the power, and before the rights and interests of third parties had attached; but, after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a bona fide holder of the bonds in this collateral way.

Another answer to this ground of defense is, that the purchaser of the bonds had a right to assume that the vote of the county, which was made a condition to the grant of the power, had been obtained, from the fact of the subscription, by the board, to the stock of the railroad company, and the issuing of the bonds.

The bonds, on their face, import a compliance with the law under which they were issued. "This bond," we quote, "is issued in part payment of a subscription of $200.000, by the said Knox county, to the capital stock, etc., by order of the board of commissioners," in pursuance of the 3d section of act, etc., passed by the general assembly of the state of Indiana, and approved 15th January, 1849.

The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power. This principle was recently applied in a case in the court of exchequer in England. 6 Ellis & Blackburn, 327, *The Royal British Bank* v. *Turquand*. It was an action upon a bond against the defendant, as the manager of a joint stock company. The defense was a want of power under the deed of settlement or charter to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed. The resolution passed was considered defective. Jervis, Ch. B., in delivering the judgment of the court, observed: "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission *to do so on certain conditions. [*546

Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done." See, also, S. C. 5 Ellis & Bl. p. 245, and 25 Eng. L. & Eq. p. 114, *Maclae* v. *Sutherland*. The principle we think sound, and is entirely applicable to the question before us.

A question was made upon the argument, that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached. But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation.

Some other minor points were made in the case upon the argument, which we have considered, but which it is not important should be particularly noticed.

We are satisfied the judgment below is right, and should be affirmed.

Mr. Justice **Daniel**, dissenting:

In the case of *The Knox County Commissioners* v. *Aspinwall et al.* it is my opinion, in the first place, that the circuit court had not jurisdiction of the cause, one of the parties being a corporation; and second, I think, moreover, that the commissioners being known to be mere agents, it was the duty of those who dealt with them to ascertain the extent of their powers.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF KNOX, *Plaintiff in Error*,

v.

DAVID C. WALLACE.

(See S C. 21 How. 546, 547.)

Commissioners of Knox Co. v. *Aspinwall, ante, 208, affirmed.*

The facts disclosed upon the trial of this case were substantially the same, *mutatis mutandis*, as those which were proved or admitted in the case of Commissioners of Knox County v. Aspinwall, *ante*, 208.

The questions involved have been examined in the said case, and the result there arrived at affirms the judgment in this case.

Argued Feb. 28, 1859. Decided Mar. 11, 1859.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit brought in the court below by the defendant in error, on certain coupons for instalments of interest. The trial below resulted in a verdict and judgment in favor of the plaintiff, for $4,287.05, with costs; whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **McDonald & Porter** and **R. W. Thompson** for plaintiff in error.

Mr. **N. C. McLean**, for defendant in error:

The board of commissioners had power to issue the bonds. The county record authorizes the issue of the bonds in accordance with the 3d section of the act of Jan. 5, 1849, and that provides for bonds bearing interest payable annually. The coupons or interest warrants were attached to the bonds in the usual and ordinary way for the convenience of all parties, and were merely the evidence of the payment of the interest authorized by the bonds themselves under the law. The power is not extended, but is simply exercised in the manner which has become the settled custom in such securities.

Graham v. *Maddox*, 6 Am. Law Reg. 615; *State of Ohio* v. *Commissioners of Clinton Co.* 6 O. St. 280.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Indiana.

The suit was brought by Wallace against the board, upon several coupons, for instalments of interest which had been attached to certain bonds issued by the defendants to the Ohio & Mississippi R. Co. The coupons were owned by the plaintiff, and had been duly presented for payment, which was refused. The defendants pleaded the general issue, and six special pleas, to which there were replications, except the second and sixth pleas, to which there were demurrers.

The court sustained the demurrers. There were afterwards amendments and demurrers to pleadings not very intelligible in the record, and seem not to have been relied on by either party. The case was tried upon the general issue, and the facts disclosed upon the trial were substantially the same, *mutatis mutandis*, as those which were proved or admitted in the previous case of Aspinwall and others against these same defendants. After the evidence was closed, the defendants presented ten prayers to the court, upon each of which instructions were given. It is unnecessary to go through them; the questions involved have already been examined in the case above mentioned, and the result there arrived at affirms the judgment in this case.

Judgment affirmed.

Dissenting, Mr. Justice **Daniel**.

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*PHILO CHAMBERLAIN and John H. Crawford, Claimants of the Propeller Ogdensburgh, *Appts.*, [*548

v.

EBER B. WARD and Stephen Clement, Survivor of Samuel Ward, Deceased.

(See S. C. 21 How. 548-572.)

Collision—incompetent officers—owners and vessel responsible—signal lights, when insufficient—neglect of officer—requirements as to lights—neglect of other vessel, mutual fault—damages.

In case of collision on Lake Erie, propellor held in fault, because she did not have a competent and

NOTE.—*Collision; rules for avoiding; steamer meeting steamer*—see notes to 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 30 C. C. A. 630.

skillful officer in charge of her deck, and because it appears that his want of qualifications and unskillfulness contributed to the collision.

Owners of vessels must see to it that the masters and other officers intrusted with their control and management, are skillful and competent to the discharge of their duties; as, in case of a disaster like the present, both the owners and the vessel are responsible for their acts, and must answer for the consequences of their want of skill and negligence.

The propeller also held in fault, because she did not have signal lights properly displayed, as required by law.

Signal lights are required by the act of Congress, and when they are extinguished, or burning so dimly as not to fulfill the purpose and object for which they are required, they do not and cannot constitute a compliance with such act of Congress.

The propeller also held in fault, for the reason that the officer in charge of her deck neglected seasonably and effectually to change the course of the vessel, after he discovered the signal lights of the steamer.

Steamboats and propellers navigating the lakes are required by the 5th section of the act of March 3, 1849, to carry a triangular light, shaded green on the starboard side, and red on the larboard side, with reflectors, and to be of a size to insure a good and sufficient light; and the owners of such vessels, neglecting to comply with the regulation, are declared liable to the injured party for all loss or damage resulting from such neglect.

But the neglect on the part of one vessel, to show signal lights as they approach, does not discharge the other from the obligation to adopt all reasonable and practical precautions to prevent a collision.

The steamer also held chargeable with fault, because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel, after he discovered the white lights which subsequently proved to be the white lights of the propeller.

The steamer also held chargeable with fault, because the officer in charge of her deck did not seasonably, and effectually change the course of the vessel, or slow or stop her engine, so as to avoid collision, after he discovered the white lights of the approaching vessel.

The steamer also held in fault, because she did not have a vigilant and sufficient lookout.

In a case of mutual fault, the decree of the circuit court, apportioning the damages, was correct.

Argued Feb. 15, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The libel in this case was filed in the district court of the United States for the southern district of Ohio, by the appellees, to recover damages sustained by a collision. The decree of the said court dismissed the libel and further ordered, adjudged, and decreed, that the libelants pay to the respondents the sum of $3,000, with interest, as damages which they sustained by the collision.

The circuit court, on appeal, reversed this decree, and decreed that the damages occasioned by the collision, with costs in both courts, be equally divided between the parties, whereupon both parties appealed to this court, and the appeals have been separately docketed, in conformity to the agreement of the parties, that the answer of the respondents should operate as a cross libel for the damage sustained by the propeller.

A further statement of the case appears in the opinion of the court.

See, also, the next succeeding case.

Messrs. **R. P. Spalding** and **H. Stanbery**, for appellants:

1. The propeller Ogdensburgh was on her true course, N. E. by E., when she first made the steamer's light.

2. She did not change her course.

3. It was the duty of the propeller, under existing circumstances, to keep her course. To have thrown her helm "a-port," with the steamer from two to three points of the compass on her starboard bow, would have been a gross violation of the rules of navigation.

London Packet, 2 W. Rob. 213; *Steamer Ocean*, Naut. Mag. vol. I. No. 5, p. 355; *Steam-Tug Sampson*, 3 Wall. Jr. 14; 3 Am. Law Reg. p. 337; *The Santa Claus*, Olcott, 428.

4. The light of The Atlantic, as first made from the propeller, was by no means a "red signal light." It was an ordinary white light. The Atlantic was only three or four times her length off, and was consequently swinging under "a port helm," when she showed her "red light" to the propeller.

5. At the instant of collision, and when it was inevitable, the helm of the propeller was ordered "a-starboard." But the testimony shows that the object was solely to lessen the amount of damage by receiving a glancing stroke upon the bows, rather than a direct blow upon the broadside of the propeller.

The steamboat had no right to place the propeller in such jeopardy, that the error of a moment might cause her destruction. If an error was committed in giving the order to "starboard," it could not, under the circumstances, be deemed a "fault."

The Genesee Chief v. *Fitzhugh*, 12 How. 461; *Shute* v. *Goslee*, 3 Am. Law Reg. 476.

6. The propeller displayed proper lights.

The steamer Atlantic was wholly in fault:

First. She had no sufficient "lookout" on the night in question. The inside of the pilot house was not the proper place from whence to keep watch for approaching vessels. "A competent and vigilant 'lookout' should have been stationed at the forward part of the steamer, in the position best adapted to descry vessels at the earliest moment."

St. John v. *Paine*, 10 How. 585; *The Genesee Chief* v. *Fitzhugh*, 12 How. 462; *The Catharine* v. *Dickinson*, 17 How. 177; *The Europa*, 2 Eng. L. & Eq. 563 and 564; *The Diana*, 1 W. Rob. 131; Pritch. Adm. Dig. p. 163, § 50 and note; *The New York* v. *Rea*, 18 How. 225; *The Wm. K. Perrin* v. *The Louisiana*, 6 Am. Law Reg. 427.

Second. The master and chief mate were in bed while the steamboat was running at a rapid rate, in a locality much frequented by vessels, through an atmosphere so smoky that the character and course of the propeller could not be determined at the distance of half a mile. Under such circumstances, the safety of more than four hundred human lives was intrusted to a second mate, who lacked the experience of a single summer, as "an officer of the deck."

This shows, on the part of the two first-named officers, an indifference to their responsibility perfectly unjustifiable, and tends very much to cast the blame for the collision upon The Atlantic.

The Iron Duke, 2 W. Rob. 385; *Shute* v. *Goslee*, 3 Am. Law Reg. 474.

Third. The steamboat was greatly in fault in not diminishing her speed, when she found her-

self in close proximity with another vessel, of whose character and course she was ignorant.

The Rose, 2 W. Rob. 2, 3; *The Virgil*, 2 W. Rob. 205; *The Birkenhead*, 3 W. Rob. 75; *The Perth*, 3 Hagg. 414-417; *The Rainbow*, 11 Am. Law Jour. 332; *Peck* v. *Sanderson*, 17 How. 181; *The Genesee Chief*, 12 How. 463; *The Northern Indiana*. Judge Hall, Manuscript; *The Sampson*, Justice Hall, 3 Am. Law. Reg. 340; *Shute* v. *Goslee*, Justice Campbell, 3 Am. Law Reg. 475; *The Europa*, 2 Eng. L. & Eq. 559.

In the case of *The N. Y. and Va. Steamship Co.* v. *Calderwood*, 19 How. 241, Mr. Justice Campbell says (p. 246): "In the present instance, the steamer had notice that a vessel was before her and was near her track, and under the circumstances she was bound to take efficient measures to avoid the schooner."

Fourth. Having neglected to "ease her engine," which would have been, to say the least, a proper precautionary measure under the circumstances, the burthen rests upon the The Atlantic to show that the collision was not owing to that neglect, but would have equally happened if she had performed her duty.

Schooner Lion, Judge Sprague, 6 Law Rep. 117; *The Anita* v. *The Anglo Norman*, McCaleb, Judge, Eastern Dist. of Louisiana, Newb. Adm. 494.

Fifth. The steamboat committed an unpardonable fault, when she threw her helm "a-port" and attempted to cross the bows of the propeller. In fact, the collision was brought about by this rash and unskillful maneuver.

The London Packet, 2 W. Rob. 213; *The Emily*, 1 Blatchf. 236; *The Rainbow*, 11 Am. Law. Jour. 332; *The Steam Tug Sampson*, 3 Am. Law Reg. 339; *Steamer Ocean*, 1 Naut. Mag. 335; *Northern Indiana*, Judge Hall, Manuscript; *The James Watt*, 2 W. Rob. 270; *The Friends*, 4 Moore, P. C. 314; Pritch. Adm. Dig. 171, note 98; *The Oregon* v. *Rocca*, 18 How. 572.

Sixth. After the collision, The Atlantic was blamable in not having attempted to ascertain whether The Ogdensburgh required assistance. *The Celt*, 3 Hagg. 327.

Finally. If in any possible contingency this high tribunal shall be brought to the determination, that the propeller Ogdensburgh contributed to the terrible disaster revealed in the testimony, in such a manner as to incur liability for damages, then in behalf of her owners, Chamberlain & Crawford, I shall claim the benefit of the act of Congress of March 3d, 1851, entitled "An Act to Limit the Liability of Ship Owners and for Other Purposes."

9 U. S. Stat. at L. 635, § 3; *American Transportation Co.* v. *Moore & Co.* 7 Am. Law Reg. 15.

Messrs. **John S. Newberry** and **N. H. Swayne** for appellees.

Mr. Justice **Clifford** delivered the opinion of the court:

This was a suit *in personam*, and comes before the court by appeal from the circuit court of the United States for the southern district of Ohio, sitting in admiralty. It was commenced by the present appellees, as owners of the steamer Atlantic, against the appellants, as owners of the propeller Ogdensburgh, and grew out of a collision which occurred on Lake Erie between those vessels on the 20th day of August, 1852, whereby the propeller received damage, and the steamer was run down and lost. Some change was made in the nature *and character of the proceeding after [*554 the suit was instituted, making it necessary that a brief explanation should be given, in order that the present state of the pleadings may not be misunderstood. According to the transcript, the original libel was filed in the clerk's office of the district court on the 27th day of October, 1852, and on the same day a process of attachment against the propeller, and monition to her owners, was taken out, and subsequently served, pursuant to its mandate, by attaching the vessel, publishing notices to those interested, and summoning the respondents. On the 11th day of November following, an amended libel was filed in court, setting forth more in detail the circumstances of the collision and the grounds of the claim as made by the libelants. As amended, however, the libel still retained, in some of its aspects, the form of a proceeding *in rem* against the vessel, and a suit *in personam* against her owners.

In the answer, which was not filed till after the process was served, the appellants, as claimants of the propeller and respondents in this suit, excepted to the form of a libel, alleging that the two modes of proceeding were improperly joined, and prayed that the libel should be dismissed on that account. At the hearing in the district court, the exception of the respondents for a misjoinder was sustained, and thereupon the libelants, on motion for leave, were permitted to amend and change the proceeding to the form of a suit *in personam* against the appellants as owners of the propeller, and the cause was allowed to progress, and in that form of proceeding, the parties were ultimately heard upon the merits of the controversy. Another explanation is also necessary, connected with the answer of the respondents, as without it the subsequent proceedings in the cause would appear to have been irregular, and certainly would be incomprehensible. On the 26th day of April, 1853, the parties entered into an agreement to the effect that the answer of the respondents in this suit should operate as a cross libel for the damage sustained by the propeller, and that the claims of both parties to damage should be considered by the court in weighing the evidence, and be adjudicated upon in the final decree; and in order to facilitate the investigation, *it was admitted in the case that [*555 the damage sustained by the propeller amounted to the sum of $3,000, and that the value of the steamer was $75,000. Other interlocutory proceedings were had in the cause which it is not important to notice, and testimony was taken on both sides, and at the final hearing on the 10th day of May following, a decree was entered, that the libel be dismissed with costs; and under the authority conferred by the agreement that the answer should operate as a cross libel, it was further ordered, adjudged, and decreed, that the libelants pay to the respondents, within thirty days, the sum of

$3,000, with interest, as the damage which the propeller sustained by the collision.

From that decree the libelants appealed to the circuit court. Much additional testimony was taken in the circuit court, and after a full hearing on the 12th of November, 1856, upon the pleadings as modified, and the proofs adduced by the respective parties, it was ordered, adjudged, and decreed, that the decree of the district court be in all things reversed, and a final decree was entered, to the effect that the damages occasioned by the collision, together with the costs in both courts, be equally divided, and that each party bear a moiety of the same; and that the respondents, pursuant to the admissions of the parties as to the amount of the damage, pay to the libelants the sum of $36,000. Whereupon the parties respectively appealed to this court, and the appeals have been separately docketed in conformity to the agreement of the parties, that the answer of the respondents should operate as a cross libel for the damage sustained by the propeller.

Some reference to the pleadings touching the merits of the controversy now becomes necessary, before we proceed to the consideration of the matters of fact in dispute between the parties in this suit.

According to the allegations of the libel, the steamer Atlantic was duly enrolled and licensed, and was regularly employed in transporting passengers and freight, making semi-weekly trips each way, to and from Detroit, in the state of Michigan, and Buffalo, in the state 556*] of New York. She left Buffalo at *the usual hour in the evening of the 19th of August, 1852, with freight and a large number of passengers on board, bound on her regular trip to the port of Detroit. And the libelant's allege that she was a tight, strong vessel, and in every respect well manned, equipped, and appointed for the voyage, with a full complement of officers and men; and that those to whom the duty properly belonged were at the time of the disaster on the lookout for the safety and protection of the vessel. They also allege that after leaving Buffalo she proceeded on her voyage in the usual route across the lake, with all her signal lights displayed as required by law; that while she was so proceeding, at about half past two o'clock in the morning of the following day, and when she was off Long Point, on the Canada shore, the propeller Ogdensburgh, then being on her way from Cleveland to the entrance of the Welland canal, came upon the steamer, and with great force and violence ran into her, the bow of the propeller striking the larboard side of the steamer near the forward gangway, breaking and crushing by the force and violence of the collision into and through the guard and hull of the vessel, so that she filled with water and sunk, and became wholly lost to the libelants.

Other matters of fact, material to the issue, are also set forth in the libel, and among the number are the following: that the propeller, before and at the time of the collision, did not have burning, and properly displayed, the signal lights required by law; that she was not then proceeding in the usual route from Cleveland to the entrance of the canal, and that those in charge of her when she came in sight of the lights of the steamer neither stopped her engines, nor slackened her speed, nor altered her course, nor took any other precaution to prevent or avoid a collision; and the libelants aver that it was otherwise with those in charge of the steamer; that as soon as they perceived the lights of the propeller approaching, they put the wheel of the steamer first a-port, and then hard a-port, turning her course to the right, away from the propeller, as by law it was their duty to do, and that they made every effort in their power to avoid a collision; and finally, that the persons in charge of the propeller, though they saw the lights of the *steamer at a great distance, and in [*557 ample time to have prevented the disaster, did not put the wheel of the propeller a-port, or turn their vessel to the right, away from the steamer, as they were bound to do; nor did they stop or slow the engine, or display lawful signal lights, but so negligently, improperly, and unskillfully navigated their vessel that she ran directly and almost at right angles into and against the steamer, and thereby occasioned the disaster. Many of the affirmative facts alleged in the libel are expressly controverted in the answer filed by the respondents. They deny that the steamer was a tight, strong vessel, or that she was well manned and appointed for the voyage; and they also deny that the proper persons were on the lookout for the protection and safety of the vessel, or that those in charge of the steamer took any precautionary measures to prevent the collision.

In addition to these denials, they allege, as matter of defense, that the propeller, a vessel of three hundred and fifty-three tons burthen, left Cleveland on the day preceding the disaster at about twenty minutes past twelve o'clock, deeply laden, and proceeded on her voyage, by the way of Fairmount, toward Ogdensburgh, her place of destination, which was to be reached through the canal before mentioned; that about two o'clock the next morning, and when she was steering northeast by east, on her proper course to the entrance of the canal, the wind being light and the weather somewhat hazy, the watch on her deck discovered the light of a steamer from two or three points off her larboard bow, which was supposed to be three miles distant; that the propeller kept on her course, running at a speed of about seven miles an hour, until the mate, who had the watch, ascertaining that the light was fast approaching the propeller, gave the signal to slow, which was obeyed; and soon after, on discovering that the light was coming still nearer, signaled to stop; and then, finding that the vessels were likely to come in contact, he directed the engine to be reversed, and gave the order to back; but in spite of all these precautionary measures, the collision ensued.

Respecting the immediate cause of the collision, the theory of the respondents is, that the steamer, if she had held her *course [*558 southwest by west, would have passed the propeller nearly a mile on her starboard quarter; and they accordingly allege, that by putting her helm a-port her course was turned to the right, so as to bring her across the bows of the propeller. And they also allege, in this connec-

tion, that the steamer was running with unabated speed, at the rate of fifteen miles an hour, when she fell with all her momentum upon the stem of the propeller, wrenching it out of its place, and carrying the propeller half round as she ran on her course.

And they finally allege that the persons in charge of the propeller, from the moment they first discovered the light of the steamer to the time of the collision, managed their vessel according to the most approved rules of navigation; and that the collision was wholly owing to the fault, neglect, and unskillfulness of the officers and crew of the steamer, in changing her course across the path of the propeller, and in their culpable omission to stop the steamer, after it was found that such change of course increased the danger, by bringing the two vessels closer together. And, in accordance with the theory that the steamer was wholly in fault, they pray that their answer may be taken as a cross libel in their behalf, to recover the damage sustained by the propeller, and that such sum may be decreed to them, by reason of the collision, as in justice they are entitled to receive.

Such is the substance of the pleadings, so far as respects the circumstances of the collision, and all the matters of fact to be determined by the court.

Since the suit was commenced, the parties have examined more than one hundred witnesses; and their testimony, as exhibited, fills nearly four hundred pages of the transcript. In that state of the case, a particular analysis of the testimony of each witness, and a comparison of their respective statements, will not be attempted, as its effect would be to extend the investigation beyond all reasonable limits, without any practical benefit to either party. All that can be done, under the circumstances, will be to state the material facts proved, and to refer to such brief portions of the evidence as seems to be necessary to confirm our conclu-
559*] sions. Conflicting testimony *we have endeavored to reconcile, where it was possible; and when not so, we have drawn our conclusions from the weight of the evidence and the probabilities of the case.

With these explanations, we will proceed to state the material facts, so far as respects the steamer Atlantic.

She left Buffalo between nine and ten o'clock in the evening of the day preceding the disaster, having on board, in addition to her freight, nearly five hundred passengers, of whom more than one hundred were lost. At the time of her departure, she was in every respect seaworthy, and was well manned and appointed for the voyage, with a competent master and a sufficient and competent crew. Steamers, on leaving Buffalo for Detroit, usually steer southwest by west; and The Atlantic, following her accustomed route, pursued that general course during the night, until she made Long Point light, on the Canada shore, when the officer in charge of her deck changed her course one fourth of a point to the southward, in order to give the light a wider berth. When abreast of that light, and about two miles distant from it, the steamer resumed her former course, about southwest by west, and continued on her voyage, without any other change, until the second mate, who had charge of the deck, discovered two white lights three fourths of a point off her larboard bow, when he ordered the wheelsman to port her helm, and the order was obeyed.

Nothing additional occurred during the voyage, of any importance in this investigation, up to the time those lights were discovered by the second mate. His watch, which commenced shortly after the steamer was outside, had not then closed and of course he was properly in charge of the deck. He testifies, that at first he saw only one light, and then another, and that they appeared like glimmering stars, and at first view he was unable to determine whether they were stars or the lights of a vessel; but upon further observation he supposed they were the lights of a sail vessel, and accordingly gave the order to port the helm. That order was given while the officer who issued it was standing in the pilot house, which was situated on the forward part of the hurricane deck, at the usual elevation in steamers of that description, above the water line of *the [*560 vessel. She was a first-class steamer, of eight hundred tons burthen, and was moving through the water at the rate of sixteen miles an hour, and the officer in charge of the deck, and who gave the order to port the helm, was the only lookout stationed on any part of the vessel; and it is not pretended that either officer or seamen, other than the officer of the deck, had been assigned to that duty during the voyage.

Two other persons, the wheelsman and a passenger, were in the pilot house with the second mate, both when he discovered the lights and when he gave the order to port the helm; and the evidence shows that he went there for a purpose connected with his duty as officer of the deck; and he testifies that he had not been inside more than two minutes when he first saw the light. After having given the order to port the helm, he immediately left the position where he had been standing, and went on to the top of the pilot house, and then he says the signal lights of The Atlantic, which were properly displayed, and were burning brightly, shone onto the approaching vessel, and enabled him to see that she was a steamer, and that the two vessels were very close together. His own account of what followed shows conclusively that the knowledge he then for the first time obtained, as to the character of the approaching vessel, was too late to enable him to adopt the necessary precautions to avoid the impending peril. On seeing the propeller, and ascertaining the danger of his situation, arising from the closeness of her approach, he ordered the helm of the steamer hard-a-port, and, without waiting to know whether the order was obeyed, put his hand on to the telegraph, with a view to give the signal to stop; but perceiving that the collision was almost certain, he omitted to signal, concluding that the only chance of safety was to rely upon the velocity of the steamer, and the operation of her helm under the order already given, which, it seems, was promptly obeyed. Precautionary measures could not then be effectually adopted, as the time and opportunity to render them available had passed, and the two vessels almost immediately came together, the propeller striking

the larboard side of the steamer near the forward gangway, crushing through the guard and 561*] hull of the steamer, and *otherwise damaging her, so that before she had run a mile she filled with water and sunk in the lake. These facts are drawn from the testimony of the witnesses who were on the deck of the steamer or in her pilot house, and are believed to be substantially correct, and to correspond with the events as they occurred. They all concur in saying that they did not see any signal lights on the propeller as she approached, and supposed she was a sail vessel till it was too late to stop the engine, and affirm, most confidently, that if good signal lights had been shown, they would have seen them. Those shown by the steamer were seen by the mate of the propeller when the vessels were three miles apart, and several witnesses testify that such lights, if properly shown, as required by law, could be seen at the distance of four or five miles; and in view of the evidence as to the state of the weather and the character of the night, we have no doubt they might have seen, if burning brightly, in ample time to have prevented the disaster. All the witnesses agree that the wind was light, and the surface of the lake smooth, and they generally admit that there was some mist or haze on the water; but assert in the most positive terms that it was starlight overhead, and no one pretends that it was unusually dark. Good signal lights, under such circumstances, if burning brightly, could readily be seen, notwithstanding the haze on the water, at a sufficient distance to enable steamers approaching each other to adopt every necessary precaution to avoid a collision.

Having stated the principal facts proved, as they appear to the court, so far as respects the steamer, we will now proceed to the examination of those of a corresponding character which relate to the propeller. More difficulty attends this branch of the inquiry, on account of the conflicting state of the testimony, and the consequent uncertainty in which the facts are involved. Some of the facts, however, are fully proved, and to those we will first invite attention. As alleged in the answer, the propeller left Cleveland, on the day preceding the disaster, on her downward trip from Chicago to Ogdensburgh, which was to be reached through the Welland canal. No doubt is entertained that she was a good, strong vessel, 562*] and there is nothing *in the testimony to call in question either the competency of her master or the sufficiency of her crew. It appears, by the testimony of her master, that she left Cleveland about noon, and ran down opposite Grand River by daylight; that after arriving there she steered, for about an hour, east-northeast, and then turned to northeast by east till the vessels came together. This last statement, however, is obviously mere hearsay, as the watch of the mate commenced at twelve o'clock at night, and he continued in charge of the deck until half past two in the morning, when the collision occurred; and the master admits, what it is important to observe, that it was usual when they got down off Long Point, and found themselves out of the way, "to steer accordingly," by which we understand him to mean that it was usual, when they got down there, to regulate the course of the propeller with respect to the well-known position of Long Point, and perhaps with a view to make that light, in the further progress of the voyage, which is proved to be the most prominent light on the route. At twelve o'clock the mate took charge of the deck, and he says he kept the propeller on a course of east-northeast until two o'clock, and then hauled her off from the southern shore, to northeast by east, and that soon after he saw a light two points or two and a half points off her starboard bow. Could this statement of the mate, in regard to the course of the propeller, be regarded as correct, we should be obliged to acquit both vessels, upon the ground that the alleged collision never took place, as obviously it could not, assuming that the course of the steamer has been correctly ascertained. His testimony in this particular, therefore, must be considered as founded in mistake; and it is proper to remark that he is contradicted in so many particulars, and is proved to have made so many contradictory statements in respect to the circumstances of the collision, that we deem it unsafe to give full credence to his statements, especially in regard to such matters in controversy as obviously involve the vindication of his own conduct in the management of the vessel. Rejecting his statement as incredible, because inconsistent with the admitted and well-established facts in the case, we are left without any satisfactory testimony in the record *from which the precise course of the [*563 propeller, for one or two hours before the collision, can be ascertained with any reasonable degree of certainty.

Looking at the other facts and circumstances in the case, there is much reason to conclude that the inexperience and ignorance of the mate led him, in the early part of his watch, to adopt a route somewhat to the southern shore than had been usual, until he got down off Long Point; and finding, on arriving there, that he was too far to the southward, he then changed the course of the propeller to the one she was pursuing when the lights of the steamer were first discovered; and this view of the case finds support in the fact proved by the master, that it was usual to correct any irregularity in the course at that stage of the voyage. That the propeller was south of The Atlantic when her mate discovered the signal lights of the latter vessel, is proved beyond all reasonable doubt and is, in effect, admitted by the mate in that part of his testimony where he says that the bearing of her lights, when he first saw them, was two or two and a half points off the starboard bow of the propeller. Her course then was in an easterly direction, and it is equally well established that her white lights were first seen on the steamer, whose course was westerly off her larboard bow. Assuming these two facts to be true, of which there is no doubt whatever, and it necessarily follows that the propeller was south of The Atlantic, and such, it is believed, was the real fact. Both vessels were injured by the collision, and additional light is shed upon this inquiry by the evidence in the case as to the localities in the respective vessels where the damage was received. All, or nearly all, the damage received by the propeller was in her starboard bow, near the stem, and it was the larboard side of the

steamer, near the forward gangway, that was so crushed and broken in as to cause her to fill with water and sink. These circumstances, taken in connection with the well-established fact that the mate of the propeller, who had charge of her deck, persistently maintained that he had a right to keep his course, and that it was the duty of the steamer to adopt the necessary precautions to keep out of the way, 564*] furnish strong grounds of *presumption that no considerable change was made by the propeller until the peril was impending and the collision inevitable. Any change of course, if made under such circumstances, whether to the starboard or larboard, would not constitute a compliance with the rules of navigation, because it would be too late to accomplish the purpose for which precautions are enjoined.

Much discussion also took place at the bar upon the question whether the propeller, at the time of the collision, had proper signal lights displayed, as required by law. On that point, the evidence shows that her signal lights were seasonably set and properly displayed at the usual hour, and were burning brightly throughout the early part of the night; and no doubt is entertained that they continued to burn, so as to answer the purpose for which they are required, till after twelve o'clock, when the watch of the mate commenced. It is, however, clearly proved that it was usual and necessary to clean and trim them, and perhaps supply them with additional oil, about the middle of the night; and the steward, who was assigned to that service, and whose duty it was to see that it was properly performed, testifies that her signal lights were neglected in that particular on the night of the collision, and consequently, were burning so dimly when it occurred that they could not be seen at a distance beyond twice the length of the vessel; and in confirmation of this statement, he says that, shortly after the vessels came in contact, he took down the signal lights of the propeller, by order of the master, and brushed off the crust from the wicks and trimmed them, and testifies positively that they were dim.

1. Our conclusions upon this state of the evidence will now be briefly stated, commencing with the propeller; and we find that she was in fault, because she did not have a competent and skillful officer in charge of her deck, and because it appears that his want of qualifications and unskillfulness contributed to the collision. Owners of vessels, and especially those who own and employ steamships, whether propellers or side-wheel steamers, must see to it that the master and other officers intrusted with their control and management are skillful and 565*] *competent to the discharge of their duties, as, in case of a disaster like the present, both the owners and the vessel are responsible for their acts, and must answer for the consequences of their want of skill, and negligence; and this remark is just as applicable to the under officers, whether the mate or second mate, as to the master, during all the time they have charge of the deck. That the mate in this case was substantially without experience in navigating steamers, and utterly destitute of the requisite information to fit him to determine the proper courses of the voyage, are facts so fully proved that it is difficult to regard them as the proper subjects of dispute; and what is more, the master knew his unfitness when he started on the voyage, and stated, before the vessel left Cleveland, to the effect that he was afraid that he was going to be sick, and that he had no confidence in the mate. Some of the owners also distrusted his fitness when they employed him, and made an effort to engage another person in his stead; and one of them, after having heard of the disaster, expressed his regret that the person to whom he first applied had not taken his place. We forbear to pursue this branch of the subject, only remarking, in addition to what has already been stated, that the evidence to establish his unfitness and incompetency for the place is full and conclusive.

2. The propeller is also in fault because she did not have signal lights properly displayed, as required by law; and this conclusion is intended to apply to the entire period after the steamer came in sight, the weight of the testimony tending strongly to show that they were little better than if they had been actually extinguished. At all events, it is satisfactorily shown that they were burning so dimly as not to fulfill the purpose and object for which they are required. There is some conflict in the statements of the witnesses on this point; but the testimony of the steward, whose duty it was to repair them, and who, by the command of the master, attended to the service shortly after the collision, appears to be entitled to belief, and when considered in connection with the positive affirmations of the witnesses for the libelants, that they looked for signal lights on the propeller as she approached, and saw none, seems to be *decisive of the question. [*566 Signal lights are required by the act of Congress, in order that they may be seen by an approaching vessel in season to enable those in charge of her to ascertain and adopt the necessary precautions to prevent a collision with the vessel whose lights are so displayed; and when they are extinguished, or burning so dimly as not to fulfill the purpose and object for which they are required, they do not and cannot constitute a compliance with the act of Congress.

3. The propeller is also in fault, for the reason that the officer in charge of her deck neglected seasonably and effectually to change the course of the vessel, and persistently kept her on her course after he discovered the signal lights of the steamer, rendering it highly probable that it was this error, no less than the former, which contributed to the collision. Many circumstances tend to show that if he had adopted the usual precaution the disaster might have been avoided. Comment upon this proposition is unnecessary, as in its legal aspect it imputes to the propeller a palpable violation of the rules of navigation, and the theory of fact on which it rests is substantially supported by the testimony of all the witnesses on both vessels, and by no one more fully than by the mate of the propeller, who had charge of her deck. He admits that he saw the signal light of the steamer when she was three miles distant, and he expressly states that the propeller was kept precisely on her course, until he saw that the steamer was very near, and then he says he gave the signals to stop and back; and at the same time that he signalled to stop, he told the man at the wheel to put the helm hard a-star board, and he says the order was obeyed.

Full damages are claimed by the libelants,

not only on the ground that the evidence shows that the steamer was without fault, but upon the further ground that the propeller, under the circumstances of this case, is made liable by the 5th section of the act of the 3d of March, 1849, for all the loss or damage which the steamer sustained. A brief reference, however, to the provision referred to, will show that the construction cannot be supported. Steamboats and propellers navigating the lakes are required 567*] by that section to carry a *triangular light shaded green on the starboard side, and red on the larboard side, with reflectors, and to be of a size to insure a good and sufficient light; and the owners of such vessels, neglecting to comply with the regulation, are declared liable to the injured party for all loss or damage resulting from such neglect. It is insisted by the libelants that the owners of the propeller, inasmuch as she did not show good and sufficient signal lights, are liable to them in this case, under a proper construction of that provision, for all the damage occasioned to the steamer by the collision. Such is not the language of the section, and we think the construction contended for would be both unwarranted and unreasonable. Owners of the vessels named in that section are made liable for the consequences resulting from their own acts, or from the acts of those intrusted with the control and management of their own vessel, and not for any damage resulting from the misconduct, incompetency, or negligence, of the master or owners of the other vessel. They are made liable for their own neglect, and not for the neglect of the other party. Failure to comply with the regulation, in case a collision ensues, is declared to be a fault, and the offending party is made responsible for all loss or damage resulting from the neglect; but it is not declared by that section, or by any other rule of admiralty law in the jurisprudence of the United States, that the neglect to show signal lights, on the part of one vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. Absence of signal lights in cases falling within the act of Congress renders the vessel liable to the extent already mentioned, but it does not confer any right upon the other vessel to disregard or violate the rules of navigation, or to neglect any reasonable and practicable precaution to avoid a collision, which the circumstances afford the means and opportunity to adopt. Steamers displaying proper signal lights are, in that respect, without fault; but they have other duties to perform to prevent collisions, besides complying with that requirement, and their obligation to perform such other duties remains unaffected by anything contained in the provision under consideration. 568*] As an *illustration of our views upon the subject, we will suppose the case of two steamers approaching on intersecting lines. They are required by the act of Congress to show signal lights, in order that each may be seen by the other in time to adopt reasonable and necessary precautions to prevent a disaster like the present; and if one has such lights, and the other has not, yet if the one having such lights actually sees the other vessel as she approaches, in ample season to avoid the collision, and neglects to take any proper precaution to prevent it, and it ensues, it cannot be said in such a case that all the loss or damage resulted from the neglect of the vessel without such lights, as the collision might have been prevented; and but for the negligence or perverseness of those in charge of the vessel showing lights, would never have occurred. We are not prepared to admit that a fair construction of the section referred to would absolve a party, under such circumstances, from pecuniary responsibility. What the judgment of the court would be in the case supposed it is not necessary to decide, and we only advert to it as an illustration, to show that the construction of the act of Congress contended for cannot be sustained. All we mean to decide is, that the neglect of the propeller to show signal lights did not vary the obligations of The Atlantic to observe the rules of navigation, and to adopt all such reasonable and necessary precautions to prevent the collision, as the circumstances in which she was placed gave her the opportunity to employ.

1. The Atlantic is also chargeable with fault, because the officer in charge of her deck did not exercise proper vigilance to ascertain the character of the approaching vessel after he discovered the white lights, which subsequently proved to be the white lights of the propeller. His excuse, that he supposed she was a sailing vessel, under the circumstances of the case, as shown in the evidence, is not satisfactory. When he first discovered those lights, the two vessels were at least a mile apart; and if it be true, as he states, that they appeared like glimmering stars, we are satisfied, from the evidence, that the distance must have been much greater, as is evident from the character of the night, and from the fact, which is fully *proved, that the red light of the steam- [*569 er was seen on the propeller at the distance of three miles. Those white lights, though not the signal lights required by the act of Congress, were nevertheless sufficient to apprise the officer on the deck of the steamer that a vessel of some sort was approaching; and if he had performed his duty, the night being calm and the wind light, he might have seasonably ascertained that it was a propeller. They were large globe lamps, such as are usually shown by sail vessels, and were suspended in a similar manner, and the weight of the testimony clearly shows that they were burning brightly; and if so, they would hardly appear like glimmering stars at the distance of a mile, on a smooth sea, when at the same time the usual red lights carried by steamers were plainly visible at three times that distance. Two other persons were in the pilot house with the second mate when he discovered those white lights, one of whom was a master mariner; and although he says they did not hold any conversation, there is much reason to conclude that his estimate of the time he remained there is somewhat short of the fact. Master mariners, as well as other seafaring men, are very apt to converse when they meet on the theater of their favorite pursuit; and the statement that they remained together in the pilot house, even for two minutes, without speaking, needs confirmation.

2. In the second place, The Atlantic is chargeable with fault, because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engine, so as to avoid a collision, after he discovered

the white lights of the approaching vessel. Whether his neglect to adopt those precautions or some one of them arose from inattention or rashness, is immaterial; as, in either event, it was a culpable omission of duty, plainly required by the rules of navigation in that emergency, and one which the dictate of common prudence, as well as a proper regard for the safety of his passengers, should have prompted him to perform; and the owners of the steamer must answer for the consequences of his negligence. His first order, to port the helm, was not designed to change the course of the vessel to any considerable extent, and only had the effect to open the light of the other vessel half a point.

570*] *This is admitted, and so is the more important fact that no other change of course was made until he gave the order hard a-port, which his own testimony shows was at the instant of collision, and not until all reasonable expectation of preventing it was gone. Nothing additional was done to avert the disaster; and the officer of the deck admits that the speed of the steamer was not slackened at any time throughout the entire period that elapsed after he saw the white lights of the approaching vessel.

On this ground, we think the steamer was clearly in fault, and that her owners are responsible for the consequences of the negligence or mismanagement of the officer in charge of the deck.

3. In the third place, The Atlantic was in fault, because she did not have a vigilant and sufficient lookout. No person, either officer or seaman, was assigned to that duty, except the second mate, who also had charge of the deck and the control and management of the vessel. According to his testimony, the officer of the deck was not expected to occupy any one particular place on the vessel; but was sometimes on the top of the promenade deck, either on the larboard or starboard side of the vessel—sometimes in the pilot house, on the hurricane deck—and sometimes on the top of the pilot house; and, in accordance with this practice, the wheelsman of his watch, who was called by the libelants, testifies that he saw him round on the deck, attending to his duties, during all the time he was at the wheel. Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned. To constitute a compliance with the requirements of law, they must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of the duty; and for a failure in either of those particulars, the vessel and her owners are responsible.

Lookouts stationed in positions where the view forward or on the side to which they are 571*] assigned is obstructed, either by *the lights, rigging, or spars of the vessel, do not constitute a compliance with the requirement of the law; and, in general, elevated portions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward deck, nearer the stem. Persons stationed on the forward deck are less likely to overlook small vessels, deeply laden, and more readily ascertain their exact course and movement. Ocean steamers usually have two lookouts in addition to the officer of the deck, and in general they are stationed one on the larboard and the other on the starboard side of the vessel, as far forward as possible, and during the time they are so engaged they have no other duties to perform; and no reason is perceived why any less precaution should be taken by first-class steamers on the lakes. Their speed is quite as great, and the navigation is no less exposed to the dangers arising from the prevalence of mist and fog, or from the ordinary darkness of the night; and the owners of vessels navigating on those waters are under the same obligations to provide for the safety and security of life and property as attaches to those who are engaged in navigating the seas.

Apply these principles to the present case, and it is obvious that the officer in charge of The Atlantic was not a sufficient lookout. He stood the watch of the master, who was below; and, as the officer of the watch, he had the charge of the deck and the control and management of the vessel; and in the midst of his varied duties it is scarcely possible that he could give his undivided attention to the special duty required of lookouts.

Not long before the white lights of the approaching vessel were discovered, he had occasion to go into the pilot house, to look at the compass; and there is much ground to presume that the disaster is more attributable to that circumstance than any other in the case, except the absence of proper signal lights on the propeller.

We are of the opinion that it is a case of mutual fault, and that the decree of the circuit court, apportioning the damages, was correct.

The decree of the Circuit Court, therefore, is affirmed, without costs.

*Dissenting, Mr. Justice **Grier** and [*572 Mr. Justice **Daniel**.

Mr. Justice **Daniel**, dissenting:

In the case of The Atlantic and The Ogdensburgh, it is my opinion that the admiralty powers of the United States courts do not embrace such a case.

EBER B. WARD and Stephen Clement, Survivors of Samuel Ward, Deceased, *Appts.*,

v.

PHILO D. CHAMBERLAIN and John H. Crawford, Claimants of the Propeller Ogdensburgh.

(See S. C. 21 How. 572-575.)

Chamberlain v. Ward, ante, 211, affirmed—right to bring cross libel—practice in.

The appellants in this suit were the libelants in the case of Chamberlain v. Ward, *ante*, 211, decided at the present term, and the questions to be deter-

mined have respect to the same subject-matter which was in controversy in that case, and come before the court upon the same pleadings and testimony.

The questions in that case, and the conclusions there stated, and the reasons for them, are applicable to this case and need not be repeated.

Respondents in a pending libel have the right, in a proper case, to institute a cross libel to recover damages against the libelants in the primary suit; but they should file their libel, take out process, and have it served in the usual way.

When that is done, the libelants in the first suit regularly become respondents in the cross libel, and as such, they must answer or stand the consequences of default.

Argued Feb. 15, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

The case is stated by the court.

See, also, the preceding case, of which this case is a branch.

Messrs. **N. H. Swayne** and **John S. Newberry** for appellants.

Messrs. **R. P. Spalding** and **H. Stanbery** for appellees.

See abstract of argument in the preceding case.

Mr. Justice **Clifford** delivered the opinion of the court:

This is an appeal in admiralty from a decree of the circuit court of the United States for the southern district of Ohio. The appellants in this suit were the libelants in the case of *Ward* v. *Chamberlain et al.*, decided at the present term, and the questions to be determined have some respect to the same subject-matter which was in controversy in that case, and come before the court upon the same pleadings and testimony. In that case Ward *et al.*, as owners of the steamer Atlantic, filed their libel in the district court against Chamberlain *et al.*, as **573*]** *owner of the propeller Ogdensburgh, to recover the damage sustained by the steamer in a collision which occurred between those vessels on the 20th day of August, 1852, while navigating on the waters of Lake Erie. After the process was served, Chamberlain *et al.* appeared and filed their answer to the libel. In the answer, after setting up several defenses, they alleged, among other things not necessary to be noticed, that the collision was not occasioned by the negligence, inattention, or want of proper care and skill, on the part of the master or crew of the propeller, but wholly through the fault, neglect, and unskillfulness, of the master and crew of the steamer, and set forth the grounds on which those allegations were based, and prayed that their answer to the libel might also be taken as a cross libel in their behalf against Ward *et al.*, to recover the damage which the propeller sustained by the collision.

On the 26th day of April, 1853, the parties entered into an agreement, which is a part of this record, that the answer of the respondents should operate as a cross libel, and that the claims of both parties should be considered by the court in weighing the evidence, and be adjudicated upon in the final decree. Afterwards, at the final hearing in the district court, on the merits of the case, the libel was dismissed upon the ground that the steamer was wholly in fault; and under the agreement of the parties that the answer should operate as a cross libel, a decree was entered in favor of Chamberlain *et al.*, for the amount of the damage occasioned to the propeller. Ward *et al.*, as owners of The Atlantic, appealed to the circuit court, where the decree of the district court dismissing the libel and awarding damages to the propeller, as upon a cross libel, was in all things reversed. The reversal was made upon the ground that the collision was the result of mutual fault, and that the damages and costs ought to be equally divided. Injuries had been sustained by the propeller to the amount of $3,000, and the agreed value of the steamer at the time of her loss was $75,000, and accordingly a decree was entered in favor of Ward *et al.* for the sum of $36.000, together with a moiety of the costs in both courts. From that decree Chamberlain *et al.* appealed to this court, and [*574 the appeal was regularly docketed, and the case has been heard and decided by the court, upon the libel, answer and proofs, as exhibited in the transcript. At the same time Ward *et al.*, the present appellants, also appealed from so much of the decree of the circuit court as found The Atlantic in fault, and directed that the damages should be divided. They appealed to the respondents in the cross libel, and under the agreement before referred to, as sanctioned in the district court, filed a separate copy of the record, and regularly docketed the appeal, as in the case of a cross libel, the answer in the other record constituting the libel in this case.

We have been thus particular in adverting to these proceedings, in order that the relation which the respective parties bear to this controversy, and the state of the pleadings, may be fully and clearly understood, and for the purpose of remarking that they are unusual, and do not meet the approval of this court, and ought not to be drawn into precedent. Respondents in a pending libel have the right, in a proper case, to institute a cross libel to recover damages against the libelants in the primary suit; but they should file their libel, take out process, and have it served in the usual way; and when that is done, the libelants in the first suit regularly become respondents in the cross libel, and, as such, they must answer or stand the consequences of default. Regularity in pleading is both convenient and essential in judicial investigations, and such departures from the usual practice as are exhibited in this record ought not to receive countenance. This appeal was taken, and has been prosecuted upon the ground that the circuit court erred in coming to the conclusion that The Atlantic was in fault. That question we have already considered and decided in the other appeal, and the conclusions there stated, and the reasons for them, are applicable to this case. As before remarked, both appeals were taken from the same decree, and the questions presented for the decision of the court are in all respects the same, and depend upon the same testimony. In that case, the court held that The Atlantic was chargeable with fault upon three grounds:

*1. Because the officer in charge of [*575 her deck did not exercise proper vigilance to ascertain the character of the approaching vessel, after he discovered the white lights, which sub-

sequently proved to be the white lights of the propeller.

2. That she was also in fault, because the officer of her deck did not seasonably and effectually change the course of the vessel, or slow or stop her engines, after he discovered those lights, so as to prevent a collision.

3. That she was also in fault, because she did not have a vigilant and sufficient lookout.

Our reasons for these conclusions are fully stated in the former case, and need not be repeated. Having already decided that the propeller also was in fault, the necessary result is, that the decision of the circuit court was correct.

The decree of the Circuit Court, therefore, is affirmed, without costs.

Dissenting, Mr. Justice **Grier**, and Mr. Justice **Daniel**.

SELDEN F. WHITE, *Plff. in Err.*,
v.
THE VERMONT & MASSACHUSETTS RAILROAD COMPANY.

(See S. C. 21 How. 575-578.)

Bonds of railroad company—blanks in, by whom filled—construction of—negotiability.

Bonds of defendant in error were issued by the company, in regular course and for a sufficient consideration, to a citizen of Massachusetts, and were payable in blank, no payee being inserted, and came into the hands of the plaintiff through several intervening holders, in regular course. Held, that it was the intention of the company, by issuing the bonds in blank, to make them negotiable and payable to the holder, as bearer, and that the holder might fill up the blank with his own name or make them payable to himself or bearer, or to order.

Until the plaintiff choose to fill up the blank, he is to be regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order. At that time he was a citizen of New Hampshire, and therefore competent to bring the suit in the court below.

Repeated decisions by courts and judges of the highest respectability, have settled the question of the negotiability of this class of securities.

Argued Mar. 8, 1859. Decided Mar. 11, 1859.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The history of the case and a sufficient statement of the facts appear in the opinion of the court.

Mr. **Henry M. Park**, for the plaintiff in error:

The first question is, whether these choses in action are, or are not, within the protection of the rule as to negotiable paper laid down in *Bank of Kentucky* v. *Wister*, 2 Pet. 318; *Smith* v. *Clapp*, 15 Pet. 125; *Wood* v. *Dummer*, 3 Mason, 308.

We contend:

1. That they were notes, and negotiable notes.

Morris Canal Co. v. *Fisher*, 1 Stock. Ch. 667; *Mechanics' Bank* v. *N. Y. & N. H. R. Co.* 13 N. Y. 599; *Carr* v. *Lefevre*, 27 Pa. 418; *Delafield* v. *State of Illinois*, 2 Hill, 159; *Craig* v. *City of Vicksburg*, 31 Miss. 216.

This is but carrying out certain familiar decisions of the English courts in regard to exchequer bills.

Gorgier v. *Mieville*, 3 B. & C. 45; *Wookey* v. *Pole*, 4 B. & Al. 1; *Lang* v. *Smyth*, 7 Bing. 284; Redf. on Railw. 595, 596; 1 Pars. Cont. 240.

Following these authorities, we have the right at all events to recover upon the money counts. The instruments sued were payable to bearer. They do not differ from promissory notes of a private individual, payable to his own order, and indorsed in blank before being issued.

Gorgier v. *Mieville*, 3 B. & C. 45; *Cruchley* v. *Clarance*, 2 M. & S. 90.

2. If these instruments were not originally negotiable, they were so when this action was brought.

Statute of Mass., 1852, ch. 76; 1850, ch. 233; *Chapin* v. *V. & M. R. Co.* 8 Gray, 575.

3. The fact that these instruments bear the corporate seal of the company, does not exclude them from being considered promissory notes. The seal is but the evidence of a corporate act. It is the proper evidence of every corporate act, yet it does not make every instrument so attested of necessity a deed. An instrument attested by a corporate seal should be examined before its character can be definitely pronounced upon.

NOTE.—*Negotiability of railroad bonds.*

Bonds issued by a railroad company and payable in blank, usually secured by a mortgage to trustees, are negotiable securities. Mercer County v. Hacket, 68 U. S. (1 Wall.) 83; Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 176, 206; Bronson v. La Crosse R. Co. 69 U. S. (2 Wall.) 283.

The negotiability of such bonds as are ordinarily issued by municipal, railroad and other corporations, drawn payable to bearer, and intended for sale in the public market, is sustained to a full extent by many adjudications. 64 U. S. (23 How.) 381; Woods v. Lawrence Co. 66 U. S. (1 Black.) 386; Moran v. Com'rs of Miami Co. 67 U. S. (2 Black) 722; Mercer Co. v. Hacket, 68 U. S. (1 Wall.) 95; Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175; Van Hostrup v. Madison City, 68 U. S. (1 Wall.) 291; Meyer v. Muscatine, 68 U. S. (1 Wall.) 382; Thomson v. Lee County, 70 U. S. (3 Wall.) 227; Murray v. Lardner, 69 U. S. (2 Wall.) 110; Rogers v. Burlington, 70 U. S. (3 Wall.) 654; Railroad Company v. Howard, 74 U. S. (7 Wall.) 392; Brainerd v. N. Y. & Harlem R. Co. 25 N. Y. 496; Conn. Mut. L. Ins. Co. v. Cleveland, etc. R. Co. 41 Barb. 9; 15 Conn. 502; 31 Conn. 342; 20 Ind. 467; 18 Ind. 96; Railway v. Clearlay, 13 Ind. 161; Chapin v. Vt. & Mass. R. Co. 8 Gray, 575; 21 How. Craig v. City of Vicksburg, 31 Miss. 216; Arents v. Commonwealth, 18 Gratt. 338; 11 Wis. 488; 19 Iowa, 213; 16 Ohio St. 145; Nat'l Exch'ge B'k v. Hartford, etc. R. Co. 8 R. I. 379; Langston v. S. C. R. Co. 2 So. Car. N. S. 248.

No judgment conceding their negotiability has denied the additional feature of their similitude of chattels. City of Memphis v. Brown, 11 Am. L. Reg. 629; 5 Am. L. T. 424; 6 West Jur. 495.

Bonds of railroad companies and other corporations payable to A, or his assigns, and assigned by A in blank, are transferable by delivery. Brainerd v. N. Y. & Harlem R. Co. 10 Bosw. 332.

State bonds and railroad bonds are negotiable securities; the title to which will pass by delivery, and unlike certificates of stock, are valid securities in the hands of bona fide holders against existing equities between the parties. Finnegan v. Lee, 18 How. Pr. 186.

Where in an instrument for the payment of money—railroad bonds—the name of the payee is left blank, with the intention that such instrument may be transferred by delivery, any lawful holder may fill the blank with his own name as payee. Hubbard v. N. Y. & Harlem R. Co. 14 Abb. Pr. 275; S. C. 36 Barb. 286.

Thus an answer by a corporation in equity, must be under its seal.

2 Daniels Ch. Pr. 844.

Yet it is not a deed.

See, also, 1 Kyd Corp. 267; Grant, Corp. 55.

4. If it be treated as a deed, then this plaintiff was not an assignee of a contract, but the original obligee. This was the intent of the contract.

5. The same is true of these contracts, whether they be treated as deeds or as notes not payable to the bearer. It is in every respect equivalent to a blank signature, intended to have a note written above it, at the discretion of the person to whom it is delivered.

Texira v. *Evans*, cited in 1 Anstr. 228; *Cruchley* v. *Clarance*, 2. M. & S. 90; *Crutchly* v. *Mann*, 5 Taunt. 529; 1 Marsh. 29; *Atwood* v. *Griffin*, 2 C. & P. 368.

6. The blank having been purposely left to be filled, we, as bona fide holders, might well fill it.

Story, Prom. N. § 37; Bayl. Bills, ch. 1, § 19; *Cruchley* v. *Clarance*, 2 M. & S. 90; *Atwood* v. *Griffin*, 2 C. & P. 268; Ryan & M. 425; 1 Stockton, 693.

7. We submit that it is not admissible for the defendant to show that it issued such obligations in a form which gave no person a right of action upon them. The instrument appears only as filled up. The defendant does not suggest any alteration of its tenor (unless it first admit it to have been payable to bearer), but offers to show that it has committed a fraud upon the public by issuing an instrument which was originally void, and this without any authority in any person whatever to complete it.

Cases already cited.

Mr. **Henry C. Hutchins**, for defendant in error:

1. The instruments declared upon being under seal, are not promissory notes within the statute of Anne, and are not, therefore, negotiable; more especially as there was no payee named in them, and no words of negotiability when issued. When transferred to the plaintiff, they were at most choses in action.

Glyn v. *Baker*, 13 East, 509; *Clark* v. *Farmers' Mfg. Co.* 15 Wend. 256; *Lewis* v. *Wilson*, 5 Blackf. 370; *Brown* v. *Lockhart*, 1 Mo. 409, (289); *Gorgier* v. *Mieville*, 3 B. & C. 45; *Warren* v. *Lynch*, 5 Johns. 239; *Higgins* v. *Bogan*, 4 Harr. Del. 30; *Parks* v. *Duke*, 2 McCord, 380; *Foster* v. *Floyd*, 4 McCord, 159; *Barry* v. *Merchants' Exchange Co.* 1 Sandf. Ch. 280; *Enthoven* v. *Hoyle*, 13 C. B. 373; *Hibblewhite* v. *M'Morine*, 6 M. & W. 200.

The cases cited by the plaintiff in error, and apparently in conflict with the above, are distinguished from the present case in this, that they were all cases where the bonds were payable to bearer, or to a person named or bearer; they were complete contracts.

2. The act of March 30, 1852, of the statutes of Massachusetts, does not apply to these bonds.

(*a*) Because they do not come within its terms. They were not payable to the bearer or some person designated, "bearer," or "order."

Chapin v. *V. & M. R. Co.* 8 Gray, 575; Sup. Ct. of Mass.

(*b*) Because the plaintiff became the holder of these bonds before the passage of the act in question.

3. If the act of March 30, 1852, was held to be applicable, it would impair the obligation of the contract. It would change the defendant's obligation, from a chose in action to a negotiable instrument, and would be unconstitutional.

Planters' Bank v. *Sharp*, 6 How. 301; *Dundas* v. *Bowler*, 3 McL. 397.

4. The court below had no jurisdiction of this suit.

11th sec. judiciary act of 1789; 1 U. S. Stat. at L. 79; *Sheldon* v. *Sill*, 8 How. 441.

It being admitted by the agreed statement that the bonds in suit were first issued to a citizen of Mass., who could not have brought suit thereon in the court below, the plaintiff cannot maintain this action, because if there was a valid contract made by the defendant with anyone, it must have been with the first taken, and these bonds being unnegotiable, the plaintiff must claim as assignee or not at all.

5. The insertion of the words "Selden F. White," and the words "or order," by the plaintiff, in these bonds, without the knowledge or consent of the defendants, was a material alteration, and vitiated them.

Story, Prom. N. § 37; *Bruce* v. *Westcott*, 3 Barb. 374; *Johnson* v. *Bank U. S.* 2 B. Mon. 316; *Knill* v. *Williams*, 10 East, 431.

6. In the case of a bond, there is no presumed authority in the holder to insert his own name as payee and bring suit. To allow it, would be to change the very character of the instrument.

Enthoven v. *Hoyle*, 13 C. B. 373; *Hibblewhite* v. *M'Morine*, 6 M. & W. 200.

7. If this plaintiff, having derived title to these bonds from a citizen of Mass., could fill up the blanks with his own name and bring his action in the court below by virtue of the statute of Mass., when but for that act he could not bring such action, it would follow that the legislature of Mass. can enlarge the jurisdiction of the courts of the United States.

Dromgoole v. *Bank*, 2 How. 241.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Massachusetts.

The suit was brought in the court below by the plaintiff (White) against the company, upon several bonds issued by the same.

The case was presented to the court upon an agreed state of facts, and, among others, that the bonds in question were issued by the company, in regular course, and for a sufficient consideration; and that payment had been demanded and refused. Coupons for the accruing interest, previous to the maturity of the bonds, had been duly paid.

It was further agreed that bonds of this description, issued by the company, were sold in the market, and passed from hand to hand by delivery, at prices varying according to the state of the market; and that those in question were issued at or about their date, to a person, a citizen of Massachusetts, and were payable in blank, no payee being inserted; that they came into the hands of the plaintiff through several intervening holders, in regular course; and that he then and since lived in the state of New Hampshire, and, before this suit was brought, filled up the blank by inserting "Sel-

den F. White, or order," the name of plaintiff, without the knowledge or consent of the defendants.

The court ruled that the suit could not be sustained, for want of jurisdiction.

The ground upon which this ruling below is sought to be maintained is, that these bonds were issued to citizens of Massachusetts; and as they could not be regarded as negotiable instruments, or, if negotiable, not payable to bearer, the plaintiff was disabled from suing in the Federal court, within the prohibition of the 11th section of the judiciary act. 15 Pet. 125; 2 Pet. 318; 3 How. 574, 8 How. 441.

In answer to this ground, we think it quite clear, on looking into the agreed state of facts, 577*] in connection with the bonds and *the mortgage given to secure their payment, that it was the intention of the company, by issuing the bonds in blank, to make them negotiable, and payable to the holder, as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended, by the blank, to leave the holder his option as to the form or character of negotiability, without restriction. If the utmost latitude, in this respect, was not intended, why leave the payee in blank when issuing the bonds, or why not fix the limit of negotiability, or negative it altogether? To adopt any other conclusion would seem to us to be unjust to the company, for then the blank would be wholly unmeaning; or if any, a meaning calculated, if not intended, to embarrass the title of the holder.

Assuming, then, that these bonds were intended to be made negotiable, we do not see the difficulty suggested in maintaining the suit in the Federal court; for, until the plaintiff choose to fill up the blank, he is to be regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order. At that time he was a citizen of New Hampshire and, therefore, competent to bring the suit in the court below.

As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country, dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question.

Morris Canal, etc. Co. v. *Fisher*, 1 Stockton, 667, 699; *Delafield* v. *Illinois*, 2 Hill, N. Y. 177, 8 Paige Ch. 527; *Mech. Bank* v. *N. Y. and N. H. R. Co.* 13 N. Y. 625; *Carr* v. *Le Fevre*, 27 Penn. 418; *Craig* v. *The City of Vicksburg*, 31 Miss. 216; *Chapin* v. *The Vt. and Mass. R. Co.* 8 Gray, 575, decided Sept. 7, 1857, in Sup. Ct. of Mass.

Indeed, without conceding to them the quality of negotiability, much of the value of these 578*] securities in the market, and *as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years, large masses of them have gone into general circulation, and in which capitalists have invested their money; and it is not too much to say, that a great share of the confidence they have acquired, as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand, as the protection afforded to the bona fide holder.

It is true that in England the law is, that a bond delivered in blank, as it respects the payee, is void, and the blank incapable of being filled up by the holder, either upon an implied or express parol authority from the maker. This is maintained upon the principle that the authority of an agent to make a deed for another must be by deed; and also, that to admit the parol authority to fill up the blank would, in effect, make a bond transferable and negotiable, like a bill of exchange or exchequer bill. *Hibblewhite* v. *M'Morine*, 6 Mees. & W. p. 200, and *Enthoven* v. *Hoyle et al.* in the Exch. 9 Eng. L. & Eq. 434.

The law had been otherwise held by Lord Mansfield, in the case of *Texira* v. *Evans*, cited in *Masten* v. *Miller*, 1 Anst. 228; but was distinctly overruled by Park, B., in delivering the opinion of the court in the case first above cited, and the opinion reaffirmed by him still more strongly in the second case.

Courts of the highest authority in this country have followed Lord Mansfield, and have not hesitated to meet the fears expressed by Park, B. (that the effect would be to make bonds negotiable), by admitting the consequence. Chief Justice Marshall, in the case of *The United States* v. *Nelson & Myers*, 2 Brock. 64, hesitated to reach this conclusion, but expressed a strong belief that, at some future day, it would be, by this court.

We think, for the reasons above given, the ruling of the court below cannot be upheld, and that the judgment should be reversed, with a venire de novo.

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*JOHN M. WALKER, *Appt.*, [*579
v.
JONATHAN B. H. SMITH.

(See S. C. 21 How. 579-582.)

Virginia land-warrants—proprietor of, who is—superior equity of a claimant.

The act of Congress of 3d March, 1835, made a further and apparently final appropriation of lands, to be applied to the satisfaction of Virginia military land-warrants.

This appropriation was sufficient to pay ninety per cent of the warrants received.

Thus the matter stood for fourteen years, when at length, on the 31st of August, 1852, Congress passed an act, which authorized an issue of land scrip in favor of the present proprietors of any outstanding military land-warrants, etc. This act has been construed to include not only unsatisfied warrants, but the ten per cent not given on the satisfied and surrendered warrants.

The question as to who may be considered as the "present proprietor" of these surrendered and satisfied warrants must be decided by the Secretary of the Interior in the first instance, by the rules, customs, and practice of the Land Office.

Where the defendant, assignee or grantee of the unsatisfied ten per cent of a quantity of said warrants, had paid a large and valuable consideration without any notice of plaintiff's claim, had made his proofs and had the decisions of the land office

in his favor; held that he had obtained an advantage of which a court of equity would not deprive him, under the circumstances.

Argued Mar. 1, 1859. Decided Mar. 11, 1859.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The bill in this case was filed in the court below, by the appellant, praying an injunction to prevent the issuing from the general land office, to the appellee, of certain scrip; and for the cancelation of a certain assignment, under which the appellee had, by that office, been adjudged entitled to the scrip in question.

The court below having entered a decree dismissing the bill, with costs, the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Chilton & Davidge,** for appellant:

The appellant was, at the passage of the act of August 31, 1852, the "present proprietor" of the warrants, and as such, by the very terms of the law, entitled to receive the unpaid 10 per cent. He held by a legal title warrant, assignable under the laws both of Virginia and the United States. The language of the act manifestly relates to legal ownership.

Assuming, however, that as regards a legislative grant of this description there can be no inquiry beyond the plain terms of the grant, and that in any case the defense of bona fide purchaser for valuable consideration without notice, could be set up, that defense cannot avail the appellee.

I. Because the appellant holds the legal title and asks relief upon it, and in such case equity follows the law.

Williams v. *Lambe*, 3 Bro. Ch. 264; *Collins* v. *Archer*, 1 Rus. & M. 284, 292; *Rogers* v. *Seale*, Freem. 84; *Shirras* v. *Caig*, 7 Cranch, 34; *Snelgrove* v. *Snelgrove*, 4 Desaus 288; *Fitzsimons* v. *Ogden*, 7 Cranch, 2.

II. Because the appellant claims under a prior assignment, and, the appellee not having legal title, *qui prior in tempore, potier est in jure.*

1 Story Eq. Jur. § 64, C. and D.

3. Because the appellee has no title whatever.

Hallett v. *Collins*, 10 How. 174.

III. The decision below was on the ground that the appellant lost his superior equity, by his failure to file his assignment in the general land office, where search was made by the ancestor of the appellee, and the case of *Judson* v. *Corcoran*, 17 How. 612, was considered in point.

The circuit court erred.

1. There is here no conflict of equitable titles. The appellant holds by as complete a legal title as he could stock or negotiable paper.

Baldwin v. *Ely*, 9 How. 580.

2. Because the subject matter of this controversy is not a chose in action, but an interest or estate in land. The English doctrine that notice to the debtor or trustee holding the fund, is necessary to complete the transfer of a chose in action (*Row* v. *Dawson*, *Ryall* v. *Rowles*, 2 White & Tudor's Lead. Cas. Eq. 731-734, and notes; *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*. 3 Russ. 1) has never been applied to equitable interests of estates in land.

Jones v. *Jones*, 8 Sim. 633; *Wilmot* v. *Pike*, 5 Hare, 14; *Peacock* v. *Burt*, Coot. Mort. 569, *Wiltshire* v. *Rabbits*, 14 Sim. 76.

The American doctrine certainly is, that no such notice is necessary, although proper, to secure the fund by preventing payment to a second assignee in ignorance of the prior assignment.

Muir v. *Schenck*, 3 Hill, 228; *U. S.* v. *Vaughan*, 3 Binn. 394; *Stevens* v. *Stevens*, 1 Ashm. 190; *Bholen* v. *Cleveland*, 5 Mas. 174; *Warren* v. *Copelin*, 4 Met. 594; *Dix* v. *Cobb*. 4 Mass. 512; *Wood* v. *Partridge*, 11 Mass. 488; *Littlefield* v. *Smith*, 17 Me. 327; Story, Confl. L. § 396.

3. Even assuming that the principles relating to the assignment of choses in action apply here the general rule still is, *qui prior in tempore, potior est in jure*, unless the first assignee has been guilty of laches, whereby he has enabled the assignor to practice a fraud on the assignee.

Judson v. *Corcoran*, 17 How. 612.

To bring the case within the exception to the general rule, there must be fraud or gross negligence on the part of the first assignee and diligence on the part of the second assignee.

The neglect relied on here, is the failure to file in the general land office. The diligence is inquiry there.

Counsel reviewed the circumstances of the case, and contended that appellant was not to be held to have lost his priority, by a failure to file his assignment until a few months after the second assignment.

IV. The appellee did not obtain the legal title by the letter of the Commissioner of the General Land Office, of August 3, 1854.

1. Because the Secretary of the Interior, much less a subordinate unknown to the law, had not jurisdiction *inter partes.*

Comegys v. *Vasse*, 1 Pet. 193.

2. Because the Secretary of the Interior did not act in the premises.

3. Because the letter of the commissioner clearly shows that even his action was not final.

V. As to the consideration of the assignment to appellant, the answer by appellee denies any real consideration on information only, not even belief. A replication was filed, but no evidence offered by the appellee:

Messrs. **George E. Badger** and **J. M. Carlisle,** for appellee:

1. As the alleged assignment to the appellant, the answer impeaches it in form and substance, and particularly denies that it was founded on any consideration whatever. The answer is responsive to the bill, and is evidence against the appellant.

2. The warrants were satisfied, surrendered and canceled by the voluntary act of the holders.

3. The case is within the principles of *Judson* v. *Corcoran*, 17 How. 612. The points decided there are in support of the appellee in this cause, and support the correctness of the decree below.

1st. The assignment to the appellee "was fair and accepted on his part, without knowledge" of the prior assignment, if any, to the appellant.

2d. The appellee had, in effect, drawn to his equity a legal title.

3d. The prior assignment, if any, to the appellant, "operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect upon the appellee, was priority accredited to it."

4. If the decision of the land office did not give to the appellee a "legal advantage," the facts referred to constitute an "equitable advantage," giving him "a superior claim to the legal title;" and even if the appellant have an equity prior in time, the doctrine of *Corcoran* v. *Judson* is, that under such circumstances he shall not be aided to prevail.

5. There is no evidence whatever that there was any real consideration paid for the assignment on which the bill is founded.

Mr. Justice Grier delivered the opinion of the court:

The purpose of this bill is to obtain an injunction to prevent the issuing of certain scrip to appellee by the land office, and to have canceled the assignment under which the appellee had, by the officers of government, been adjudged entitled to the scrip.

This bill was properly dismissed by the court below, as a brief statement of the case will show. The act of Congress of 3d March, 1835, made a further and apparently final appropriation of six hundred and fifty thousand acres, to be applied to the satisfaction of Virginia military land-warrants. It provided that "no scrip should be issued thereon until the 1st of September following, and that warrants should be received in the General Land Office till that day; and immediately thereafter, if the amount filed exceeded six hundred and fifty **580*]** thousand *acres, the commissioner of the land office should apportion the said six hundred and fifty thousand among the warrants which shall then be on file, in full satisfaction thereof."

This appropriation was sufficient to pay ninety per cent of the warrants received.

William S. Scott, as attorney for the heirs of General Charles Lee, filed a warrant in their names for fifteen thousand acres; which was surrendered and satisfied by the issue of land-scrip for thirteen thousand five hundred acres, being ten per cent, or one thousand five hundred acres less than the whole amount called for on the face of the warrants.

The warrants were, therefore, fully satisfied; and being surrendered, were no longer evidence of any right of property. But it seems that, notwithstanding this surrender and satisfaction, there was a sort of lingering hope or expectation that sometime hereafter, Congress, by continued importunity, might be prevailed upon to make some further grant of land to satisfy the shadow of equity which was supposed to remain, after the warrantees had surrendered their warrants and accepted the satisfaction tendered.

On the 30th March, 1837, Scott signed an instrument in form of a power of attorney, which, after reciting that he had sold to Walker, the complainant, the warrants, and delivered him the scrip issued in lieu thereof, stated as follows: "Now, the object of this power of attorney is to secure the said Walker the said ten per cent of warrants unsatisfied, or any and every equivalent that may be at any time given in lieu thereof," etc.

On the 18th of January, 1838, Scott conveys by indenture, in consideration of $750, and with warranty, the Lee warrants, on which he alleges there is "still due one thousand five hundred acres" to defendant. At this time the records of the land office contained no evidence of the prior assignment (if such it can be called) to Walker; and a clerk in the office indorsed on the respondent's deed as follows: "William S. Scott, the party grantor of the within, has full authority on file to sell the warrants and appoint a substitute; and in the event Congress makes up the ten per cent, the scrip to be issued will be delivered to Mr. Smith."

*Thus the matter stood for fourteen [***581** years, when, at length, on the 31st of August, 1852, Congress passed an act which authorized an issue of land-scrip in favor of the present proprietors of any outstanding military land-warrants, etc. This scrip is to be issued by the Secretary of the Interior, who is to make the necessary inquiries, and "be satisfied by a revision of the proof, or by additional testimony," etc.

It seems that this act has been construed to include not only unsatisfied warrants, but the ten per cent not given on the satisfied and surrendered warrants. It is a liberal construction of the statute, and so far as it extends to the scrip in question, it is a simple gratuity. The secretary is made the agent for its distribution. It is his duty to ascertain the parties entitled to it, if any person can be said to have a title to a gift before it is received. When he issues the scrip it then becomes a "chose in action," capable of being dealt with as property by courts of justice, but not till then. The question, as to who may be considered as the "present proprietor" of these surrendered and satisfied warrants, must be decided by him in the first instance by the rules, customs, and practice of the land office. Before the act of Congress, this right was too subtile (being no more than the remote expectation of a gift) to be dealt with by courts, and the act of Congress has not conferred on them the distribution of their bounty. Besides, if an injunction was issued to hinder the defendant from receiving the scrip which the land office has concluded to give him, this would confer no title on the complainant.

Whether, after the land office have issued the scrip to a claimant, another person alleging fraud or misrepresentation, and claiming himself to be the "proprietor" intended by the act, might not obtain the interference of the courts to obtain a transfer of the scrip to himself, is a question not presented in this case.

But assuming that the court would undertake to decide as to the respective rights of these claimants, treating their claims as tangible equities, the complainant has not made out such a case as would entitle him to relief. His power of attorney (or whatever it may be called) mentions no consideration paid. *The answer of defendant, which is re- [***582** sponsive to the bill (which avers a purchase at market price), denies the payment of any consideration whatever, and none has been proved.

The defendant has paid a large and valuable consideration without any notice of the plaintiff's claim, has made his proofs, has had the decision of the land office in his favor. He has obtained an advantage of which a court of equity will not deprive him, under the circumstances.

The judgment of the court below is affirmed, with costs.

HIRAM BARBER, *Appt.*,
v.
HULDAH A. BARBER, by her Next Friend. George Cronkhite.

(See S. C. 21 How. 582-605.)

Courts of United States have no jurisdiction of divorce or alimony—decree of state court for same, binding—decree of one state has full force in another—jurisdiction of United States courts over—separate domicil of wife—may sue husband for alimony—husband's change of domicil—where suable.

This court disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony.

The parties to a cause for a divorce and for alimony are bound by a decree for both, which has been given by a state court having jurisdiction of the subject matter and over the parties.

Such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given.

For such a purpose, both the equity courts of the United States and the equity courts of the states, have jurisdiction.

Where the wife is plaintiff in a divorce suit, she is entitled to a separate domicil.

So when parties are already living under a judicial separation, the domicil of the wife does not follow that of the husband.

A wife, under a judicial sentence of separation from bed and board, is entitled to make a domicil for herself, different from that of her husband.

And she may, by her next friend, sue her husband for alimony, which he had been decreed to pay as an incident to such divorce, or when it has been given after such a decree by a supplemental bill.

Her right to pursue her remedy in the equity side of the district court of the United States in the state of Wisconsin is undoubted.

Where the husband, after the decree of separation was given, left his domicil in New York for another in the state of Wisconsin, in which he says that he has acquired a domicil; held, that his voluntary change of domicil from New York to Wisconsin makes him suable there.

Argued Jan. 19, 1859. Decided Mar. 11, 1859.

APPEAL from the District Court of the United States for the District of Wisconsin.

The bill in this case was filed in the court below, by the appellee, on a foreign judgment for alimony. The court below having entered a decree in favor of the complainant, for $5,936.80, with costs, the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **C. Billinghurst** and **J. R. Doolittle**, for appellant:

1. Husband and wife, although allowed to live separately under a decree of separation *a mensa et thoro*, made by a state court having competent jurisdiction, are still so far one person while the marriage relation continues to exist, that they cannot become at the same time citizens of different states, within the meaning of the Federal Constitution; and therefore, the court below, upon the plaintiff's own ground, had no jurisdiction.

Warrender v. *Warrender*, 9 Bligh. 103; *Dougherty* v. *Snyder*, 15 S. & R. 90; Phillim. Dom. p. 27; Story, Confl. L. § 46; *Harrison* v. *Harrison*, 20 Ala. 629; 6 Pa. 452; 6 Watts & S. 87.

2. The case presented by this bill is not such a one as a court of equity, in the state of Wisconsin, can take cognizance of, either by virtue of any statute conferring equity jurisdiction, or as coming within its original equity jurisdiction. It is not for a divorce; it is not for alimony; it is not in the nature of a creditor's bill; and if it were, it does not show that execution issued upon the decree in New York, or that any other means were resorted to to enforce it there. Nor is it for any other cause, of which equity will take original jurisdiction.

1 Story, Eq. ch. 3; Bish. Mar. & Div. §§ 553, 554; 2 Story, Eq. 1425, note 2; *Stones* v. *Cooke*, 7 Sim. 22; 8 Sim. 321; *Pennington* v. *Gibson*, 16 How. 79.

3. The whole subject of divorce and alimony was exclusively of ecclesiastical jurisdiction, at the time of the adoption of the Constitution of the United States; therefore, the whole subject of divorce and alimony is, by the Constitution of the United States, placed beyond the jurisdiction of the courts of the United States.

4. The decree of the circuit court in Wisconsin, upon the bill filed by the plaintiff in error dissolving the marriage, is valid and effectual in that state.

Manley v. *Manley*, 4 Chand. 96; *Hubbell* v. *Hubbell*, 3 Wis. 662; *Gleason* v. *Gleason*, 4 Wis. 64.

This is true, both in the courts of the state and of the United States for that district.

10 How. 93; *Harding* v. *Alden*, 9 Me. 140.

It follows that if the marriage relation has been dissolved, the plaintiff should have sued in her own name and not by her next friend; and also, that whatever claim the plaintiff may have had, at law or in equity, against the appellant for alimony, it ceased from and after the decree dissolving the marriage relation. The plaintiff should only be entitled to recover up to the date of the decree.

20 Ala. 649.

Mr. **James S. Brown** for appellee.

Mr. Justice **Wayne** delivered the opinion of the court:

We regard this as a suit for a wife brought on the equity side of the district court of the United States for the district of Wisconsin, by her next friend, George Cronkhite, a citizen of the state of New York, against Hiram Barber, a citizen of the state of Wisconsin, to give the same validity to a judgment *in that [*584 state which it has in the state of New York against the defendant for the payment of alimony to his wife, who has been divorced from him *a mensa et thoro*, with an allowance of alimony by a court, which had, when the decree was made, jurisdiction over the parties and the subject-matter.

We shall not have occasion to comment upon the relations of husband and wife in her unis-

NOTE.—*Validity of a divorce decree granted by a court of a foreign country*—see note to 19 L. R. A. 515.

terrupted coverture, nor will we discuss the general rights, obligations, or disabilities of either, when they have been separated by a divorce *a mensa et thoro*.

Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court of Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.

The record raises these inquiries: Whether a wife divorced *a mensa et thoro* can acquire another domiciliation in a state of this union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equity jurisdiction, to recover from him alimony due, and which he refuses to make any arrangement to pay; and whether a court of equity is not a proper tribunal for a remedy in such a case.

We will first direct our attention to the circumstances of the case, and will give them from the bill and answer, and from the testimony in the record.

Hiram Barber and Huldah Adeline Barber were married in the state of New York in the year 1840, where his domicil then was, and continued to be until he left it for Wisconsin, which was soon after a decree had been given for a divorce *a mensa et thoro* between them, with an allowance of alimony to be paid by him. Her application for such a divorce was made by Cronkhite, her next friend, in the 585*] court of chancery for *the fourth district of the state of New York, that court having jurisdiction of the subject matter and over the parties.

The defendant appeared and resisted the application. The cause was heard on the pleadings and proofs. It resulted in a declaration by the chancellor that the defendant had been guilty of cruel and inhuman treatment of his wife, and of such conduct towards her as to render it unsafe and improper for her to cohabit with him; and that he had abandoned, neglected, and refused to provide for her. And it therefore decreed that the complainant and defendant be separated from bed and board forever; provided, however, that they might at any time thereafter, by their joint petition, apply to the court to have the decree modified or discharged; and that neither of the said parties shall be at liberty to marry any other person during the lifetime of the other party. The court then referred the cause to a master, to ascertain and report what should be allowed and to be paid by the defendant, or out of his estate, to Mrs. Barber, for her suitable support and maintenance. In pursuance of this decretal order and reference, the master made a report. The defendant filed exceptions to it. The cause was regularly brought to a hearing upon the defendant's exceptions. They were overruled, and a final decree was made in the cause. The language of the decree is, that the exceptions are overruled, and that the report of the master is absolutely confirmed. That for the suitable support and maintenance of Mrs. Barber, there should be allowed and paid to her by the defendant, or out of his estate, in quarterly instalments, the annual sum of $360 in each and every year; and that as it appeared he had not given to her any support in the interval between the filing of the bill in her behalf and the rendition of the decree, that the defendant should pay to her $360 a year in quarterly payments from the 1st day of July, 1844, that being the day when the bill was filed; and it was agreed that the sum of $960, being the alimony retrospectively due, should be paid forthwith by the defendant, and that the complainant should have execution therefor. It was further ordered, that the permanent alimony allowed and to become due after the *1st of March, 1847, to which day [*586 alimony is above computed, should be paid by the defendant in quarterly payments on the 1st days of March, June, September, and December, in each year, during the life of Mrs. Barber; and in case of its not being so paid, that the quarterly payments should bear interest as they respectively became due, and that execution might issue therefor *toties quoties*. The court then decreed that the permanent alimony allowed to Mrs. Barber was vested in her for her own and separate use, and as her own and separate estate, with full power to invest the same in a trustee or trustees, as she might think proper to appoint, with the power to dispose of the same by will or otherwise, from time to time during her life, or at her death, or either, as she may think proper, free from any control, claim or interposition of the defendant. The said decree, with a tax bill of costs in the suit, was signed and enrolled according to the form of the statute in such cases made and provided in the state of New York.

It is upon a transcript of all the papers in that suit, authenticated as the law requires it to be done, that the suit now before us was brought in the district court of the United states for the district of Wisconsin.

The complainants aver in their bill that they are citizens of the state of New York, and that the defendant is a citizen of the state of Wisconsin. They then set out the proceedings of the court of New York, divorcing Mr. and Mrs. Barber from bed and board, with especial reference to the decree and the entire record of that suit, charging the defendant with not having paid any part of the alimony adjudged to Mrs. Barber; and that there was then due to her on that account the sum of $4,242.15, with interest at seven per cent, that being the legal rate in the state of New York. The rest of the bill it is not necessary to state more particularly, than that it is a recital of a suit which had been brought upon the common-law side of the district court of the United States for the county of Milwaukee, in the territory of Wisconsin, for the amount of alimony due by the defendant; to the declaration in which he filed a demurrer, upon which a judgment was rendered in *his favor, which was after- [*587 wards affirmed in the supreme court of the state, for the reason that the remedy for the recovery of alimony was in a court of chancery, and not at law. To this bill also the defendant demurred, on account of the case not being

within the ordinary jurisdiction of a court of chancery, that the relief sought could only be had in the court of chancery in the state of New York, and that it did not appear that the complainants had exhausted the remedy which they had in New York. This demurrer was overruled, and the defendant was ordered to answer. He did so. He admits in his answer the legality and locality of his marriage with Mrs. Barber; the jurisdiction of the court in the divorce case; that a divorce had been decreed between them from bed and board, after contestation; and that by that decree he was subject to the payment of alimony to the extent and in the way it is claimed in the bill he was then answering. He admits that he left the state of New York without having paid any part of it, or having made any arrangement to do so; alleging, however, that he had left real estate in New York, upon which no proceedings had been taken to make it liable to the decree against him for alimony. And he then goes on to state, that on the 19th day of April, 1852, he had filed his bill in the circuit court of the county of Dodge, in the state of Wisconsin, against Mrs. Barber, she then being his wife, to obtain a dissolution of the marriage contract between them, and that their marriage had been dissolved by a decree of that court, which is on record in the same. And he adds, that his wife by that decree became a *feme sole;* and being so, she could not sue by her next friend, and that her remedy was in a court of law. To this answer a general replication was filed. The cause was carried to a hearing upon the pleadings and proofs, and a decree was made, adjudging that $5,936.80 is due from the defendant upon the alimony sued for, for principal and interest, to and prior to the time of filing the bill in this cause, and that the defendant should pay it, for the sole and separate support and maintenance of Mrs. Barber, together with the costs, to be taxed within ten days; and in default thereof, that execution should issue for the same.

588*] *It appears, from the testimony in the cause, that the defendant left the state of New York in a short time after the decree for the divorce and for alimony had been rendered, for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony due, or leaving any estate of any kind out of which it could be paid; for he gave no proof of any kind that he had real estate in the state of New York in support of that allegation in his answer.

It also appears, from the record, that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce case in New York; and that, contrary to the truth, verified by that record, he asks for the divorce on account of his wife having wilfully abandoned him. It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and every where else from his liability to the decree made against him in the state of New York, upon that decree being carried into judgment in a court of another state of this union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicil different from that which he had in New York when the decree was made there against him.

The questions made by the bill and the answer, and by the arguments of counsel, we will state in the form of an inquiry. They are as follows: whether a wife divorced *a mensa et thoro* may not have a domiciliation in a state of this Union different from that of her husband in another state, to enable her to sue him there by her next friend, in equity, in a court of the United States, to carry into judgment a decree which has been made against him for alimony by a court having jurisdiction of the parties and the subject matter of divorce.

In the consideration of these questions, we must not allow ourselves to be misled by the general rule which prevails in England, that a suit cannot be maintained at law by a *feme covert*, and that, notwithstanding a di- [*589 vorce *a mensa et thoro*, a wife cannot sue or be sued in a court of law; for in England she may in several cases maintain a suit in her own name as a *feme sole*, both at law and in equity. They are exceptions to the general rule, or privileged cases, under certain circumstances, where it cannot be presumed, from his own acts, that the husband's control of his wife is continued, and where she has been deprived of his protection to represent with her her rights and interests in a suit at law, or in one in equity. The cases mentioned in the books where a *feme covert* may sue as a *feme sole* are: when her husband is banished, or has abjured the realm, or has been transported for felony; where the husband is an alien enemy, and his wife is domiciled in the realm; where the husband is an alien domiciled abroad, and has never been in the realm; or where he has voluntarily abandoned her, and is under a disability to return; so where the husband has deserted the wife in a foreign country, and she goes to England and maintains herself as a *feme sole;* where the husband in a foreign state, compels his wife to leave him for another political jurisdiction, and she maintains herself there as a *feme sole*.

Cases have been decided in Massachusetts in conformity with the English cases. There are cases in England which have gone much further, but we do not cite them, preferring only to mention such instances as have not been questioned by subsequent cases in England or in the United States. See Sto. Eq. Pl. 6th ed. § 61, pp. 59, 60, and the cases cited in the notes.

Except in such cases, a *feme covert* cannot sue at law, unless it be jointly with her husband, for she is deemed to be under the protection of her husband, and a suit respecting her rights must be with the assent and co-operation of her husband. Mitf. Eq. Pl. by Jeremy, 28; Ed. Par. in Eq. 144. 153; Calvert on Parties, ch. 3, § 21, pp. 265, 274.

In the case of *Bein* v. *Heath*, 6 How. 228, this court said, without any reference to the law of Louisiana: "That the general rule was, when the wife complains of her husband, and asks relief against him, she must use the name

590*] *of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court. It is sanctioned in Story's Equity Pleading, and by Fonblanque. The modern practice in England has adopted a different course, by uniting the name of the wife with a person other than her husband, in certain cases."

There are also exceptions in equity, which are wholly unknown at law. Thus, if a married woman claims some right in opposition to the rights claimed by the husband, and it becomes proper to vindicate her rights against her husband, she cannot maintain a suit against him at law; but in equity she may do so, and against all others who may be proper or necessary parties. But it must be done under the protection of some other person who acts as her next friend, and the bill is accordingly exhibited in her name by such next friend. Sto. Eq. Pl. 6th ed. § 61, p. 61. It is also said, in the same work, to be our constant experience, that the husband may sue the wife, or the wife the husband, in equity, notwithstanding neither of them can sue the other at law. *Cannel* v. *Buckle*, 2 P. Wms. 243, 244; *Ex parte Strangeways*, 3 Ark. 478; Fonblanque Eq. B. 1. ch. 2, § 6, note N; *Brooks* v. *Brooks*, Finch, Pre. Ch. 24; Mitf. Pl. by Jeremy, 28. These citations have beeen made to show the large jurisdiction which a court of equity has to secure the rights of married women, when it may be necessary to exert it with the assistance of the husband, or when he improperly interferes with them, so as to make it necessary for the wife to defend herself against his unwarranted claims to her property. The result of that jurisdiction now is, that the wife may, in all such instances, sue her husband by her next friend.

There is, too, another ground of jurisdiction in equity, just as certainly established as that is of which we have just spoken. It comprehends the case before us. It is, that courts of equity will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England.

Such a jurisdiction is ancient there, and the 591*] principal reason *for its exercise is equally applicable to the courts of equity in the United States. It is, that when a court of competent jurisdiction over the subject matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony. *Shaftoe* v. *Shaftoe*, 7 Ves. 171; *Dawson* v. *Dawson*, 7 Ves. 173; *Haffey* v. *Haffey*, 14 Ves. 261; *Angier* v. *Angier*, Finch. Pre. Ch. 497; Cooper's Eq. Pl. ch. 3. pp. 149, 150; *Coglar* v. *Coglar*, 1 Ves. Jr. 94; *Street* v. *Street*, 1 Turn. & Russ. 322.

The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction.

We observe, in confirmation of what has just been said, that the jurisdiction of the courts of the United States is derived from the Constitution, and from legislation in conformity to it. The first limitation by the latter upon the jurisdiction of the equity courts of the United States is, that no suit can be sustained in them, where a plain, adequate, and complete remedy may be had at law. The court has said: "It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficacious to the ends of justice, and its prompt administration, as the remedy in equity. *Boyce's Ex'r* v. *Grundy*, 3 Pet. 210; *United States* v. *Howland*, *4 [*592 Wheat. 108; *Osborn* v. *United States Bank*, 9 Wheat. 841, 842. It is no objection to equity jurisdiction in the courts of the United States, that there is a remedy under the local law, for the equity jurisdiction of the Federal courts is the same in all of the states, and is not affected by the existence or nonexistence of an equity jurisdiction in the state tribunals. It is the same in nature and extent as the jurisdiction of England, whence it is derived." *Livingston* v. *Story*, 9 Pet. 632. Such a suit for the enforcement of a decree for alimony, as that before us, is not an exception, unless the court has not jurisdiction over the parties, and the amount be not such as is required to bring it into this court by appeal.

We proceed to show that it has jurisdiction. The Constitution requires, to give the courts of the United States jurisdiction, that the litigants to a suit should "be citizens of different states." The objection in this case is, that the complainant does not stand in that relation to her husband, the defendant; in other words, it is a denial of a wife's right, who has been divorced *a mensa et thoro*, to acquire for herself a domiciliation in a state of this Union different from that of her husband in another state, to entitle her to sue him there by her next friend, in a court of the United States having equity jurisdiction, to recover from him alimony which he has been adjudged to pay to her by a court which had jurisdiction over the parties and the subject matter of divorce, where the decree was rendered.

We have already shown, by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and, by cases decided by this court, that the judisdiction of the courts of equity of the United States is the same as that of England, whence it is derived. On that score alone, the jurisdiction of the court in the case before us cannot be successfully denied.

But it was urged by the learned counsel who argued this cause for the defendant, that husband and wife, although allowed to live separately under a decree of separation *a mensa et thoro*, made by a state court having competent jurisdiction, are still so far one person, while 593*] the married relation *continues to exist, that they cannot become at the same time citizens of different states, within the meaning of the Federal Constitution, and therefore the court below had no jurisdiction. It was also said, for the purpose of bringing suits for divorces, they may acquire separate residences in fact; but this is an exception founded in necessity only, and that the legal domicil of the wife, until the marriage be dissolved, is the domicil of the husband, and is changed with a change of his domicil.

Such, however, are not the views which have been taken in Europe generally, by its jurists, of the domicil of a wife divorced *a mensa et thoro*. They are contrary, too, to the generally received doctrine in England and the United States upon the point.

In England it has been decided, that where the husband and wife are living apart, under a judicial sentence of separation, that the domicil of the husband is not the domicil of the wife. Eng. L. & Eq. 9th vol. 598; 2 Rob. Eccl. 505. When Mr. Phillimore wrote his treatise upon the Law of Domicil, he said he was not aware of any decided case upon the question of the domicil of a wife divorced *a mensa et thoro*, but there can be little doubt, that in England, as in France, it would not be that of her husband, but the one chosen for herself after the divorce. In support of his opinion, he cites Pothier's Introd. *aux Coutume*, p. 4; Mercadie, in his Commentary upon the French Code, vol. I. p. 287; the French Code, tit. 111, art. 108; the Code Civile of Sardinia; and Cocher's Argument in *The Duchess of Holsten's Case*, Ouvres, 1, 2, p. 223.

Mr. Bishop, in his Commentaries on the Law of Marriage and Divorce, has a passage so appropriate to the point we are discussing, that we will extract it entire. It is of the more value, too, because it comprehends the opinions entertained by eminent American jurists and judges in respect to the domicil of a wife divorced *a mensa et thoro*. He says, in discussing the jurisdiction of courts where parties sought a divorce abroad for causes which would have been insufficient at home, that "it was necessary to settle a preliminary question, namely: whether for the purpose of a divorce suit the husband and wife can have separate domicils; that the general doctrine is familiar, that 594*] *the domicil of the wife is that of the husband. But it will probably be found, on examination, that the doctrine rests upon the legal duty of the wife to follow and dwell with the husband wherever he goes.

"If he commits an offense which entitles her to have the marriage dissolved, she is not only discharged thereby immediately, and without a judicial determination of the question, from her duty to follow and dwell with him, but she must abandon him, or the cohabitation will amount to a condonation, and bar her claim to the remedy. In other words, she must establish a domicil of her own, separate from her husband, though it may be, or not, in the same judicial locality as his. Courts, however, may decline to recognize such a domicil in a collateral proceeding—that is, a proceeding other than a suit for divorce. But where the wife is plaintiff in a divorce suit, it is the burden of her application, that she is entitled, through the misconduct of her husband, to a separate domicil. So when parties are already living under a judicial separation, the domicil of the wife does not follow that of the husband." § 728.

Chief Justice Shaw says, in *Harteau* v. *Harteau*, 14 Pick. 181, 185, the law will recognize a wife as having a separate existence and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicil and home. Otherwise, the parties, in this respect, would stand upon a very unequal footing, it being in the power of the husband to change his domicil at will, but not in that of the wife.

The cases which were cited against the right of a wife, divorced from bed and board, to choose for herself a domicil, do not apply. *Chichester* v. *Donegal*, in 1 Ad. Eccl. pp. 8, 19. That of *Shachell* v. *Shachell*, cited in *Whitcomb* v. *Whitcomb*, 2 Curt. Eccl. 352, are decisions upon the domicil of the wife, when living apart from her husband by their mutual agreement, but not under decrees divorcing the wife from the bed and board of the husband. The leading case under the same circumstances is that *of *Warrender* v. *Warrender*, 9 Bligh. [*595 103, 104. In that case, Lord Brougham makes the fact that the husband and wife were living apart by agreement, and not by a sentence of divorce, the foundation of the judgment. The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of all these conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts s. itable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers, and places her in a situation to sue him for a divorce *a mensa et thoro*, and to ask the court having jurisdiction of her suit to allow her from her husband's means, by way of alimony, a suitable maintenance and support. When that has been done, it becomes a judicial debt of record against the husband, which may be enforced by execution or attachment against his person, issuing from the court which gave the decree; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him, wherever he may be found or where he shall have acquired a new domicil, for the purpose of recovering the alimony due to her, or to carry the decree into a judgment there with the same effect that it has in the state in which the decree was given. Alimony decreed to a wife in a divorce of separation from bed and board, is as much a debt of

record, until the decree has been recalled, as any other judgment for money is. When it is not paid, the wife can sue her husband for it in a court of equity, as an incident of that condition which gave to her the right to sue him, by her next friend, for a divorce.

It was decided in the state of Massachusetts, as early as the year 1800, that there were circumstances under which it appears to be absolutely necessary for the wife to sue, as for the recovery of alimony. That case was the same, in its circumstances, as this with which we are 596*] dealing. The wife libeled *for a divorce *a mensa et thoro*, on account of the extreme cruelty of her husband. The divorce was decreed; and the husband was ordered to pay to her alimony, in quarterly instalments. The wife afterwards brought an action against him for arrears. He demurred to the declaration, and judgment was given for her. *Wheeler* v. *Wheeler*, 2 Des. Abr. 310.

The same has been held in other cases in that state. It is now established doctrine there, and in some of our other states. They hold that a decree for a divorce, with an allowance for alimony, is as much a judgment as if it had been obtained on the common-law side of the court.

Rogers, Justice, in *Clark* v. *Clark*, 6 Watts & Serg. 85, places the right to recover arrears of alimony on the ground that the husband after the decree for a divorce was rendered, had withdrawn himself from the jurisdiction of the court, to prevent him from being forced by attachment to pay the alimony which had been decreed to the wife.

In the state of New York, a wife may file a bill against her husband for alimony; and it appearing that he had abandoned her without any support, and threatened to leave the state, the court, on the wife's petition, granted a writ of *ne exeat respublica* against him. *Seymour* v. *Hazard*, 1 Johns. Ch. 2; *Denton* v. *Denton*, 1 Johns. Ch. 364.

In South Carolina, where the court, having no power to grant divorces, decreed to a wife alimony, on her bill praying for that remedy only, and ordered the husband to give security for its payment, the sheriff, having taken him into custody, suffered him to escape; it was held that the wife might maintain, by her next friend, an action at law against the sheriff for the escape. Smith, Justice, said: "It had been urged in the argument that this woman, being a *feme covert*, could not maintain the action by her next friend. If that argument were to prevail, there would be a failure of justice, which our law abhors, as there would be no means of enforcing a decree of a wife against her husband for alimony. The court of equity could order a refractory husband to be attached, and the sheriff would let him go, if he thought proper; then, if the wife could not sue by her next friend, who could? The law provides no other course. And, upon this 597*] occasion, I would adopt the course *of a very learned judge, 'if there is no precedent, I will make one.' "

In Ohio, a wife divorced *a mensa et thoro* may maintain ejectment for a lot of land, the use of which was allowed to her as alimony. In Virginia, it was said, in *Purcell* v. *Purcell*, 4 Hen. & M. 507, that the court of chancery has jurisdiction in all cases of alimony. In Maryland the high court of chancery, from the earliest colonial times, exercised the jurisdiction to decree alimony, but not to grant divorces.

This was done under the belief that it belonged to the high court of chancery, in the absence of ecclesiastical tribunals; and in 1777 an act of assembly provided that the chancellor shall and may hear and determine all causes for alimony; in as full and ample a manner as such causes could be heard and determined by the laws of England, in the ecclesiastical courts there.

Under that statute, alimony is granted to the wife whenever the English courts would be authorized to render a divorce from bed and board; but the court has no power to extend the remedy, and decree a divorce also.

The inherent jurisdiction of a court of equity to decree alimony has also been acknowledged in Alabama. In North Carolina, bills of equity by the wife against the husband, praying alimony, were sustained, from an early day, without question as to the lawfulness of the jurisdiction.

Where such a decree has been made, whether done as an inherent power in equity to grant a decree for alimony, or as an auxiliary to enforce the payment of it as an incident of a divorce *a mensa et thoro*, there are no decisions, either in the English or American books, denying wife's right to sue her husband for arrears of alimony due, by her next friend.

In some of the states she may do so, without the intervention of her next friend; but she cannot do that, as has been said before, in the courts of the United States having equity jurisdiction.

We think, also, that the cases which have been cited in this opinion are sufficient to show, whatever may have been the doubts in an earlier day, that a wife under a judicial sentence *of separation from bed and board is [*598 entitled to make a domicil for herself, different from that of her husband, and that she may by her next friend, sue her husband for alimony, which he had been decreed to pay as an incident to such divorce, or when it has been given after such a decree by a supplemental bill. In our best reflections, we have been unable to come to a different result. The privileges allowed to a wife under such circumstances rest upon the facts that the separation is only grantable *propter Sævitiam;* that the alimony commonly allowed is no more than enough to give her a home and a scanty maintenance, almost necessarily short of that from which her husband has driven her; and that, as a consequence, she should be permitted to change her domicil, where she may live upon her narrow allowance with most comfort and the least mortification. Her right to sue her husband, by her next friend, for alimony already decreed, rests upon higher considerations, or upon legal principles which have been so well expressed by Chief Justice Shaw, as to her right to sue in the State of Massachusetts, that we will use his language, deeming it to be applicable in any other state in the American Union:

"After such a divorce, the law of this commonwealth recognizes her right to acquire and hold property, to take her own earnings to her own use, for the maintenance of herself and her

children. She is deprived of the protection, and exempted from the control, of her husband. She may by the decree of the court granting the divorce, and pursuant to the provision of the statute law of the commonwealth, be charged with the custody, and consequently with the support and maintenance. of the children of the marriage. The reason therefore, why a wife cannot sue or be sued without joining or being joined with her husband, does not exist. The relation in which the divorce *a mensa et thoro* places the parties opposes a joinder. If it were necessary to join the husband as plaintiff, he might release her rights, by which she would be subjected to costs; if he might be joined as defendant, he might be made subject to her debts; both of which consequences are repugnant to the true relation of divided and separate interests, in which the law by such a decree places them. Whilst the law thus **599***] recognizes *the right of a woman so divorced to acquire and take the proceeds of her own industry to her own use, it recognizes her power to make contracts; and if she could not sue and be sued, it would present the anomalous case in which the law recognizes a right without affording a remedy for vindicating it, and subjects a party to a duty without lending its aid to enforce it."

We do not deem it necessary to show, further than it has already been done in this opinion, that the equity side of the court was the appropriate tribunal for this cause. We have, however, verified the correctness and applicability of several of the cases cited in his argument by the counsel of the complainant to sustain that point, and deem them decisive.

The only point remaining for our determination is that which questions the complainant's right to pursue her remedy in the equity side of the district court of the United States in the state of Wisconsin.

The facts are, that she married the defendant in the state of New York, the state then of her husband's domicil; that they lived there until the decree of separation was made; that she has retained it ever since as her domicil, but that the defendant, after the decree of separation was given, left her domicil in New York for another in the state of Wisconsin, in which he says that he has acquired a domicil. The complainant comes into court in the character of citizen of the state of New York. Mrs. Barber is recognized to be such by the laws of that state, and her status as a divorced woman *a mensa et thoro* by a court of competent jurisdiction in New York, and the rights of citizenship which she has under it there, are decisive of her right to sue in the courts of the United States, as that has been done in this instance. The citizenship of the defendant is admitted and claimed by him to be in the state of Wisconsin. His voluntary change of domicil from New York to Wisconsin makes him suable there. That might have been done in a state court in equity as well as in the district court of the United States; but she had a right to pursue her remedy in either. She has chosen to do so in a court of the United States, which has jurisdiction over the subject matter of her claim to the same extent that a court of equity of a state has, and we think, that the **600***] *court below has not committed error in sustaining its jurisdiction over this cause, nor in the decree which it has made.

We affirm the decree of that court, and direct a mandate to be issued accordingly.

Dissenting Mr. Justice **Campbell**, and Mr. Justice **Daniel**, and Chief Justice **Taney**.

Mr. Justice **Daniel**, dissenting:

From several considerations, which to me appear essentially important, I am constrained to differ in opinion with the majority of the court in this case.

1st. With respect to the authority of the courts of the United States to adjudicate upon a controversy and between parties such as are presented by the record before us. Those courts, by the Constitution and laws of the United States, are invested with jurisdiction in controversies between citizens of different states. In the exercise of this jurisdiction, we are forced to inquire, from the facts disclosed in the cause, whether during the existence of the marriage relation between these parties the husband and wife can be regarded as citizens of different states. Whether, indeed, by any regular legal deduction consistent with that relation, the wife can, as to her civil or political status, be regarded as a citizen or person.

By Coke and Blackstone it is said: that "By marriage, the husband and wife become one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband, under whose wing and protection she performs everything. Upon this principle of union in husband and wife, depend almost all the rights, duties, and disabilities, that either of them acquire by the marriage. For this reason, a man cannot grant anything to his wife, nor enter into a covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage." Co. Lit. 112; Bla. Com. vol. I. p. 442. *So, too, Chancellor Kent (vol. II. p. [*601 128): "The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union."

Such being the undoubted law of marriage, how can it be conceived that pending the existence of this relation the unity it creates can be reconciled with separate and independent capacities in that unity, such as belong to beings wholly disconnected, and each *sui juris?* Now, the divorce *a mensa et thoro* does not sever the matrimonial tie; on the contrary, it recognizes and sustains that tie; and the allowance of alimony arises from and depends upon reciprocal duties and obligations involved in that connection. The wife can have no claim to alimony but as wife, and such as arises from the performance of her duties as wife; the husband sustains no responsibilities save those which flow from his character and obligations as husband, presupposing the existence and ful-

fillment of conjugal obligations on the part of the wife. It has been suggested that by the regulations of some of the states a married woman, after separation, is permitted to choose a residence in a community or locality different from that in which she resided anterior to the separation, and different from the residence of the husband. It is presumed, however, that no regulation, express or special, can be requisite in order to create such a permission. This would seem to be implied in the divorce itself; the purpose of which is, that the wife should no longer remain *sub potestate viri*, but should be freed from the control which had been abused, and should be empowered to select a residence and such associations as would be promotive of her safety and her comfort. But whether expressed in the decree for separation, or implied in the divorce, such a privilege does not destroy the marriage relation; much less does it remit the parties to the position in which they stood before marriage, and create or revive ante-nuptial, civil, or political rights in the wife. Both parties remain subject to the obligations and duties of husband and wife. **602***] Neither can marry during the *lifetime of the other, nor do any act whatsoever which is a wrong upon the conjugal rights and obligations of either. From these views it seems to me to follow, that a married woman cannot, during the existence of the matrimonial relation, and during the life of the husband the wife cannot be remitted to the civil or political position of a *feme sole*, and cannot, therefore. become a citizen of a state or community different from that of which her husband is a member.

2d. It is not in accordance with the design and operation of a government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society, should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household. If such functions are to be exercised by the Federal tribunals, it is important to inquire by what rule or system of proceeding, or according to what standard, either of ethics or police, they are to be enforced. Within the range subjected to the political, general and uniform control of the Federal Constitution, there are numerous commonwealths, and within these are ordinances much more numerous and diversified, for the definition and enforcement of the duties of their respective members. Now, to which of these ordinances, or to which of these various systems of regulation, will the Federal authorities resort as a source of jurisdiction, or as a rule of decision, especially when it is borne in mind that it is only between members of different communities, persons legitimately subject to such separate rules of obligation or policy, that the tribunals of the Federal Government have cognizance; when, too, it is recollected that the Federal Government is clothed with no power to execute the laws of the states. The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.

*It has been suggested, that by the [*603 decree for separation *a mensa et thoro*, the husband and wife have become citizens of different states, and that the allowance to the wife is in the nature of a debt, which, as a citizen of a different state, she may enforce against the husband in the Federal courts. This suggestion, to my mind, involves two obvious fallacies. The first is the assumption, that by the decree, the wife is made a citizen at all, or a person *sui juris*, whilst yet she is wife, still bound by her conjugal obligations, the faithful observance of which, on her part, is the foundation of her claim to maintenance as wife, and which claim she would forfeit at any time by a violation of these obligations. Indeed, the form of her application is an acknowledgment that she is not *sui juris*, and not released from her conjugal disabilities and obligations, for she sues by *prochein ami*.

The second error in the position before mentioned is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. It is not unconditional, but always dependent upon the personal merits and conduct of the wife—merits and conduct which must exist and continue, in order to constitute a valid claim to such an allowance. This allowance might unquestionably be forfeited upon proof of criminality or misconduct of the wife, who would not be permitted to enforce the payment of that to which it should be shown she had lost all just claim; and this inhibition, it is presumed, might embrace as well a portion of that allowance at any time in arrears, as its demand in future. The essential character, then, of this allowance, *viz.:* its being always conditional and dependent, both for its origin and continuation, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances. That authority can exist nowhere but with the power and the right to control the private and domestic relations of life. The Federal government has no such power; it has no commission of *censor morum* over the several states and their people.

But, irrespective of the disability of the wife as a party, I *hold that the courts of [*604 the United States, as courts of chancery, cannot take cognizance of cases of alimony.

It has been repeatedly ruled by this court, that the jurisdiction and practice in the courts of the United States in equity are not to be governed by the practice in the state courts, but that they are to be apprehended and exercised according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles. Such is the law as announced in the cases of *Robinson* v. *Campbell*, 3 Wheat. 212; *The United States* v. *Howland*, 4 Wheat. 108; *Boyle* v. *Zachrie & Turner*, 6 Pet. 648. It is repeated in the cases of *Story* v. *Livingston*, 13 Pet. 359, and of *Gaines* v. *Relf*, 15 Pet. 9. Now, it is well known that the court of

chancery in England does not take cognizance of the subject of alimony, but that this one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised. Of these matters, the court of chancery in England claims no cognizance. Upon questions of settlement or contract connected with marriages, the court of chancery will undertake the enforcement of such contracts, but does not decree alimony as such, and independently of such contracts.

In Roper on the Law of Baron and Feme (vol. II. p. 307), it is stated that Lord Loughborough, in a case in 1 Vesey, Jr., 195, is reported to have said, that if a wife applied to the court of chancery upon a *supplicavit* for security of the peace against her husband, and it was necessary that she should live apart as incidental to that, the Chancellor will allow her separate maintenance. That this passage has been quoted by Sir William Grant in 10 Ves. 397, and that the same opinion was advanced in the case of *Lambert* v. *Lambert*, 2 Brown's Parliamentary Cases, p. 26. "But," continues this writer, "there seems to be no reported instance of such a jurisdiction, and it would be inconsistent with the object and form of the writ of *supplicavit*;" and he concludes with the position that "the wife can only obtain a separate maintenance in the ecclesiastical courts where alimony is decreed to be paid during the pendency of any suit between bus-
605*] band and wife, and after its *termination, if it ends in a sentence of separation on the ground of the husband's misconduct."

From the above views, it would seem to follow, inevitably, that as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States in chancery is equally excluded.

It has been said that, there being no ecclesiastical court in the United States, many of the states have assumed jurisdiction over the subjects of divorce and alimony, through the agency of their courts of equity. The answer to this suggestion is, first, that it concedes the distinction between the character and powers of these different tribunals. In the next place, it may have been that the jurisdiction exercised by the state courts may have been conferred by express legislative grant; or it may have been assumed by those tribunals, and acquiesced in from considerations of convenience, or from mere toleration; but whether expressly conferred upon the state courts, or tacitly assumed by them, their example and practice cannot be recognized as sources of authority by the courts of the United States. The origin and the extent of their jurisdiction must be sought in the laws of the United States, and in the settled rules and principles by which those laws have bound them.

END OF VOLUME 62.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1859.

Vol. 63.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

DECEMBER TERM, 1859.

J. W. HODGE, John W. Hunter, Haywood Hunter, Thomas Coleman, and Young Coleman, *Plffs. in Err.*,

v.

JOHN A. WILLIAMS.

(See S. C. 22 How. 87-89.)

Writ of error must be brought by party who alleges error—amendment of, refused—party must see that process is legal.

This court has no appellate power over the judgment of the court below, unless the judgment is brought here by writ of error, sued out by the party who alleges error in the judgment of the inferior court.

This court has uniformly refused to amend writs of error.

It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, the writ of error must be dismissed.

Motion made Dec. 9, 1859. Decided Dec. 19, 1859.

IN ERROR to the District Court of the United States for the Eastern District of Texas.

On motion for leave to amend the record, or to dismiss this writ of error for want of jurisdiction.

The case is stated by the court.

Mr. **Wm. G. Hale** for the plaintiffs in error.

Mr. **Robert Hughes** for defendant in error.

Mr. Chief Justice Taney delivered the opinion of the the court:

It appears, from the record in this case, that an action was brought in the circuit court of the United States for the eastern district of Texas, by John A. Williams, against Hodge and the other defendants named in the proceedings, and at the trial, the judgment was against the plaintiff.

The writ of error removing the case to this court is in the name of the defendants who succeeded in the court below, *and do not desire to disturb the judgment; and the plaintiff in that court, who alleges error in the judgment, and seeks to reverse it, is made the defendant in the writ of error. [*88

It is evident that the writ was intended to be sued out by the plaintiff in the court below, and that the names of the defendants, as plaintiffs in the writ, were used without their authority; for the errors are assigned by the plaintiff, and the bond states that a writ of error has been sued out by him, and the citation issued by the judge is directed to the defendants, and served on their counsel. And it is obvious that the writ in the name of the defendants was an oversight of the clerk by whom it was issued.

But the amendment proposed cannot be made here. An amendment presupposes jurisdiction of the case. And this court have no appellate power over the judgment of the court below, unless the judgment is brought here according to the act of Congress—that is, by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not a mere matter of form, but matter of substance prescribed by law and essential to the jurisdiction of this court. And if it were amended here, by making the plaintiffs in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law.

Upon this principle, the court have uniformly refused to amend writs of error; and this must now be regarded as the settled practice of the court. It has repeatedly refused to amend, where the partnership name of a firm name was used instead of the proper names of the parties; and in like manner it has refused to amend where the name of one or more of the parties were given, and the rest designated as others joined with them, without setting out the names of those intended to be included as others.

But the precise point now before us was decided in the case of *Hines* v. *Papin*, at December term, 1857. The same error was committed in that case which had been committed in this; and the error was equally apparent, as in the present instance, *from the recital [*89 in the bond and the citation and service. The case was, indeed, even stronger for the amendment than this, for counsel appeared in this court for each of the parties, and offered to amend by consent. Yet the court refused to amend, upon the ground that consent of parties would not give jurisdiction, where it was not given by law and legal process. But here there is no appearance for the parties who are named as plaintiffs in the writ of error; and if we

order the amendment, we should make them defendants in a suit in which they are not bound to appear in that character. It is the duty of the party who desires to bring a case before this court. to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere clerical error, for which he is not to be held responsible.

The opinion in the case of *Hines* v. *Papin*, above referred to, was delivered orally, and not reduced to writing, and consequently does not appear in the printed reports. The court have, therefore, deemed it advisable to state now the practice and doctrine of the court in this respect, in order that suitors may be aware of the necessity of paying proper attention to the process they issue, and not subject themselves to costs and delays by errors which a clerk, in the hurry and pressure of other business, will unavoidably sometimes commit.

The writ of error must, therefore, upon the motion before the court, be dismissed, as it cannot be amended.

GEORGE BONDIES, late Master and Part Owner of the Steamboat Kate, Intervening, etc., *Appt.*,

v.

JAS. P. SHERWOOD, Jos. McClelland, and Barney McGinnis, *Libts.*

(See S. C. 22 How. 23-28.)

Contract to raise sunken vessel cannot be repudiated and libel filed for salvage.

Where the libelants agreed to raise a sunken vessel in fourteen days, and proceeded under their contract to raise the vessel, but not within the agreed time, and the bargain was an unprofitable one, the libelants cannot repudiate it and file a libel for salvage.

Assuming the services rendered to be in nature of salvage services, and that a court of admiralty had jurisdiction to enforce the contract, as a maritime contract. yet the libelants, by their own showing, cannot recover under the contract.

And it is equally clear that they cannot repudiate their contract, and libel the vessel for salvage.

Submitted Dec. 7, 1859. Decided Dec. 19, 1859.

APPEAL from the District Court of the United States for the Eastern District of Texas.

The libel in this case was filed in the court below, by the appellees, on a claim for salvage compensation. The said court found for the libelants, and entered a decree for $2,575, as salvage, being fifty per cent. of the total value of everything saved; whereupon the claimant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **L. Sherwood** and **William G. Hale**, for appellant:

The whole case is replete with evidence that libelants worked under the written contract and under no verbal agreement whatsoever; that Bondies cautiously avoided all verbal agreements; that he carefully guarded the boat, cargo, himself, and the underwriters, by stipulating against all claims for salvage services; that he sought to guard against a *devastavit* upon the property by stipulating that he should retain exclusive possession until the contract should be complied with by the libelants.

No counsel appeared in this court for the appellees.

Mr. Justice **Grier** delivered the opinion of the court:

The appellees, describing themselves as ship-carpenters, residing in Galveston, filed their libel in the district court of Texas against the steamboat Kate, and against Bondies, late master and owner, in a "cause of salvage, civil and maritime.'

They charge that the steamboat left the port of Galveston, for ports and places on the Trinity river, in said district of Texas, laden with merchandise. That the boat was snagged and sunk in the river near Morse's bluff, in Liberty county.

That on the 24th of April, 1856, the libelants entered into an article of agreement, under seal, with Bondies, who had become sole owner of both cargo and vessel, to raise the vessel.

In this agreement, the libelants covenant to proceed with *the necessary boats, appa- [*216 ratus, etc., and to raise the steamboat at their own cost in fourteen days after their arrival at the place where it lay, provided they were not hindered by high water; when raised, the boat to be taken to Galveston. Bondies covenants to convey the boat to them, on their payment to him of $4,000, and also to subrogate them to all his claims against the cargo. But, in the mean time, until the covenants of libelants were performed, the legal possession of the boat and cargo was to be and remain in Bondies.

The libel alleges that 'this agreement was mutually given up and abandoned." But this averment is not sustained by the evidence. On the contrary, it appears that the libelants proceeded under their contract to raise the vessel, but did not succeed till sometime in July. The boat and merchandise being much injured in the operation and by the delay, it turned out that the costs and expenses would exceed the whole value of the boat and cargo when recovered. The bargain was, therefore, an unprofitable one, and the libelants concluded to repudiate it, and filed this libel for salvage.

Without adverting to the numerous other facts developed in the history of this case, but which cannot affect its merits, it is very plain, that assuming the services rendered by these mechanics to be in the nature of salvage services, and that a court of admiralty had jurisdiction to enforce the contract both against the owner and the boat as a maritime contract, yet the libelants, by their own showing, cannot recover under the contract. And it is equally clear that they cannot repudiate their contract, and libel the vessel for salvage.

See *The Mulgrave*, 2 Hagg. Adm. 78, and Abbott, Shipping, 706.

For this reason alone the libel must be dismissed.

But there are two other questions which arise on the face of this record, and which it will not be necessary to decide, but which ought not to pass without notice, lest an inference should be drawn from our silence that the court considered them of no importance, or intended to decide them in favor of the libelants.

1. By the 19th rule prescribed by this court 217*] for practice in *the courts of admiralty, it is ordered, that "in all suits for salvage the suit may be *in rem* against the property saved, or *in personam* against the party at whose request and for whose benefit the salvage service has beeen performed." By reference to Mr. Conklin's treatise, page 42, it will be found that it is the prevailing opinion that both cannot be joined in the same libel. The point has not been brought before this court, and we notice it now only to show that it is not now decided.

2. The libel shows that the steamboat was engaged in the internal trade of the state of Texas, proceeding from a port in the same, up a river wholly within the same. It is not even alleged that she had a coasting license. That a court of admiralty had jurisdiction in such a case, or that the maritime law of wreck and salvage could be applied to it, are questions not made by the pleadings nor noticed in the argument, and therefore are not decided by the court.

Let the libel be dismissed, with costs.

WILLIAM B. LAWLER, *Appt.*,
v.
HORACE B. CLAFLIN, Wm. H. Mellen, Nathaniel F. Miller, David H. Conkling, and Henry Stone.

(See S. C. How. 23-28.)

Where record defective, no exceptions, and jury waived, nothing to review.

In a suit on a mortgage, where the loose papers certified from the supreme court of Minnesota to this court has neither the form nor substance of a record, and no exceptions were taken, and a jury was waived, and the facts were submitted to the court, there is nothing for this court to try.

Argued Dec. 8, 1859. Decided Dec. 27, 1859.

APPEAL from the Supreme Court of the Territory of Minnesota.

This action was brought in the district court of Ramsey county in Minnesota, by the appellees, to foreclose a certain mortgage. A jury having been waived, the court entered judgment of foreclosure. This judgment having been affirmed on appeal by the supreme court of the territory of Minnesota, the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Brisbin & Bigelow, H. W. Merrill** and **H. L. Stevens**, for appellant:

The note and mortgage were effectual and valid as collateral security for the debt of $2,126.08, and for that debt only; and the payment of this identical debt on Dec. 15, 1852, satisfied and discharged the note and mortgage.

Bleaden v. *Charles*, 7 Bing. 246; *Walker* v. *Snediker*, 1 Hoffm. Ch. 145; *Shirras* v. *Caig*, 7 Cranch, 34; Chit. Bills, ch. 3, pp. 84, 96, 12th ed.; Story, Prom. N. § 187, cases cited, 2d ed.

The mortgage, in any just view of the case, was not a continuing security. No reasonable construction can give it the effect of a continuing guaranty covering future balances.

Wright v. *Johnson*, 8 Wend. 512; *Hunt* v. *Smith*, 17 Wend. 179; *Dobbin* v. *Bradley*, 17 Wend. 422; *Fellows* v. *Prentiss*, 3 Den. 512; *Baker* v. *Rand*, 13 Barb. 152; *Bigelow* v. *Benton*, 14 Barb. 123.

A mortgage once paid becomes *functus officio*, and is forever extinguished, and *a fortiori* when given by a surety as collateral security.

Truscott v. *King*, 6 N. Y. 162; *Mead* v. *York*, 6 N. Y. 452; *Bergen* v. *Boerum*, 2 Cai. 256; *Robinson* v. *Frost*, 14 Barb. 536, 543; *Wheelwright* v. *De Peyster*, 4 Edw. Ch. 232; 17 N. Y. 242, 246.

Mr. **R. H. Gillet**, for appellees:

The decision of the court where a jury is waived, is conclusive upon the parties as to all questions of fact, and the appellate court cannot review its decision on such questions.

United States v. *King*, 7 How. 833; *Bond* v. *Brown*, 12 How. 254; *Graham* v. *Bayne*, 59 U. S. (18 How.) 60; *Penhallow* v. *Doane*, 3 Dall. 54; *Guild* v. *Frontin*, 59 U. S. (18 How.) 135; *Craig* v. *Missouri*, 4 Pet. 410; *Suydam* v. *Williamson*, 61 U. S. (20 How.) 427; *Kelsey* v. *Forsyth*, 62 U. S. (20 How.) 85; *Campbell* v. *Boyreau*, 62 U. S. (21 How.) 224.

The cause having been tried without a jury, no objection can be taken to the admissibility of evidence.

Weems v. *George*, 13 How. 190; *Arthurs* v. *Hart*, 58 U. S. (17 How.) 6; *Martin* v. *Ihmsen*, 62 U. S. (21 How.) 394.

The record does not show any exceptions; and, therefore, defendant cannot raise the question of the admissibility of evidence in this court.

Stevens v. *Gladding*, 60 U. S. (19 How.) 64; *Guild* v. *Frontin*, 59 U. S. (18 How.) 135; *Prentice* v. *Zane*, 8 How. 470.

Mr. Justice **McLean** delivered the opinion of the court:

This is an appeal from the supreme court of the territory of Minnesota.

The suit was brought on a mortgage executed the 1st day of October, 1852, by Ann Curran, the duly authorized attorney in fact of William B. Lawler, conditioned for the payment of the sum of $4,000, being part of lot three, in block thirty, in the town of St. Paul, forming an oblong square, forty-two feet on Third street by eighty feet *on Roberts street. This [*26 mortgage was duly recorded on the day subsequent to that of its execution.

This mortgage, it was alleged, was executed to secure a sum of money then due to the plaintiffs, and which was likely to become due, in the further purchase of merchandise from the plaintiffs by the defendant. The plaintiffs accepted the mortgage, as security for purchases to be made, or any debts which the firm of Curran & Lawler might subsequently owe the firm.

The understanding and agreement between the parties was, that the mortgage was to be held by plaintiffs as a pledge or collateral security, and was not to be canceled or delivered up until all purchases which Curran & Lawler might make, and which might become due at any time within the year—that is, before the 1st day of October, 1853. So long as anything

should remain due on such purchases, the indebtment was to be considered and deemed secured by the mortgage.

The payment of the note and mortgage as alleged by Curran & Lawler in their answer, is denied; and it is stated that the amount of indebtment on the note and mortgage, at maturity, was upwards of $5,000.

It is difficult to determine the character of the loose papers certified from the supreme court of Minnesota to this court. They have neither the form nor the substance of a record. The papers seem to be thrown together, as much by accident as design; and one can scarcely gather any special object in reading the transcripts. It would seem that neither certainty nor order can be extracted from these papers, and that some form should be adopted by which the pleadings should be stated, and the points controverted, whether of fact or of law. Many objections are made to questions propounded to witnesses, but no exceptions seem to have been taken.

A jury seems to have been waived, and the facts were submitted to the court. In such a case, the question of law arising on the facts would appear to have been decided by the court. Still, no exception is taken. In fact, there seems to be nothing for this court to try, except the validity of the mortgage and the fact of its discharge. And, even in this 27*] *matter, the evidence is in conflict, and it is difficult to decide the point disputed.

The mortgage was for $4,000, and was to stand as a security for the balance due the plaintiffs; and in this way it was intended to give an additional credit to the company. From the manner in which the mortgage was treated, it appears to have been designed as a standing guaranty for the sum named.

And, in the language of the court, the said "action having come on to be heard at the May term of the district court of Ramsey county, upon the complaint of the plaintiffs and the answer of the said William B. Lawler, before the presiding judge of said court, a jury trial therein having been waived by the respective parties, the same having been decided in favor of the plaintiffs, and that there is due on the notes and mortgage upon which the action is brought the sum of $4,495.40, with interest from the 4th of October, 1853, amounting in all to $5,084.07; and, on motion, it was ordered, adjudged, and decreed, that the mortgaged premises, or so much thereof as may be necessary, be sold by the sheriff for the payment of the mortgage; and it is further ordered, adjudged, and decreed, that the defendants, and all persons claiming under them, be forever barred," etc.

On the appeal of Lawler and others from the district court of Ramsey county to the supreme court of the territory, "the matters at issue in this cause having been fully considered, it appears to this court that, in the proceedings, decree, and judgment thereon, in the district court of Ramsey county, to this court appealed from, there is no error. It is, therefore, ordered that said decree and judgment be in all things affirmed with costs," etc.

From this last decree there is an appeal now pending before this court.

In looking into the facts of this case, it does not appear that the merits are changed by the views taken by the district court of Ramsey county, or by the decision of the supreme court of the territory.

*The evidence is against the discharge of [*28 the mortgage. After the amount claimed under the mortgage, there is still a balance due the plaintiffs on general account.

Upon the whole, the decree of the Supreme Court of the Territory is affirmed; and the cause is remitted to the Supreme Court of the State of Minnesota, to be carried into effect as the law authorizes.

EDWIN M. CHAFFEE, *Plff. in Err.*,
v.
THE BOSTON BELTING COMPANY.

(See S. C. 22 How. 217-225.)

Purchaser of patented machine may use it during extended term—error in charge, to assume fact not proved.

A party who had purchased a patented machine, and was using it during the original term for which the patent was granted, may continue to use the machine during the extended term and until it is worn out, or he may repair it or improve upon it, as he pleases, in the same manner as if dealing with property of any other kind.

That the defendant had a title to the machinery and was rightfully in the use of it under that title, before and at the time the original letters patent expired, finds no support in the evidence reported.

It is clearly error for the court, in its instruction to the jury, to assume a material fact as proved, of which there is no evidence.

And when the finding of the jury accords with the theory of the instruction thus assumed without evidence, the error is of a character to deserve correction.

Argued Dec. 7, 1859. Decided Dec. 27, 1859.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

This was an action on the case brought in the court below, by the plaintiff in error, for the alleged infringement of certain rights secured by letters patent.

The trial below having resulted in a verdict and judgment for the defendant, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **T. A. Jenckes** and **C. A. Seward**, for plaintiff in error:

I. The court below erred in charging the jury that under its title the defendant had a right to continue to use the same machinery for the same purpose. This charge was predicated upon an assumption of title in the defendant which had not been proved. This entitles the plaintiff to a reversal of the judgment, and to a *venire facias de novo.*

The court below assumed in its charge that the defendants, upon the assumption that they were rightfully in the use of the plaintiff's patent during its original term, had by operation of law a right to continue that use during the extended term. To this we reply:

1. That the license from Goodyear to Edwards was, by its terms, for so long only as said Goodyear and his assigns shall be possessed

of any valid patent rights or the United States before mentioned.

2. The defendants derive no right from the proviso of the 18th section of the act of July 4, 1836, to use the invention during the extended term.

Brooks v. *Byam*, 2 Story, 525; Curt. Pat. §§ 195, 197.

It is well settled that an instrument like that between Goodyear and Edwards is not an assignment or a grant, but a mere license.

Blanchard v. *Eldridge*, 1 Wall. Jr. 338; *Gayler* v. *Wilder*, 10 How. 477.

Mr. **H. F. Durant** for the defendant in error, submitted no argument in this court.

Mr. Justice **Clifford** delivered the opinion of the court.

This case comes before the court on a writ of error to the circuit court of the United States for the district of Massachusetts. It was an action of trespass on the case, for the alleged infringement of certain rights secured by letters patent.

As the foundation of the suit, the declaration alleges, in effect, that the assignor of the plaintiff was the original and first inventor of certain improvements in the manufacture of India rubber, and that in the year 1836 letters patent for such improvements were duly issued to him by the commissioner of patents, as is therein fully and correctly set forth and described.

Those improvements, as is alleged in the declaration, consist in a mode of preparing the rubber for manufacturing purposes, and of reducing it to a pasty state, without the use of the spirits of turpentine or other solvents, and of applying the same to cloths, and for other purposes, by the use of heated rollers and other means, as set forth in the letters patent, saving thereby, as is alleged, a large portion of the expense of reducing the original material to a proper degree of softness, and of fitting and preparing it for the various uses to which it may be applied.

On application subsequently made to the commissioner of patents, in due form of law, by the original inventor, the patent was extended for the further term of seven years, from the 31st day of August, 1850; and the plaintiff alleges that the patentee, on the 1st [*220] day of July, 1853, transferred, assigned, and conveyed to him all his title to the invention and to the patent for the extended term.

By virtue of that deed of transfer, it is claimed in the declaration that the plaintiff acquired the right to demand and recover the damages for all infringements of the letters patent prior to the date of the transfer, as well as for those that have been committed since that time; and accordingly the plaintiff alleges that the defendants, on the 31st day of August, 1850, fraudulently commenced the use of those improvements, without law or right, and so continued to use them to the day of the commencement of this suit; averring, at the same time, that the defendants have prepared large quantities of the native rubber for manufacturing purposes, without the use of spirits of turpentine or other solvents, thereby making large gains, and greatly to the damage of the plaintiff.

As appears by the transcript, the action was entered in the circuit court at the May term, 1854, but was continued from term to term until the May term, 1857, when the parties went to trial upon the general issue.

From what is stated in the bill of exceptions, it appears that one Charles Goodyear was the owner of the original letters patent on the 26th day of January, 1846, and that he continued to own them for the residue of the term for which they were originally granted. On that day he entered into an indenture with one Henry Edwards, of the city of Boston, whereby, for certain considerations therein expressed, he sold and conveyed to the said Henry Edwards, his executors, administrators, and assigns, the exclusive right and license to make, use, and vend, any and all articles appertaining to machines, or in the manufacture, construction, and use of machines or machinery, of whatever description, subject to certain limitations and qualifications therein expressed.

By the terms of the instrument, it was understood that the right and license so conveyed was to apply to any and all articles substituted for leather, metal, and other substances, in the use or manufacture of machines or machinery, in so far as the grantor had any rights or privileges in the same, by virtue of any invention or improvement made, or which should thereafter be made, by him in the man- [*221] ufacture of India rubber or gum elastic goods, and in virtue of any and all letters patent or patent rights of the United States granted or belonging to him, or which should thereafter be granted or belong to him, for any and all inventions or improvements in the manufacture of such goods in this country, but excluding the right to make any contract with the government of the United States. In consideration of the premises, the grantee paid the sum of $1,000, as appears by the recital of the instrument, and agreed to pay a certain tariff, at the rate of five cents per superficial yard, or five cents per pound for the pure gum, according to the nature of the article manufactured.

Reference is made in the declaration to the letters patent, and to the deed of assignment from the patentee to the plaintiff, but neither of those instruments appears in the bill of exceptions or in any other part of the record.

At the trial of the cause, it was conceded and agreed that the defendants, before the date of the plaintiff's writ, used certain machinery, constructed in conformity with the specification annexed to the letters patent declared on, and that the defendants, in using the machinery, conformed to the directions contained in the specification, and that the same was so used for the preparation and application of India rubber to the manufacture of the articles mentioned and described in the indenture from Charles Goodyear to Henry Edwards, and that all the machinery so used was constructed and in use as aforesaid before and at the time the original letters patent expired.

Upon this state of the case, according to the bill of exceptions, the presiding justice ruled and instructed the jury, that, under their title, the defendants had the right to continue to use the same machinery for the same purposes, and in conformity with the directions contained in the specification, after the expiration and re-

newal of the letters patent; and consequently, that the plaintiff could not recover.

Under the ruling and instruction of the court, the jury returned their verdict for the defendants; and the plaintiff excepted to the ruling, and his exceptions were duly allowed.

It is insisted by the counsel of the plaintiff, 222*] that the *instruction given to the jury was erroneous; and that is the only question presented for decision at the present time. In considering that question, our attention must necessarily be confined to the evidence reported in the bill of exceptions, as the only means of ascertaining the precise state of facts on which the instruction to the jury was given. Whether the report of the evidence, as set forth in the bill of exceptions, may or may not be incomplete or imperfectly stated, cannot be known in an appellate court. Bills of exception, when properly taken and duly allowed, become a part of the record, and, as such cannot be contradicted.

By the admissions of the parties in this case, it appears that the defendants, before the date of the plaintiff's writ, had used certain machinery, constructed in conformity with the specification of the plaintiff's patent. In the absence of any explanation or suggestion to the contrary, it must be inferred that the use of the machinery so admitted was without the license or consent of the plaintiff, and subsequent to the period when he became the owner of the patent for the extended term; and if so, the admission was sufficient, under the pleadings, to make out a prima facie case for the plaintiff. To maintain the issue on their part, the defendants, proved in effect, or it was admitted, that all the machinery so used by them had been constructed, and was in use, as aforesaid, before and at the time the original letters patent expired, and that in using the machinery they had conformed to the directions contained in the specification; and that the same was so used for the purposes and in the manufacture of the articles specified, and described in the before mentioned indenture. As before stated, they had previously proved, or it had been admitted, that the owner of the original term of the patent had granted the exclusive right and license to a third party to use the invention for the same purposes for which the defendants, both under the original and extended term of the patent, had used their machinery; but they did not prove, and there is no evidence in the case to show, any privity between themselves and that license, either by assignment or in any other manner. They offered no proof tending 223*] to show *that their use of the machinery in question, under either term of the patent, was with the license, consent, or knowledge, of the patentee, or of any other person who ever had or claimed to have any power or authority under him to convey the right. Provision is made by the 18th section of the act of Congress, passed July 4th, 1836 (5 Stat. at L. p. 125), for the extension of patents beyond the time of their limitation, on application therefor in writing, by the patentee, to the commissioner of the patent office, setting forth the grounds for such extension. By the latter clause of that section, the benefit of such renewal is expressly extended to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein. Under that provision, it has been repeatedly held by this court, that a party who had purchased a patented machine, and was using it during the original term for which the patent was granted, might continue to use the machine during the extended term. *Bloomer* v. *McQuewan*, 14 How. 549; *Wilson* v. *Rousseau*, 4 How. 646. That rule rests upon the doctrine that the purchaser, in using the machine under such circumstances, exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or the exclusive privilege granted to the patentee.

When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. According to the decision of this court in the cases before mentioned, it then passes outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. By a valid sale and purchase, the patented machine becomes the private, individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated. Hence it is obvious, that if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it as he pleases, in the same maner as if dealing with property of any other kind. Applying *these principles to the present case, as [*224 it is exhibited in the bill of exceptions, there would be no difficulty in sustaining the instructions given to the jury, provided it appeared that the machinery used by the defendants had been legally purchased by them of the patentee or his assigns during the original term of the patent. But nothing appears in the evidence reported to warrant the inference that they were either assignees or grantees of the thing patented, within the meaning of the act of Congress or the decisions of this court. All that the indenture offered in evidence showed, was the nature and extent that the defendants had used the invention, but, as is well contended by the counsel for the plaintiff, it proved nothing more. It did not prove, or tend to prove, that the defendants were rightfully in the enjoyment of the thing patented during the original term of the patent, and having failed to establish any right or license to use their machinery during the extended term by any other proof, they appear in the record as naked infringers.

Their right to continue to use the machinery as against the plaintiff is predicated in the instruction upon the assumption they had a title to it, and were rightfully in the use of it under that title, before and at the time the original letters patent expired. That assumed fact finds no support in the evidence reported. It is clearly error for the court, in its instruction to the jury, to assume a material fact as proved, of which there is no evidence in the case. *United States* v. *Breitling*, 20 How. 255. And when the finding of the jury accords with the theory of the instruction, thus assumed without evidence, the error is of a character to deserve correction.

Another position is assumed by the counsel of the plaintiff, which ought not to be passed over without a brief notice. They contend that the invention of the plaintiff, as described in the letters patent, is for a process, and not for a machine or machinery; and that the act of Congress, extending the benefit of renewals to assignees and grantees of the right to use the thing patented, when properly construed, does not include patents for a process, but should be confined to patents for machines. That ques-
225*] tion, if properly presented, *would involve the construction of the letters patent in this case as well as the act of Congress; but as the patent is not in the record, it is not possible to determine it at the present time, and we only advert to it that it may not appear to have escaped attention.

The decree of the Circuit Court is reversed, with costs, and with directions to issue a new venire.

JOHN C. SINNOT, Samuel Wolf and James Sands, *Plffs. in Err.*,
v.
GORHAM DAVENPORT *et al.*, Commissioners of Pilotage of the Bay and Harbor of Mobile.

(See S. C. 22 How. 227-244.)

Act of state regulating coasting trade, invalid, as inconsistent with act of Congress.

Where the act of a state imposes a condition to the privilege of carrying on the coasting trade within her waters, namely: the filing of a statement in writing, in the office of the probate judge, setting forth: 1. The name of the vessel; 2. The name of the owner, etc., and provides that unless this condition is complied with, the vessel is forbidden to leave the port, under the penalty of $500 for each offense, held, that there is a direct conflict between this act of the state and the Act of Congress regulating this trade.

This act of the state is not merely the exercise of a police power, which has not been surrendered to the general government, but reserved to the states.

When an act of a state prescribes a regulation repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state legislature derived its enactment.

Such act of the legislature of the state of Alabama is in conflict with the Constitution and law of the United States and, therefore, void.

Argued Dec. 7, 1859. Decided Dec. 27, 1859.

IN ERROR to the Supreme Court of the State of Alabama.

This was an action in the nature of a libel filed in the city court of Mobile in the state of Alabama, by the commissioners of pilotage for the bay and harbor of Mobile, against the steamboat William Bagaby, claiming the sum of $4,000 for eight separate violations of the act of said state, entitled "An Act to Provide for the Registration of the Names of Steamboat Owner," approved February 15, 1854.

In the answer and exceptions filed to this libel, it is insisted that the general assembly of the state of Alabama had no constitutional authority to require the owners of said boat to comply with the requirements of said statute, the said act being in conflict with the Constitution of the United States.

The case was tried on an agreed statement of facts, from which it appears to be admitted "that the said boat was regularly engaged in navigation and commerce between the port of New Orleans in the state of Louisiana, on the one hand, and the cities of Montgomery and Wetumpka on the other; that the said boat touched Mobile only for the purpose of better carrying on the said business between New Orleans and Montgomery and Wetumpka."

It is also stated in the answer, and admitted to be true, that the said steamboat was built at Pittsburg and that on her way to New Orleans, to wit: at Cincinnati, she took on board freight for New Orleans, for Mobile, and for Montgomery and Wetumpka; that previously to leaving Pittsburg, she was regularly enrolled and licensed in pursuance of the laws of the United States; that while at New Orleans she was regularly cleared, at the custom-house of that port, for Montgomery and Wetumpka; that having discharged her freight for Mobile on arrival there, she proceeded to Montgomery; and that on her return thence to New Orleans, she passed Mobile without stopping.

The judge decreed in favor of libelants.

On appeal to the Supreme Court, the decree of the judge of the city court was affirmed; whereupon the appellant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **P. Phillips**, for plaintiffs in error:

The power to regulate commerce, conferred by the Constitution of the United States, includes the regulation of navigation, and was one of the primary objects which led to its adoption.

Gibbons v. *Ogden*, 9 Wheat. 67; *Pennsylvania* v. *Wheeling Bridge Co.* 18 How. 431.

The power to regulate navigation is the power to prescribe rules, in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instrument used.

Cooley v. *Port Wardens, Phil.* 12 How. 316.

Is the power to regulate commerce, thus granted to the Federal government, exclusive? In *Gibbons* v. *Ogden*, the court says: It has been concluded that as the word *to regulate*, implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result applying to those parts which remain as they were as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in the argument, and the court is not satisfied that it has been refuted.

In *City of N. Y.* v. *Miln*, 11 Pet. 130, which involved the constitutionality of an act requiring captains of vessels arriving in the port of that state to furnish a list of passengers, etc., and which was sustained as a police regulation, the court waived the examination of the question whether the power to regulate commerce be or be not exclusive to regulate the states.

NOTE.—*Jurisdiction to regulate coasting trade as between nation and subdivision thereof*—see note, 46 L. R. A. 277.

In commenting on this case, Judge Wayne says that the power to be exercised under state authority was after the passengers have landed. That on the question as to the exclusiveness of the power, the judges were divided, four being in favor of the exclusiveness, and three opposed, and to this state of opinion was owing the waiver above quoted.

7 How. 431.

In the *Passenger Cases*, 7 How. 400, Justice McLean said: The power to regulate commerce, foreign and between the states, was vested exclusively in Congress.

Justice Wayne: This power "includes navigation upon the high seas and in the bays, harbors, lakes, and navigable waters within the United States, and any law by a state in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the grant" (p. 414).

Justices Catron and Grier: "That Congress has regulated commerce and intercourse with foreign nations and between the several states by willing that it shall be free, and it is therefore not left to the direction of each state in the Union, either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it" (p. 464).

In *Cooley* v. *Port Wardens of Phil.* the court says: "Although Congress has legislated on the subject of pilotage, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects under the commercial power are under the exclusive control of Congress, or may be regulated by the states in the absence of all congressional legislation," etc.

12 How. 320.

But whether this power is exclusive or not, when Congress, in pursuance of the power, proceeds to regulate the subject matter, it necessarily includes state interference with the same subject-matter.

In *Houston* v. *Moore*, 5 Wheat. 1, the court says: "We are altogether incapable of comprehending how two distinct wills can at the same time be exercised in relation to the same subject, to be effectual and at the same time compatible with one another."

In *Prigg* v. *Commonwealth of Penn.* 16 Pet. 617, the language of the court is: "If Congress have a constitutional power to regulate a particular subject, and they do regulate it in a particular manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and as it were by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case the legislation of Congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it.

The license granted to the steamer to carry on the coasting trade, is a grant of authority to do whatever it purports to authorize. The states cannot add to the regulations made by the paramount authority, nor subtract anything from them.

Gibbons v. *Ogden*, 9 Wheat. 79; *The People* v. *Brooks*, 4 Den. 479.

The act of the state is in direct conflict with these principles; for, in effect, it declares that vessels engaged in foreign commerce or the coasting trade, shall not navigate its waters without complying with a condition not prescribed by the acts of Congress. If the state has power to inflict a penalty for the violation of the condition, it is equally authorized to use force to prevent the violation.

It is not pretended that the act is based on the police power of the state; neither the preservation of the health, morals, nor the peace of the community is affected by it. In the language of the supreme court of the state, its object is merely to "advance the remedies for torts or contracts done or made by the agents of steamboats," etc.

While the power of the state over its legal remedies is admitted, this, like the taxing power of the state, cannot be exercised so as to interfere with the power delegated to Congress to regulate commerce.

Brown v. *State of Maryland*, 12 Wheat. 419; *Hays* v. *Steamship Company*, 17 How. 599; *Towboat Company* v. *Steamboat Company*, Law Reg. March, 1857, p. 284.

The act of Congress of 29th of July, 1850, provides the mode by which sales and transfers shall be made, and what shall be the evidence of ownership, while the act of the state disregards the mode thus provided, and declares a different rule shall prevail in its courts.

Messrs. **C. C. Clay, Jr.,** and **J. T. Taylor,** for defendants in error.

1. There are three cases on appeal from the supreme court of Alabama against this defendant, now pending. The same question arises alike in all. See the cases reported in 28 Ala. 185. The only question to be determined by this court, is whether the act of the legislature of the state of Alabama is in violation of the Constitution of the United States.

The object sought and the evil intended to be cured by the act, is clearly indicated on its face. The narrow and shallow channels in the bay and interior rivers of Alabama, required the aid of legislative protection. Navigation would be impeded by the sinking of wrecks, discharged ballast, etc., by careless, negligent and irresponsible seamen. On the narrow rivers particularly, competition, strife, explosions and collisions were of frequent occurrence, against all which the legislature found it necessary to provide for the safety of navigation, and the protection of the life, property, and rights of all persons trading or navigating the waters. But the whole of these police regulations were rendered inefficient and irresponsible, employees rendered more reckless, from the fact that the responsibility could not be fixed on the owner and real wrongdoer.

To remedy this the act referred to was passed. The act does not in any way prohibit, obstruct, or interfere with free and uncontrolled navigation, and a compliance with it would not injure, but would encourage, both domestic and foreign trade and commerce.

Neither is the law partial; it acts alike on all, and is for the benefit and protection of all.

The act, therefore, being for the purpose of carrying out and rendering effectual the undisputed and police regulations of the state, is itself of the same police character admitted by undisputed authority to be within the power of the states.

The coasting license authorizes the navigation of the waters, and the carrying on of trade and commerce within the states, but it does not pretend to authorize a disregard of the police laws passed by the states for the observance of its own citizens. All laws for the protection of life, health, and property, inspection laws, and laws to prevent strife and confusion in bays, harbors, and rivers, and to secure the rights of vessels navigating the waters, are of this kind.

18 Ala. 185; 11 Pet. 102; 4 Sand. 492; 12 How. 299; 7 Ired. 321; 16 B. Mon. 699; 1 Park. C. R. 659, 583; 18 Miss. 283; 4 Rich. 286; 14 Tex. 153; 5 Tex. 426; 31 Me. 360; 18 Conn. 500; 32 Me. 383; 4 Ga. 26; 12 Conn. 7; 7 Shep. 353; 2 Spear, 769; 2 Pet. 251; 14 How. 574.

The legislature of New York passed "An Act Requiring the Master of Every Vessel Arriving at New York from a Foreign Port, or any Port of any Other of the States, Under Certain Penalties, to make a Report in Writing Containing the Names, etc., of all Passengers." The ship in question landed passengers, and failed and refused to file a report as required. A suit was brought for the penalty. The defense was that the law was unconstitutional; but it was held good, by the Supreme Court of the United States, as a police law. The case at bar and that above cited differ in this only—one requires the names of passengers to be recorded, and the other requires the owners' names to be recorded. The law of New York was for the protection of her citizens only. The act of Alabama was for the mutual benefit of all persons and vessels.

2 Pet. 102; 2 Paine, C. C. 429.

The state of Pennsylvania passed an act requiring all vessels to take a pilot, and on refusal, to pay to the master warden of the pilots, for the use of the society, etc., one half the regular amount of pilotage. The supreme court of Pennsylvania and the Supreme Court of the United States held, that this law was not void or inconsistent with the Constitution or any of the acts of Congress.

Cooley v. *Port Wardens, etc.*, 12 How. 299.

In the case of *Veazie* v. *Moor*, 14 How. 574, this court says: "The design and object of the clause of the Constitution under consideration was, to establish a perfect equality between the states, and to prevent unjust discrimination, etc., and in accordance therewith have been the expositions of this court in the decisions quoted by counsel, etc.

In nearly all the cases above referred to, it is held that a state has the right to make improvements in its navigable waters, in order to make the common right more beneficial to all, and to pass laws for mutual protection.

See, also, 18 Conn. 500; 4 Rich. 286; 44 Tex. 157; 4 Sand. 462, and the numerous cases there cited.

2. If it should be considered that the act of Alabama is not a police regulation, still, as it is necessary for the protection and security of the rights of all persons trading and navigating the rivers, and is not in direct conflict with any act of Congress, it will be held good. It was never intended by Congress, in passing general laws for all the waters of the Union, to prohibit the states from passing such other regulations not in conflict, that might be found necessary for safe and peaceful navigation on particular streams or localities. In 14 How. 296, it is said that "the grant of commercial power to Congress does not forbid the states from passing laws, not in conflict with the acts of Congress. The power to regulate commerce includes various subjects, upon some of which there should be uniform rule, and upon others different rules in different localities.

In the case, 4 Sand., the court, after commenting on the authorities of the Supreme Court of the United States, says: "If any principle may be deduced from the decisions and opinions of the judges of that high tribunal, it is this: that each state may pass such laws affecting commerce to operate within its own limits, not in conflict with the provisions of the Constitution of the United States or acts of Congress, as are necessary for the preservation of the life, the health, the personal rights and property of its citizens, and of those enjoying its protection." A great majority of the cases already cited hold the same. The object of the act of Alabama, was to afford all passengers and persons trading or navigating the waters, some certain evidence by which to sustain their rights or redress their wrongs, and a means of getting at the secret wrong-doers; to give fair play and ready redress to all. Upon examining this act with the acts of Congress, it will be seen that it does not conflict with the acts of Congress; it is rather in addition or in aid of the objects of those laws.

3. There are three classes of these cases appealed from the supreme court of Alabama, one of which was engaged in running from Mobile to Montgomery, one in towing vessels in and about the port of Mobile, and one between New Orleans and Montgomery. As to the first two boats mentioned, they are domestic vessels entirely, running on our own waters and within our limits, and so regularly occupied and engaged, and not between the ports of different states. The mere fact, therefore, that they happened to have a coasting license on board, cannot help them. The Supreme Court of the United States, in 14 How. 573, says: "These categories are: (1) Commerce with foreign nations; (2) commerce among the several states; (3) commerce with the Indian tribes. Taking the term 'commerce' in its broadest acceptation, supposing it to embrace not merely traffic but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contemplated by the law under review? Commerce with foreign nations must signify commerce which, in some sense, is necessarily connected with those nations; transactions which either immediately or at some stage of their progress, must be extraterritorial. It can never be applied to transactions wholly internal," etc.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Alabama.

The suit was brought by the plaintiffs below, commissioners of pilotage of the harbor of Mobile, against the steamboat Bagaby, of which Sinnot, the defendant, was master, to recover certain penalties for a violation of the law of the state of Alabama, passed February 15, 1854, entitled "An Act to Provide for the Registration of the Names of Steamboat Owners."

The 1st section of the act provides that it shall be the duty of the owners of steamboats navigating the waters of the state, before such boat shall leave the port of Mobile, to file in the office of the probate judge a statement in writing, setting forth the name of the steamboat and of the owner or owners, his or their place or places of residence, and their interest therein, which statement shall be signed and sworn to by the owners, or their agent or attorney, and which statement shall be recorded by the said judge of probate; and, also, in case of a sale of said boat, it is made the duty of the vendee to file a statement of the change of ownership, his place of residence, and the interest transferred, which statement shall be signed by the vendor and vendee, his or their agent or attorney, and recorded in the office of the aforesaid judge.

The 2d section provides, that if any person or persons, being owner or owners of any steamboat, shall run, or permit the same to be run or navigated, on any of the waters of the state, 239*] *without having first filed the statement as provided by the act, he or they shall forfeit the sum of $500, to be recovered in the name of the commissioners of pilotage of the bay of Mobile, either by a suit against the owners or by attachment against the boat, the one half to the use of the commissioners, and the other half to the person or persons who shall first inform said commissioners.

The steamboat Bagaby in question was seized and detained under this act until discharged, on a bond being given to pay and satisfy any judgment that might be rendered in the suit. A judgment was subsequently rendered against the vessel in the city court of Mobile, for the penalty of $500, with costs, which, on an appeal to the Supreme Court, was affirmed.

The material facts in the case are, that the steamboat was engaged in navigation and commerce between the city of New Orleans, in the state of Louisiana, and the cities of Montgomery and Wetumpka, in the state of Alabama, and that she touched at the city of Mobile only in the course of her navigation and trade between the ports and places above mentioned; that she was an American vessel, built at Pittsburg, in the state of Pennsylvania, and was duly enrolled and licensed in pursuance of the laws of the United States, and had been regularly cleared at the port of New Orleans for the ports of Montgomery and Wetumpka, whither she was destined at the time of the seizure and detention under the act in question.

The plaintiffs in error, the master, and stipulators in the court below, insist that the judgment rendered against them is erroneous, upon the ground that the statute of the legislature of the state of Alabama is unconstitutional and void, it being in conflict with that clause in the Constitution which confers upon Congress the power "to regulate commerce with foreign nations and among the several states," and the acts of Congress passed in pursuance thereof. The act of Congress relied on is that of the 18th February, 1793 (1 Stat. at L. 305), providing for the enrolment and license of vessels engaged in the coasting trade. The force and effect of this act was examined in the case of *Gibbons* v. *Ogden*, 9 Wheat. pp. 210, 214, and it was there held that vessels enrolled and licensed in pursuance of it had *conferred [*240 upon them as full and complete authority to carry on this trade as was in the power of Congress to confer.

The Chief Justice says (speaking of the 1st section): "This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted." Again; the court say, to construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act. And again; speaking of the license provided for in the 4th section, the word "license" means permission or authority; and a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license.

The license is general in its terms according to the form given in the act of Congress: "License is hereby granted for the said steamboat (naming her) to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

In the case already referred to, it was denied in the argument that these words authorized a voyage from New Jersey to New York. The court observed, in answer to this objection: It is true that no ports are specified; but it is equally true that the words are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it, and all know its meaning perfectly. The act describes with great minuteness the various operations of vessels engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

On looking into the act of Congress regulating the coasting trade, it will be found that many conditions are to be complied *with [*241 by the owners of vessels, before the granting of the enrolment or license. 1. The vessel must possess the same qualifications, and the same requisites must be complied with, as are made necessary to the registering of ships or vessels engaged in the foreign trade by the act of December 31, 1792 (1 Stat. at L. 287). These conditions are many and important, as will be seen by a reference to the act. 2. A bond must be given by the husband, or managing owner, and the master, with sureties to the sat-

satisfaction of the collector, conditioned that such vessel shall not be employed in any trade by which the United States shall be defrauded of its revenues; and also the master must make oath that he is a citizen of the United States; that the license shall not be used for any other vessel or any other employment than that for which it is granted, or in any trade or business in fraud of the public revenues, as a condition to the granting of the license. These are the guards and restraints, and the only guards and restraints which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon a compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as Congress is capable of conferring.

Now, the act of the legislature of the state of Alabama imposes another and an additional condition to the privilege of carrying on this trade within her waters, namely: the filing of a statement in writing, in the office of the probate judge of Mobile county, setting forth: (1) The name of the vessel; (2) the name of the owner or owners; (3) his or their place or places of residence and (4) the interest each has in the vessel. Which statement must be sworn to by the party or his agent or attorney. And the like statement, *mutatis mutandis*, is required to be made each time a change of owners of the vessel takes place. Unless this condition of navigation and trade within the waters of Alabama is complied with, the vessel is forbidden to leave the port of Mobile, under the penalty of $500 for each offense.

If the interpretation of the court, as to the force and effect of the privileges afforded to the vessel by the enrolment and license in the case of *Gibbons* v. *Ogden* are to be maintained 242*] *it can require no argument to show a direct conflict between this act of the state and the act of Congress regulating this trade. Certainly, if this state law can be upheld, the full enjoyment of the right to carry on the coasting trade, as heretofore adjudged by this court, under the enrolment and license, is denied to the vessel in question.

If anything further could be necessary, we might refer to the enrolment prescribed by the act of Congress, by which it is made the duty of the owner to furnish, under oath, to the collectors, all the information required by this state law, and which is incorporated in the body of the enrolment. Congress, therefore, has legislated on the very subject which the state act has undertaken to regulate, and has limited its regulation in the matter to a registry at the home port.

It has been argued, however, that this act of the state is but the exercise of a police power, which power has not been surrendered to the general government, but reserved to the states; and hence, even if the law should be found in conflict with the act of Congress, it must still be regarded as a valid law, and as excepted out of and from the commercial power.

This position is not a new one; it has often been presented to this court, and in every instance the same answer given to it. It was strongly pressed in the New York case of *Gibbons* v. *Ogden*. The court, in answer to it, observed: "It has been contended, that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes in conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other, like equal opposing forces." But, the court say, the framers of the Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary *to, the laws of Congress, made in pur- [*243 suance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress or treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. The same doctrine was asserted in the case of *Brown* v. *The State of Maryland*, 12 Wheat. pages 419, 449. and in numerous other cases. 5 How. pp. 573, 574, 579, 581; 2 Pet. 251, 252; 4 Wheat. pp. 405, 406, 436.

We agree, that in the application of this principle of supremacy of an act of Congress in a case where the state law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and also that the act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question.

The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state legislature derived its enactment.

This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power over the subject conferred upon that body by the states. They surrendered this power to the general government; and to the extent of the fair exercise of it by Congress, the act must be supreme.

The power of Congress, however, over the subject does not extend further than the regulation of commerce with foreign nations and among the several states. Beyond these limits the states have not surrendered their power over the subject, and may exercise it independently of any control or interference of the general government; and there has been much *controversy, and probably will continue [*244 to be, both by the bench and the bar, in fixing the true boundary line between the power of

Congress under the commercial grant and the power reserved to the states. But in all these discussions, or nearly all of them, it has been admitted, that if the act of Congress fell clearly within the power conferred upon that body by the Constitution, there was an end of the controversy. The law of Congress was supreme.

These questions have arisen under the quarantine and health laws of the states—laws imposing a tax upon imports and passengers, admitted to have been passed under the police power of the states, and which had not been surrendered to the general government. The laws of the states have been upheld by the court, except in cases where they were in conflict, or were adjudged by the court to be in conflict, with the act of Congress.

Upon the whole, after the maturest consideration the court have been able to give to the case, we are constrained to hold, that the act of legislature of the state is in conflict with the Constitution and law of the United States and, therefore, void.

The judgment of the court below is reversed.

PHINEAS O. FOSTER, Roger A. Heirne, and George J. Blakeslee, Owners of the Steamboat Swan, *Plffs. in Err.*,

v.

GORHAM DAVENPORT *et al.*, Commissioners of Pilotage of the Bay and Harbor of Mobile, *Libts.*

(See S. C. 22 How. 244-246.)

Sinnot v. *Davenport, ante, p 243, affirmed.*

The case is, in all respects, like the one of Sinnot v. Davenport, *ante*, 243.

This steamboat was employed in aid of vessels engaged in the foreign or coastwise trade, either in the delivery of their cargoes in or towing the vessels to port, which was but the prolongation of their voyage.

The case, therefore, is not distinguishable in principle from the one above referred to.

Argued Dec. 7, 1859. *Decided Dec. 27, 1859.*

IN ERROR to the Supreme Court of the State of Alabama.

This was an action in the nature of a libel filed in the city court of Mobile, in the state of Alabama, by the commissioners of pilotage, for the bay and harbor of Mobile, against the Steamboat Swan, claiming $500 for violation of an act entitled, "An Act to Provide for the Registration of Steamboats Owner," approved February 15, 1854.

The case having been submitted to the court on an agreed statement of facts, a decree was entered in favor of the libelants for the said amount, with costs.

On appeal to the Supreme Court, this decree was affirmed; whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

See, also, the preceding case.

Mr. **P. Phillips** for plaintiffs in error.

Messrs. **C. C. Clay, Jr.,** and **J. T. Taylor** for defendants in error.

For the argument, see argument of same counsel in the preceding cause.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Alabama.

The case is, in all respects, like the one just decided except it is insisted that the steamboat was employed as a lighter and towboat upon waters within the state of Alabama, and therefore engaged exclusively in the domestic trade and commerce of the state.

According to the admitted state of facts, this boat was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile, and the wharves of the city, and in towing vessels anchored there to and from the city, and, in some instances, towing the same beyond the outer bar of the bay, and into the gulf to the distance of several miles. This boat was duly enrolled and licensed to carry on the coasting trade at the time she was engaged in this business, and of the seizure under the state law.

It also appears from the answer, and which facts are admitted to be true, that the port of Mobile is resorted to and frequented by ships and vessels, of different size in tonnage, engaged in the trade and commerce of the United States with foreign nations and among the several states; that the vessels of small size and tonnage are accustomed to come up to the wharves of the city and discharge their cargo, but that large vessels frequenting said port cannot come up, on account of the shallowness of the waters in some parts of the bay, and are compelled to anchor at the lower bay, and to discharge and receive their cargo by lighters; and that the steamboat of claimants was engaged in lightering goods to and from said vessels, and in towing vessels to and from the lower bay and the wharves of the city.

*It is quite apparent, from the facts [*246 admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination. The case, therefore, is not distinguishable in principle from the one above referred to.

Judgment of the court below reversed.

EBER B. WARD, Survivor of Himself and Sam'l Ward, Deceased, Owner of the Steamboat Detroit, *Appt.*,

v.

CHARLES THOMPSON.

(See S. C. 22 How. 330–334.)

Admiralty has no jurisdiction of contract of partnership in a ship—what is such partnership.

A court of admiralty will not assume jurisdiction of a contract of partnership in the earnings of a ship.

If the party desires an account, his remedy is in a court of chancery.

If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law.

Where the parties have joined together to carry on a certain adventure or trade, for their mutual profit—one contributing the vessel, the other his skill, labor and experience, etc., and there is a communion of profits, on a fixed ratio, it is a partnership.

Of such a contract, a court of admiralty has no jurisdiction.

Submitted Dec. 13, 1859. Decided Dec. 27, 1859.

APPEAL from the Circuit Court of the United States for the District of Michigan.

The libel in this case was filed in the district court of the United States for the district of Michigan, by the appellant, against Charles Thompson, the appellee, for breach of a certain contract.

The libel alleged "that in the month of June, 1852, the libelant and Samuel Ward chartered the steamboat Detroit to said Thompson for two years as follows: This libelant was to furnish said steamboat to said Thompson in good order and condition, which he complied with in all respects. The said Thompson was to run said boat between Penetanguishene and other ports on the Georgian bay and the Sault Ste. Marie, as a passenger and freight boat. That he was to employ good, careful, and competent officers and men on board of said boat, except the clerk, who was to be employed by this libelant. That the clerk was to receive all the earnings of said boat; and after paying her expenses, to remit the first net $6.000, to this libelant, and one half of the further net proceeds."

These allegations formed the substance of the contract in question.

A preliminary motion by the respondent, Thompson, to dismiss the libel was made and heard on the ground that the contract was one of partnership. The court held otherwise. The cause was then heard on the merits, and the court dismissed the libel on the ground that Ward had himself violated the contract by instigating a seizure by the United States collector, and by not restoring the boat afterwards to Thompson. The libelant thereupon appealed to the circuit court, which court affirmed the decree below, but on a different ground, to wit: on the ground that the contract was one of partnership, and the court had no jurisdiction.

From this decree Ward has appealed to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **John S. Newberry** and **A. Russell**, for appellant.

We submit that the district court has jurisdiction over contracts relating to vessels engaged in foreign trade upon the lakes, independently of the act of February 26, 1845, by virtue of the Federal Constitution and the judiciary act of September 24. 1789. In other words, the admiralty jurisdiction embraced the lakes and other navigable waters, and was not confined to tide waters. This doctrine is fully stated in the case of *The Genesee Chief*, 12 How. 443, and it is, we submit, the correct doctrine.

2 Conk. Adm. p. 16.

If this be so, then the act of 1845 is merely declaratory of the previous law, so far as it goes.

It cannot be considered a restraining act, so far as to exclude jurisdiction not embraced within its terms; for it purports, and was evidently intended, to be an enlarging act.

The contract in question was a species of charter-party, in which the owner parts with the entire possession to the charterer.

NOTE.—*Admiralty jurisdiction as to matters of contract*—see notes, 18 C. C. A. 347; 27 C. C. A. 530.

Partnership; when a community of profits creates a partnership; exceptions.

To constitute a partnership there must be a community of interests, a participation in profit and loss. Felichy v. Hamilton, 1 Wash. 491; Coope v. Eyre, 1 H. Bl. 37; Forbes, Inst. of Scot. Law, part 2, b. 3, § 3, p. 184; Domat. Civ. Law, vol. I. p. 85; 3 Kent's Com. p. 23; Gow on Part. p. 1; Green v. Beesley, 2 Bing. N. C. 108; Bond v. Pittard, 3 Mees. & W. 357.

A participation in the profits is sufficient to constitute a partnership, because an agreement to share profits, alone, cannot prevent the legal consequences of also sharing losses for the benefit of creditors. Participation in profit will constitute a partnership as to third persons at least. *Ex parte* Langdale, 18 Ves. 301; Bisset on Part. p. 6; Waugh v. Carver, 2 H. Bl. 235; Cheap v. Cramond, 4 Barn. & A. 663; Guthwaite v. Duckworth, 12 East, 421; Wightman v. Townroe, 1 Maule & S. 412; Gilpin v. Enderby, 5 Barn. & A. 954, 1 Dow. & Ry. 570; Bloxon v. Pell, 2 W. Bl. 999; Grace v. Smith, 2 W. Bl. 998; Young v. Axwell, 2 H. Bl. 242; *Ex parte* Wheeler, Buck, 48; Geddes v. Wallace, 2 Bligh, 270; Richardson v. Debuys, 16 Mart. 127.

A dormant partner is liable because he takes part of the profits, which is part of the fund the creditor looks to, to satisfy his demand. Freel v. The Campbells, Cooke, 8.

As towards third persons a partnership may arise by mere operation of law, against the intention of the parties thereto; but the actual intention or agreement of the parties will alone constitute a partnership as between themselves. Hazard v. Hazard, 1 Story, C. C. 371, and cases cited. Gill v. Kuhn, 6 S. & R. 333.

The law will not allow one who participates in profits to withdraw from the obligations of a partner. Hesketh v. Blanchard, 4 East, 144; Perry v. Hone, 2 Car. & P. 401; Meyer v. Sharpe, 5 Taunt. 74; Peacock v. Peacock, 2 Camp. 45; 16 Ves. 56; Miller v. Hughes, 1 Mass. 54; Smith v. Watson, 2 Barn & C. 401, 3 Dow. & Ry. 751.

The general rule that actual participation in profits creates a partnership as towards third persons, has no application to a case of mere service or special agency, where the employee has no power in the firm and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same, or to compel an account. Berthold v. Goldsmith, 65 U. S. post, 762.

Share of the profits as interest on money loaned, or for services, does not constitute a partnership. Pleasants v. Fants, 22 Wall. 116; *In Re* Francis, 2 Sawy. 286, 7 Bank. Reg. 359; Bigelow v. Elliot, 1 Cliff. 24; Moore v. Walt, 9 Bank. Reg. 402; *In Re* Ward, 25 Int. Rev. Rec. 289, 8 Rep. 136; *In Re* Blumenthal, 18 Bank. Reg. 555.

An agreement between two persons that one is to devote his time to the manufacture of goods and receive for his services one half of the profits from sales of one of the articles so manufactured, does

Drinkwater v. *The Spartan*, 1 Ware, 149, 156; *The Phebe*, 1 Ware, 263; *Marcadier* v. *Chesapeake Ins. Co.* 8 Cranch, 39, 49; *Clarkson* v. *Edes*, 4 Cow. 470, 476.

The contract was maritime in its nature, and to be performed wholly on the sea.

From the nature of the case, no maritime lien exists; nor is any claimed here. Our only remedy is *in personam*.

The action is between a citizen and an alien, so that the Federal courts have jurisdiction.

Messrs. **George E. Hand** and **George V. N. Lothrop**, for appellee:

The district court had no jurisdiction in admiralty, of this cause.

The district court has no general admiralty jurisdiction. It possesses jurisdiction solely by the act of Congress of February 26, 1845. This objection was not taken below. Before the decisions of this court at the last term, an impression prevailed that the act of Congress was to be construed with greater latitude. But those decisions have indicated the limitations.

Allen v. *Newberry*, 62 U. S. (21 How.) 244.

And it is never too late to interpose this objection.

Cutler v. *Rae*, 7 How. 729.

We also insist that the Wards and Thompson were partners under the agreement of June 10, 1852; and that this court has no jurisdiction of partnership matters.

We insist that the libelant is estopped to deny the partnership. It was, before this libel was filed, *res adjudicata*.

The very question had arisen in a civil action brought by Thompson against the Wards in the Queen's Bench of Canada. The point was expressly raised by the Wards, ruled in their favor, and they had the benefit of it.

See Sto. Confl. Laws, §§ 604, 609; 1 Greenl. Ev. §§ 22, 207.

As to whether the contract in question was a partnership, see Coll. on Part. 2, 13; *Champion* v. *Bostwick*, 18 Wend. 183.

The last American edition of Coll. Part. brings together nearly the whole learning of the American and English law on this subject. Book 1, ch. 1, § 1.

But as we understand it, this point has been passed on in this court in late decisions.

Vandewater v. *Mills*, 60 U. S. (19 How.) 82; *Grant* v. *Poillon*, 61 U. S. (20 How.) 162.

Mr. Justice **Grier** delivered the opinion of the court:

The articles of agreement containing the contract, which is the subject matter of this suit, are denominated in the libel a charter-party of the steamboat Detroit to respondent. The answer denies that he had chartered the vessel, and alleges that the writing declared on is a contract of partnership, and *not a [*333 charter-party. The circuit court agreed with the respondent as to the construction of the contract, and consequently dismissed the bill.

A court of admiralty takes cognizance of certain questions between part owners, as to the possession and employment of the ship, but will not assume jurisdiction in matters of account between them. *The Orleans* v. *Phœbus*, 11 Pet. 175. It is not disputed that a contract of partnership in the earnings of a ship comes within the same category. If the party desires an account, his remedy is in a court of chancery. If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law.

A charter-party is defined to be "a contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of goods on a determined voyage to one or more places."

A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits.

The only characteristics of a charter-party to be found in this contract are, that the subject of it is a ship, and that libelants are owners. There is no letting or hiring of the ship to the respondent for a given voyage, to be employed by him for his own profit. On the contrary, the Wards contributed a steamboat, to be put into a line for freight and passengers, which has also a contract for carrying the mail. Thompson contributes the good will of an es-

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not constitute a partnership, *inter se*. Moore v. Allison, 14 Week. Dig. 265.

Where R. advanced to M., a showman, $700, upon the agreement that after the payment of all expenses R. was to receive back the $700, and one half of the net profits, held, that R. and M. were partners as to third person, irrespective of any agreement to the contrary between themselves. Haas v. Roat, 26 Hun, 632; 16 Hun, 526.

A person who has no interest in the business of a firm nor in the capital invested, save that he is to receive a share of the profits for money loaned for the benefit of the business is not a partner, and is not liable as such. Curry v. Fowler, 87 N. Y. 33, 13 Week. Dig. 287, 41 Am. Rep. Aff'g 46 N. Y. Super. (14 J. & S.) 195; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Eager v. Crawford, 76 N. Y. 97.

The test of partnership is a community of profit, a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services. Loomis v. Marshall, 12 Conn. 69; Champion v. Bostwick, 18 Wend. 175; Vanderburg v. Hull, 20 Wend. 70; *Ex parte* Hamper, 17 Ves. 404; Story on Part. p. 51; 3 Kent's Com. 34; Burnett v. Snyder, 81 N. Y. 550.

An agreement between creditors of a particular debtor to advance the moneys necessary to carry on the business of their debtor for their own profit they to contribute the funds, to purchase stock, in equal proportions, and the profits and losses of the enterprise to be shared by them equally, it seems, makes them partners in respect to that enterprise. Wills v. Simmons, 51 How. Pr. 48.

As to the community of profits constituting a partnership or a mere rate of compensation, see, also, Bisset on Part. pp. 9-32.

Where seamen take a share, by agreement with the ship owner, in the profits of a whale fishery, by way of compensation for their services, or in shipments to India, which is usual, the responsibility of partners has never been supposed to attach. Dixon v. Cooper, 3 Willes, 40; Benjamin v. Porteus, 2. H. Bl. 590; Wilkinson v. Frazier, 4 Esp. 182; Mair v. Glennie, 4 Maule & S. 240; Wallace v. Geddes, 1 Bligh, 270; *Ex parte* Rawlinson, 1 Rose, 89; *Ex parte* Watson, 19 Ves. 458; Barkire v. Scott, 1 Hud. & Bro. 83; Goode v. Harrison, 5 Barn. & Ald. 150; Muzzey v. Whitney, 10 Johns. 226; Rice v. Austin, 17 Mass. 206; Cutler v. Windsor, 6 Pick. 335; Harden v. Taxcoft, 6 Greenl. 76; Lowry v. Brooks, 2 McCord, 421; Chase v. Barrett, 4 Paige, 148; Bond v. Battard, 2 Mees. & W. 357; Turner v. Russell, 14 Pick. 192; Ambler v. Bradley, 6 Vt. 119; Porter v. McClure, 15 Wend. 187; Campbell v. Calhoun, 1 Pa. 140; Boyer v. Anderson, 2 Leigh, 550; Ross v. Drinker, 2 Hall, 415; Green v. Beesley, 2 Ring. N. S. 108; The Crusader, Ware, 437; Loomis v. Marshall, 12 Conn. 69; Story on Part. pp. 60-75; Call. on Part. 17; 3 Kent's Com. 34; Cary on Part. 11.

tablished line, together with his care, skill, and experience. He is to have the general management of the business, and the selection of the officers and crew; but the clerk, or receiving and disbursing agent, is to be appointed by the Wards, and to be under their control.

The receipts of the steamer are to be applied—

1st. To pay expenses.

2d. Insurance.

3d. Six thousand dollars to Ward.

4th. Three hundred to Thompson.

5th. The balance of the profits to be equally divided.

334*] *Here we have everything necessary to constitute a partnership.

1st. The parties have joined together to carry on a certain adventure or trade, for their mutual profit—one contributing the vessel, the other his skill, labor, and experience, etc.

2d. There is a communion of profits, on a fixed ratio.

Of such a contract, a court of admiralty has no jurisdiction.

The decree of the Circuit Court is, therefore, affirmed, with costs.

DAVID MAXWELL and Thomas Watkins and Mary Watkins, his Wife, *Plffs. in Err.*,

v.

ISRAEL M. MOORE, Madison M. Morris, Henry Morris, James P. Kellem, John F. Black, James F. Batte, and William M. Craig.

(See S. C. 22 How. 185-191.)

State decision, as to state statute, conclusive—soldier's land—courts cannot add exception to statute.

Where it has been decided by the supreme court of Arkansas that a special act of that state authorized the administrator to make a valid deed, and devest the title of the heirs, such decision on the effect of the state law, is conclusive on this court.

The act of 1826, allowing the soldier to exchange his land, did not carry with it the prohibition against alienation, contained in the act of 1812.

Where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so.

Submitted Dec. 8, 1859. Decided Dec. 27, 1859.

IN ERROR to the Supreme Court of the State of Arkansas.

This was an action of ejectment brought in the circuit court of White county, Arkansas, by the plaintiffs in error, the grantees of the heirs at law of Allen McVey, deceased, to recover a certain quarter section of land.

The trial resulted in a verdict and judgment for the defendants. This judgment having been affirmed by the supreme court of Arkansas, the plaintiffs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **A. Fowler**, for plaintiffs in error:

By the act of Congress approved May 6, 1812, granting bounty lands to soldiers, their heirs and legal representatives, it is expressly declared that "all sales, mortgages, contracts, or agreements of any nature whatever, made prior thereto"—the issuance of the patent—"should be held null and void."

2 U. S. Stat. at L. 729.

The act of May 22, 1826, on the same subject, declares that a soldier or his heirs to whom bounty land has been patented in Arkansas, and is unfit for cultivation, who has removed or shall remove to Arkansas, with a view to actual settlement on the land, etc., may relinquish such land to the United States, and enter a like quantity of land elsewhere in the district, etc., which may be patented to him, etc.

4 Stat. at L. p. 190, ch. 147.

This latter act was afterwards revised and continued in force by act of May 27, 1840.

See 5 Story U. S. L. p. 2792.

The several amendatory acts engrafted on the act of May 6, 1812, continue also in force the prohibitory clause declaring all sales, contracts, etc., void where they are made before the patent issues. The contract of sale made by McVey to Pelham was null and void; and the land entered and patented in McVey's name, inured to the benefit of his heirs and their assignees after the patent was issued—and not to Pelham or his assignees under such void contract.

The circuit court twice expressly decided that the contract of sale from McVey to Pelham was valid, denying distinctly the rights of McVey's heirs and their assignees under these acts of Congress; which the supreme court of the state broadly affirmed.

18 Ark. 475, 480.

Hence the plaintiffs have a right to a revision of the judgment, under the 25th section of the judiciary act of 1789.

The whole legislation upon these bounty lands, especially the acts above referred to, shows exclusively the intention of Congress to guard and protect the rights of the soldier and his heirs, and to prevent speculation in the lands.

And in all such cases, the courts construe such acts favorably and liberally for the protection of the recipients of the bounty of the government, and against the speculators in such bounty.

Opinion of Atty. Gen. Taney, No. 115, § 2, Laws Instr. & Opin. p. 177; *Nick's Heirs* v. *Rector*, 4 Ark. 279; *Ross* v. *Doe, ex dem. Barland*, 1 Pet. 667; *Wynn* v. *Garland*, 16 Ark. 462; *McElyea* v. *Hayter*, 2 Port. Ala. 152.

The established rule of construction, and which it is insisted on the part of the plaintiffs in error is applicable to and protects them in this case is, that where there are several legislative acts *in pari materia*, relating to the same subject-matter as these are, they must be taken together and compared, in their construction as one act. They must be considered as all governed by one spirit and policy, and intending to be consistent and harmonious in all their parts and provisions.

1 Kent's Com. 5th ed. 463; *White* v. *Johnson*, 23 Miss. 74; *Rex* v. *Loxdale*, 1 Burn. 447; *Ailesbury* v. *Pattison*, 1 Doug. 30; Sm. Const. & Stat. Const. §§ 636-639, 642, 643.

And the foregoing rule applies, although

NOTE.—*Conclusiveness and effect of judgments as between Federal and state courts*—see notes, 21 C. C. A. 478; 49 C. C. A. 468.

some of the statutes may have expired or are not referred to in the subsequent acts.

1 Kent's Com. 5th ed. 463; *Rex* v. *Loxdale*, 1 Burn. 447; Sm. Const. and Stat. Constr. §§ 637, 638.

Even in case of a subsequent and amendatory act of limitation not providing for a case specified in the former act, it will, by the court, be intended and presumed that the legislature designed the latter to be governed by the former act.

Robertson v. *DeMoss*, 23 Miss. 301; see, also, on this point, Sm. Const. and Stat. Const. §§ 638 and 643.

The intention of Congress, from a fair construction of the several acts on the subject, was manifestly to protect the soldier in his float, as much as in his original warrant, and in either case to make all contracts of sale before the issuing of the patent, void. And an object or thing which is within the intention of the legislature in making a statute, is as much within the statute as if it were within the letter.

People v. *Utica Ins. Co.* 15 Johns. 380, 381; Sm. Const. and Stat. Const. § 510.

Mr. **Geo. C. Watkins**, for the defendants in error:

1. Both parties claim title to the land in controversy, under a patent from the United States to Allen McVey. It is not, therefore, in the mouth of either party to question that title. The presumption would be that the patent emanated regularly and in accordance with law, even if that did not appear on this record; for example, the patent was not issued until after McVey's death, but since the act of Congress of May 20, 1836, that defect is fully cured.

See *Galloway* v. *Finley*, 12 Pet. 264.

Whether the patentee had died before the patent issued and before the location was made, the patent was held valid under that act.

See, also, *Hansford* v. *Minor's Heirs*, 4 Bibb. 385; *McCracken* v. *Beal*, 3 A. K. Marsh. 208; *Bowman* v. *Violet*, 4 Mon. 351; *Adams* v. *Logan*, 6 Mon. 177; *Lewis* v. *McGee*, 1 A. K. Marsh. 200; *Skeene* v. *Fishback*, 1 A. K. Marsh. 356.

It is true that the military bounty act of 1812 contained a prohibition against any sale or assignment by the soldier, of his bounty, until after the issuance of the patent, declaring all such assignments void. There was a motive as expressed in the act itself, which was to prevent the land, so long as the title remained in the government, from being subject to the debts of the soldiers. And the reason of the law was, to take away from the soldier the temptation of selling his equitable interest in a tract of land situate in a new and wild region of country, at a great distance from the soldier, and which he had never visited, nor had any opportunities for judging of its value.

But as those military bounties were selected by lottery, it inevitably resulted that in many instances the lands proved unfit for cultivation and worthless, and on the 22d May, 1826, an act of Congress was passed, authorizing the soldier to surrender and reconvey to the United States the bounty tract which had been patented to him. and to locate in lieu of it a like quantity of the public land within the military district, on proof to the satisfaction of the proper register and receiver that the tract originally patented to him was unfit for cultivation, and that his right to it had not been devested or incumbered by sale or otherwise; and in order to entitle himself to the benefits of the act, the soldier must have removed to the territory of Arkansas, with a view to actual settlement on the land drawn by him. This act was revived and extended by various acts until the act of 27th May, 1840, which revived and extended it for five years from that date. Such rights to locate were called "floats," and as proved in this case, and indeed a part of the public history of Arkansas, were the common subject of sale and transfer. At the time McVey sold his right of float to William Pelham, the act of 1840, authorizing such floats, was in force. If it was a power coupled with an interest, it did not cease after McVey's death. But if it was a mere naked power, it did cease, and the location, etc., was void, and the plaintiffs, as heirs of McVey, cannot claim under it. But the plaintiffs are bound to claim under the patent, and so recognize the validity of Pelham's acts, and as a consequence, the validity of his title, because, unless he acted for himself, and not as the mere naked agent of McVey, he had no power to act.

This restriction against assignment in the bounty act of 1812 is not included within the terms, spirit, or policy of the acts of 1826, 1830, and 1840, allowing floats. Here the sale was not of the land drawn by the soldier, but of his floating right, a mere chose in action (*Mulholllan* v. *Thomson*, 13 Ark. 232), and after all the purposes of the act of 1812 had been accomplished. McVey, in receiving pay for the sale of his float, would be guilty of an immoral and fraudulent act, to attempt to repudiate it. His supposed heirs, or rather those who tampered with them, stand in no better situation. Besides, according to the whole theory of our government, laws restricting alienation are to be strictly construed and not extended, without an express intention appears. It is inconsistent with the nature of property, if the individual owning property or a right to property has not the power to alienate it.

4 Kent's Com. 479.

But again, both parties in this action must concede that the title is out of the government by the patent to McVey, because without that neither has any pretense of title. The act of assembly authorizing the administrator of McVey to convey was passed after the issuance of the patent, and when the title was beyond the control of the general government, and so far as the legal title is concerned, the question is not whether the legislature ought to have passed such an act; but the question is, had that body the power; just as the question is, whether a court has jurisdiction.

But the right of the defendants to the land in controversy is good and available to them in this action, without reference to the act of the legislature, and without being bolstered up by it in any way. When it is considered that Maxwell and Walker must have known of the sale of his float by McVey to Pelham, they must have known that the fact of the sale from McVey to Pelham could be established.

Many worthless lands were relinquished to the United States, and floats obtained for others

to be located in lieu of them. Floating rights were freely bought and sold for the then market value, and because of the delay, often several years, in the issuance of patents, the lands when located frequently change owners, the same as other lands before the issuance of a patent. Many valuable improvements have been made on lands thus acquired and held.

In a newly settled country, wild lands are only made valuable by the toil and expense of clearing and improving them. If, then, there be any question whether all of the restrictions of the bounty act of 1812, upon the alienation, before the issuance of the patent, of the tract originally allotted to the soldier, apply to the lands located in lieu of them, under the act of 1826, and the subsequent act continuing it in force, such a question becomes one of serious magnitude. Disaster and confusion must ever attend the disturbance of titles settled and acquiesced in.

The act of 1812 was passed for a specific object, *i. e.*, to give and secure a bounty to the soldier, restricting and protecting his rights down to the issuance of the patent. After that object had been accomplished, ensued the operation of the act of 1826. That act is in no sense supplementary to the act of 1812. It does not re-enact or revive, or extend any of its provisions, so as also to revive by implication any of its restrictions. It granted no bounties, but dealt with those who had received their bounties and, by the issuance of patents, had become clothed with all the authority and free agency of ownership. They were no longer soldiers, but citizens and inhabitants of the territory to which they had removed with a view to actual settlement. The whole scope of the act of 1826 is to make provisions for an exchange of lands in certain cases, presupposing that all the provisions of the act of 1812 had been accomplished.

Mr. Justice **Catron** delivered the opinion of the court:

This cause is brought before us by writ of error to the supreme court of Arkansas, and presents a single question for our consideration.

Allen McVey served as a regular soldier in the war of 1812, and was entitled to a tract of 160 acres of land as a bounty for his services. The land was located and granted in what is now the state of Arkansas. By the act of May 6, 1812 (2 Stat. at L. 728), which granted the bounty lands, all sales or agreements made by a grantee of these lands, before the patent issued, were declared to be void.

Many tracts of the lands granted turned out to be unfit for cultivation, so that the soldier took no benefit; and, as compensation, the act of May 22, 1826 (4 Stat. at L. 190), declares that the soldier, or his heirs, to whom bounty land had been patented in the territory of Arkansas, and which is unfit for cultivation, and who has removed or shall remove to Arkansas with a view to actual settlement on the land, may relinquish it to the United States, and enter a like quantity elsewhere in the district, which may be patented to him. This act was continued in force by that of May 27, 1840. (5 Stat. at. L. 380.)

McVey surrendered his first patent according to the act of 1826, and in 1842 another issued in his name for the land in dispute.

In 1834 McVey gave William Pelham a bond to convey to him the land that might be entered on his certificate of surrender (known as a float) and a power of attorney to locate the same, and obtain the patent. McVey died in 1836. In 1842 Pelham entered the land in controversy in McVey's name.

*A special act of the legislature of [*191 the state of Arkansas was passed, authorizing McVey's administrator to convey the land to Pelham, which was done.

Afterwards, the plaintiffs in error obtained a conveyance from the heirs of McVey, on which their action of ejectment is founded. As the title vested in Allen McVey's heirs by the patent of 1842, they could well convey the land unless the administrator's deed stood in the way. *Galloway* v. *Finley*, 12 Pet. 264. That the special act of assembly authorized the administrator to make a valid deed and devest the title of the heirs, was decided in this case by the supreme court of Arkansas, and which decision on the effect of the state law is conclusive on this court. We exercise jurisdiction to revise errors committed by state courts, where the plaintiff in error claims title by force of an act of Congress, and the title has been rejected on the ground that the act did not support it. And this raises the question, whether the act of 1826 (4 Stat. at L. 190), allowing the soldier to exchange his land, carried with it the prohibition against alienation contained in the act of 1812 (2 Stat. at L. 728).

The court below held that it did not, and that Allen McVey did lawfully bind himself to Pelham for title.

It is insisted that the acts of 1812 and 1826 are on the same subject, must stand together as one provision, and the last act carry with it the prohibition found in the first. We are of the opinion that the acts have no necessary connection; that there was no good reason why the soldier who removed to Arkansas, and inspected his tract of land, then patented, and alienable, should not contract to convey the tract he might get in exchange. We can only here say, as we did in the case of *French* v. *Spencer*, 21 How. 238, that the act of 1826 is plain on its face and single in its purpose; and that in such cases the rule is, that where the legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so.

There being no other question presented by the record within the jurisdiction conferred on this court by the 25th section of the Judiciary Act, we order that judgment of the Supreme Court of Arkansas be affirmed.

ELISHA MORRILL, *Plff. in Err.*,
v.
JOHN CONE and Carlos J. Cone.

(See S. C. 22 How. 75-83.)

Acts of special agent must be within his authority—recitals in attorney's deed not evidence of his authority—admission of payment in, when good—principal not estopped—incompetent testimony.

When the authority conferred by letter of attorney is special and limited, the agent's acts under it, are valid only as they come within its scope and operation.

Bona fide purchasers are not entitled to repose credit in the recitals and declarations of the attorney, as expressed in his deed, that disclose the mode in which the authority has been exercised, and will not be protected against their falsity.

The principal is not estopped to deny their truth.

Where the deed, executed by an attorney, is apparently within the scope of his power, the admission therein of payment of the consideration, is competent testimony of the fact. But it is competent to his principal to show that the transaction was in appearance only, and not in fact, within the authority bestowed.

Testimony of one of the donors of the power, that he is informed and believes that the purchase money had not been paid to the grantors, was not admissible.

Submitted Dec. 7, 1859. Decided Dec. 30, 1859.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment brought in the court below, by Morrill, the present plaintiff in error, against the present defendants in error.

The trial resulted in a verdict and judgment for the defendants; whereupon the plaintiff sued out this writ of error to this court, alleging error in the instructions of the court.

A further statement of the case appears in the opinion of the court.

Messrs. **Williams, Grimshaw, & Williams,** for plaintiff in error:

We insist that Beck's authority to sell and convey was a special and limited, and not a general power; that the taking of sufficient security on real estate, was an indispensable condition upon which his right to sell and convey depended, and that purchasers claiming under that power were bound, at their peril, to see that this condition was complied with, and that as the land was sold on a credit and no security for the purchase money was given or taken, the conveyance made by Beck was absolutely null and void.

Sug. Pow. 210, 262, 267, cases cited; 4 Cruise Dig. 146, 200; 1 Phil. Ev. 468; 1 Story on Agen. §§ 72, 126. 133; 4 Kent's Com. 329; *Thatcher* v. *Powell*, 6 Wheat. 119; *Williams* v. *Peyton*, 4 Wheat. 77; *Nalle* v. *Fenwick*, 4 Rand. 585; *Williamson* v. *Berry*, 8 How. 495; *Williamson* v. *Irish Presb. Cong.* 8 How. 565; *Williamson* v. *Ball*, 8 How. 566.

It is certainly true as a general principle, that no person can sell and convey a valid title to the land of another, without express authority to do so. It would be extremely dangerous to the security of land titles, to hold that when a person attempts so to do the owner would thereby lose his land, simply because he failed to sue for it or otherwise assert his right to it, when no person is occupying or otherwise interfering with it. Without going this length, it is impossible to sustain the title of the defendants and the judgment of the court below. It is a new and original idea, that a void title may become valid simply by lapse of time. Soldiers frequently sold, or gave powers of attorney to others to convey, their bounty lands, from 1815 to 1817, before the patent issued. If such persons have paid the taxes to the present time and the soldier has entirely neglected the land until recently, as well might it be said that these conveyances have become valid by lapse of time and the neglect and acquiescence of the owner; yet this idea has hardly entered into the conception of any lawyer, and such title has recently been sustained by the supreme court of Illinois.

Rose v. *Buckland*, 17 Ill. 310.

In both cases the conveyance is void. In the first case the power of attorney is void, in the other the act of the attorney is void; but this makes no difference in principle. One void act may be ratified or become valid by lapse of time and acquiescence, as well as another, without reference to the particular cause which renders them void. Being void, they are subject alike to the same law and incidents.

Gantly v. *Ewing*, 3 How. 713.

Mr. **O. H. Browning,** for defendant in error:

Nathaniel Abbott, with full knowledge that Beck, purporting to act as his attorney, had in his name, on September 12, 1820, signed, sealed, acknowledged, and delivered to O'Hara, a deed whereby he, said Abbott, purported to convey to said O'Hara in fee simple the land in controversy; in February, 1821, duly executed and transmitted to Beck a power of attorney to be spread upon the records authorizing Beck, for him and in his name, to sell and convey the land; and deliberately, and with the express intention of covering what had been already done by Beck, and to give it the semblance, lineaments, and features of a pre-existing instrument, antedated it, July 14, 1820; and thus antedated, with its apparent priority in time to the deed made by Beck in September, it was put upon record for the inspection of all who might afterwards come to purchase the land conveyed apparently by its authority.

Thirty years after all this, the defendant, in good faith, purchased the land, and now Mr Abbott wishes to repudiate the entire transaction upon the ground that when the deed was made the power of attorney had no existence, in fact, admitting at the same time, that he did afterwards execute the power of attorney and antedate it. Every principle of law and justice requires that Abbott and all who claim under him, should be absolutely estopped to deny that Beck, when he made the deed, had the power of attorney with its date of July 14, 1820, by which he was invested with full power to convey.

1 Greenl. Ev. §§ 22, 23, 207, 208; *Carver* v. *Jackson*, 4 Pet. 83; Story, Agen. §§ 239, 242, 244, n. 1; *Maclean* v. *Dunn*, 4 Bing. 722; *Barbour* v. *Craig*, Lit. Sel. Cas. 213; *Cairnes* v. *Bleecker*, 12 Johns. 300; *Jackson* v. *Richtmyer*, 13 Johns. 367; *Clark* v. *VanRiemsdyk*, 9 Cranch, 153; *Fresh* v. *Gilson*, 16 Pet. 327; *Copeland* v. *Mercantile Ins. Co.* 6 Pick. 203; *McCoy* v. *Morrow*, 18 Ill. 523.

Mr. Justice **Campbell** delivered the opinion of the court:

This suit was brought for the recovery of a parcel of land *lying in the tract ap- [*80 propriated for military bounties in Illinois, and granted by the United States in 1818 to Benjamin Abbott, a private in their army in the war of 1812, as bounty. The title of the plaintiff consisted of a certified copy of the patent to Abbott, and a quitclaim deed of Abbott to him, dated in 1855. He also produced a deed from Nathaniel Abbott to him, dated in 1838. The defendants exhibited the original patent to Abbott; his deed to Nathan-

iel Abbott, dated in 1818, for the same land; a deed from Nathaniel Abbott, John Low, and John D. Abbott, dated 12th September, 1820, to William O'Hara, and executed by Abraham Beck as attorney, and connected themselves with this deed by a number of mesne conveyances, the last of which was to the defendants, and was executed in April, 1850. They entered upon the land under this deed, and paid taxes until the commencement of this suit. These conveyances were recorded in the proper office. The questions presented by the bill of exceptions sealed for the plaintiff on the trial arise on the conveyance to Wm. O'Hara, by Nathaniel Abbott, John Low, and John D. Abbott.

This deed purports to have been made upon a pecuniary consideration, the amount and receipt of which is acknowledged. The letter of attorney to Beck is dated the 14th July, 1820, and was recorded the 30th July, 1821. It authorizes the attorney to sell and convey some sixty-four parcels of land, including the one in dispute, in the military tract described in a schedule annexed, for such price and to such persons as he might think fit, and to make, execute, and deliver good and sufficient warranty deeds to them. To the ordinary *testimonium* clause a proviso was added, "that the condition is understood to be such, that our said attorney is to take sufficient security on real estate for all the lands which may be sold on a credit." The donors of this power of attorney reside in New Hampshire; the attorney in Missouri.

The plaintiff read a deposition of John Low, one of the donors of the power, from which we collect that Beck, the attorney, was verbally authorized to find a purchaser for the lands described in the schedule, and other parcels in the military tract in Illinois, and agreed with 81*] O'Hara upon the price *and term of credit. That this agreement was communicated by letter to the witness, who sanctioned it, and sent a power of attorney to Beck to complete the sale and to execute the titles, but to reserve a mortgage on the lands sold to secure the payment of the purchase money.

O'Hara objected to giving a mortgage upon the lands purchased by him, but offered to give security upon other real property. Thereupon the attorney prepared a deed for all the lands embraced in the contract to O'Hara, and took his notes for the purchase money, and gave to him his guaranty that his constituents would confirm the sale, and received from him a covenant that whenever Beck should receive a power of attorney to convey said lands and confirm his proceedings, and deliver the same to him, O'Hara, he would deliver to Beck for his constituents a sufficient mortgage upon real property to secure the price. The power of attorney produced by the defendants was prepared by Beck without the condition, and sent to Low, to be executed by him and the others, to enable him to fulfill the agreement. This was done by them after adding the condition, on the 12th February, 1821. The witness says that there was no schedule attached to it. He answers, from information and belief, that Beck did not collect from O'Hara any money, or receive from him any further security. The district judge, upon this testimony, instructed the jury that the defendants had the superior title, and their verdict was accordingly rendered for them.

The authority conferred upon the mandatary by the letter of attorney is special and limited, and his acts under it are valid only as they come within its scope and operation. He was bound to conform to the conditions it contains, in its execution to adopt the modes it indicates.

He was authorized to sell the lands for cash or on a credit with security on real property, to execute a deed describing the consideration, acknowledging its payment, and to receive the money or securities the purchaser might render. *Peck* v. *Harriott*, 6 S. & R. 149; 9 Leigh, 387. But he was not authorized to exchange the lands for other property, or to accept the notes of the vendee as cash, or to accept personal *security, or any form of security except [*82 that specified in the condition. *Non est in facultate mandatarii addere vel demere ordini sibi dato.* These propositions are not disputed as applicable to cases arising between parties to the original contract, in which the limitations on the authority and the circumstances of departure from it in the execution are understood. But it is contended that bona fide purchasers are entitled to repose credit in the recitals and declarations of the attorney as expressed in his deed, that disclose the mode in which the authority has been exercised, and will be protected against their falsity; that the principal is estopped to deny their truth. This argument rests for its support upon the hypothesis that the delinquency of the mandatary is a breach of an equitable trust, a trust cognizable in a court of chancery only, a court that will not administer relief against a bona fide purchaser having the legal title. It assumes that the deed made by the attorney invests the grantee with the legal title, notwithstanding the noncompliance with the condition. If this were true, the inference would follow. *Danbury* v. *Lockburn*, 1 Mer. 626. But the assumption is not tenable. The attorney was not invested with the legal estate. He was the minister, the servant, of his constituent, and his authority to convey the legal estate did not arise except upon a valid sale in accordance with the requirements of the power.

Doe v. *Martin*, 4 T. R. 39; *Minot* v. *Prescott*, 14 Mass. 495. The deed executed by the attorney is apparently within the scope of his power, and the admission of payment of the consideration is competent testimony of the fact. *American Fur Co.* v. *United States*, 2 Pet. 358. But it is competent to his principal to show that the transaction was in appearance only, and not in fact within the authority bestowed.

And the question arises, was there any testimony to be submitted to the jury to repel the presumption that there was a bona fide execution of the trust reposed in the attorney. One of the donors of the power, but who does not appear to be interested in the land otherwise than by the recital in that instrument, admits his knowledge of the terms of the sale made to O'Hara; that this power was remitted to Beck to validate *the contract, as far as it had [*83 been executed, and to enable him to complete it according to the engagement that had been entered into.

The power of attorney and the deed had been on the public records for thirty-four years before this suit was commenced, and for five years these defendants had been in the actual pos-

session of the property. It had been repeatedly sold during this long period. To the inquiry made of the witness, whether the purchase money had been paid to the grantors, or whether the security on real property had been taken, he answers: "This affiant is informed and believes that most of the lands were sold to William O'Hara without security, or the payment of anything in hand upon the promissory notes of the said O'Hara, which, as this affiant is informed and believes, were in the hands of Beck at the time of his death, and copies of which, . . . as he is informed and believes, . . . are annexed." It is the opinion of the court that this testimony was not admissible; and although it was read to the jury, it did not contain anything to warrant a conclusion unfavorable to the title of the defendants.

Judgment affirmed.

SPRINGFIELD TOWNSHIP OF FRANKLIN COUNTY.
v.
JOHN H. QUICK, Auditor, and Wm. Robeson, Treasurer of Franklin County.

(See S. C. 22 How. 56-69.)

Indiana school fund.

The Indiana state laws, apportioning the school fund, do not violate the acts of Congress providing that the proceeds of the sixteenth section shall be for the use of schools in the township.

Submitted Dec. 19, 1859. Decided Jan. 3, 1860.

IN ERROR to the Supreme Court of the State of Indiana.

This action was brought by Springfield township against Quick, auditor, and Robeson, treasurer, of the said county, in the Franklin circuit court. The complaint was for an injunction to enjoin the auditor and treasurer from distributing the school fund in said county, in compliance with the provisions of the school law of Indiana, approved March 5, 1855.

The clerk of that court, *ex officio*, granted a temporary injunction. This order, at the subsequent term of the court, was made perpetual.

The defendants appealed to the supreme court of Indiana, which court reversed the judgment of the Franklin circuit court.

From this ruling of the supreme court of Indiana, this writ of error is brought.

A synopsis of the laws under which the case arose appears in the brief for the plaintiff in error.

The questions as stated by the counsel for the appellees, were, the constitutionality of the school law of the state of Indiana, approved March 5, 1855, and whether that law violates the act of Congress making the grant of the 16th section of lands throughout the state for the use of schools.

Mr. **Lucian Barbour**, for the plaintiffs in error:

An historical statement of the facts involved in the controversy in this case will best exhibit the errors complained of.

The counsel referred to the following acts of Congress and of the legislature.

Act of Congress, March 26, 1804; by the 5th section of which, section number 16 was reserved in each township in Indiana for the support of schools.

Act of Congress, April 19, 1806; act to enable the people of Indiana territory to form a constitution and state government, which offered the following propositions to the territory for acceptance: First. That the section numbered 16 in every township (and when such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous), should be granted to the inhabitants of such township for the use of schools.

Second. That the salt springs within the said territory should be granted to the state for the use of the people, etc.

Third. That five per cent of the net proceeds of the lands lying within the state should be reserved for making roads, canals, etc.

Fourth. That one entire township should be reserved for the use of a seminary of learning, and vested in the legislature, etc.

Fifth. That four sections be granted to the state for the purpose of a seat of government.

This act also provided that the ordinance of the territory accepting the foregoing proposition should exempt lands sold by the United States after the first day of the next December, from taxation for five years from date of sale.

On the 20th day of June, 1816, the convention of Indiana accepted this proposition. On the 24th of December, 1816, it passed an act entitled "An Act to Prevent Waste on Lands Preserved for the Use of Schools and Salt Springs."

The 5th section provided for the incorporation of any congressional or fractional township in certain cases, and the election of trustees by the same.

This act was re-enacted in 1818. In 1819 an act was passed authorizing the trustees to let out any money of the township sustaining schools therein.

In 1824, an act was passed, one section of which provided that the lands reserved by Congress for the use of schools in each congressional township, should be vested in this corporation.

On January 25, 1827, and January 28, 1828, acts were passed, looking towards procuring an act of Congress, authorizing the legislature of Indiana to convey, in fee simple, lands reserved by Congress for the use of schools within the state. On the 24th day of May, 1828, an act of Congress was approved, granting such authority, with the provision that no land should be sold without the consent of the inhabitants of the township or district, and that out of the proceeds of the funds, each township and district should be entitled to such part thereof as should have accrued for the sale of school land belonging to such township or district.

January 23, 1829, an act passed by the Indiana legislature was approved, which provides for the incorporation of each congressional township in the state, the election of school trustees therein, and the election of a school commissioner in each county, and a sale by him of the 16th section, whenever a majority of the voters of the township should attend an election

to be held for that purpose, and direct such sale. In 1830 an act was passed authorizing the lease of school lands, and providing some restrictions on the sales.

On February 2, 1833, an act was passed, which provided that in case of a sale of the school lands of any township, the inhabitants should hold an election and determine whether the proceeds of the sale should be deposited in the loan office of the state, left with or be loaned by the school commissioner.

Sections 88 and 89 of that act read: "The moneys placed in the loan office, belonging to the inhabitants of any township, shall there remain a permanent fund for the purpose of school education for such townships, and shall yield a legal interest, and not less than at the rate of six per cent per annum."

"And the faith of the state is hereby solemnly pledged to the inhabitants of each of said townships for the preservation of the fund belonging thereto, and for the payment of said annual interest." In 1837 a similar law was enacted. In 1841 an act was passed, authorizing a township to withdraw funds from the loan office, to be loaned out by the school commissioner.

In 1843, the legislature passed an act remodeling the school law, § 114 of which provides "that the several counties should be held liable to the inhabitants of the respective congressional townships for the preservation of the said fund, and the payment of the annual interest thereon, at the rate established by law.

In 1849, the office of school commissioner was abolished, and his duties transferred to the county auditor and treasurer. For the first time the proceeds of the sale of the 16th section went into the county treasury for management and distribution.

The 7th section of this act contains the following: "Providing that nothing herein contained should be so construed as to divert the fund, commonly called the congressional township fund, or any part thereof, from the objects and purposes for which it was granted by Congress."

After this, Indiana adopted her new Constitution, called the Constitution of 1851, in which an effort is made to consolidate the school funds of the state.

The 8th article of the Constitution contains the following provisions on the subject of education.

Sec. 1. Knowledge and Learning generally diffused throughout a community being essential to the preservation of a free government, it shall be the duty of the general assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide by law for a general uniform system of common schools wherein tuition shall be without charge and equally open to all.

Sec. 2. The common-school fund shall consist of the congressional township fund, and the lands belonging thereto; the surplus revenue fund, and the other funds named.

The 3d, 4th, and 5th sections provide for the funding investment and distribution thereof.

Sec. 6 makes the several counties liable for the preservation of the fund and payment of the interest thereon.

Sec. 7. "All trust funds held by the state shall remain inviolate and be faithfully applied to the purposes for which the trust was created."

Sec. 8 provides for the election of a state superintendent of public instruction.

Pursuant to the provisions of this article of the Constitution, the first Indiana legislature, convened after its adoption by an act approved June 14, 1852, and found in the Revised Code of 1852, vol. I. page 439, undertook to consolidate the school funds of 1832, and to distribute generally over the state the proceeds of the 16th section of each township, reserved by Congress to the inhabitants of the respective townships in which the sections are situate, for the use of schools therein.

This distribution was controverted by the present plaintiffs in the state courts, and their power and right to the exclusive control of this 16th section, and its proceeds fully established by the supreme court of the state of Indiana in the case of *The state of Indiana and Others* v. *Springfield Township*, reported in 6th Indiana Reports, page 84, etc., and which is especially referred to the attention of this court, as containing a true statement and history of the legislation of Indiana on this subject, and a full vindication of the right of the plaintiffs in this case to the relief sought.

Shortly after this judgment was pronounced by the supreme court of the state of Indiana, which was at the November term, 1854, the legislature of Indiana, to avoid its force and effect, and indirectly to accomplish that which the court determined could not be done, passed an act approved March 5, 1855, entitled "An Act to Provide for a General System of Common Schools, the Officers thereof, and Their Respective Duties, and Matters Properly Connected therewith, and to Establish Township Libraries, and for the Regulation thereof."

See acts of Indiana for 1855, page 161.

The plaintiffs in error insist that the 8th article of the Constitution of 1851, of the state of Indiana, and the legislation of said statute of March 4, 1855, are both in violation of the ordinance and acts of Congress vesting these said 16th sections in the inhabitants of the respective townships in which they are situated, and consequently, void.

It cannot be disguised that this legislation of 1855 was a palpable evasion of the judgment pronounced by the supreme court of Indiana, in 6th Indiana Reports, page 84. And this high court will certainly not tolerate this petty subterfuge, but will hold, as they did in *Trustees for Vincennes University* v. *The State of Indiana*, 14 How. 268, that the rights of parties cannot thus be trifled with, but will be held sacred from all improper legislation.

The judgment of the supreme court of Indiana, in the case at bar in 7th Indiana Reports, page 636, pronounced by Judge Gookins, we think, is a very lame attempt to justify the 8th article of the Constitution of 1851 and the act of 1855, and cannot be sustained by reason or authority. With all due respect for the opinion of that court, it is a mere *ad captandum* argument; and, as will be seen, was the opinion of a divided court.

Mr. **D. D. Jones**, for defendants in error:

The appellees conceive the only material points in the case to be the following two:

1st. Is the act in question constitutional?

2d. Does it violate the act of Congress making the grant of the 16th section of lands in the several congressional townships of the state of Indiana, "to the inhabitants thereof, for the use of schools?"

Does it contravene any provision of the Constitution of the state of Indiana? It is insisted that it does not, as the Constitution of the state is but an organic rule originating in, and restrictive of, the unlimited powers of a sovereignty—not defining what alone the legislature may do in its capacity as the law-making power of the state—but positively prohibiting certain acts of legislation; denying that branch of the state government the privilege of interfering with certain defined rights reserved by the people, and pointing out the mode in which legislation shall be conducted. It does not withhold from the state the right to prescribe, through the agency of her legislature, a rule for the taxation of her people and their property within her limits, for educational purposes. Nor does it prohibit any distribution the legislature may see proper to direct, of such taxes so collected, whether that distribution be *per capita*, or with reference to existing educational advantages one locality may have over another; and whether donations from the general government or other sources shall be taken into consideration in the mode of distribution, is conceived to be an untrammeled power of the legislature of the state, the exercise of which is unforbidden by any provision of either the state or Federal Constitution.

The very features of the law complained of are component parts of the state Constitution; and if not repugnant to other subsequent provisions of that instrument; their validity is coequal with the Constitution itself. These provisions are contained in the 8th article of the Constitution of the state.

Vide R. S. of Indiana, 1852, vol. I. p. 62.

The sections of the law held to be exceptionable by the appellant, are clearly within the directory provision of the 8th article of the Constitution of Indiana, and § 101, so far from diverting or diminishing the congressional township fund, expressly provides "that in no case shall the income of the congressional township fund belonging to any township, or part of such township, be diminished by such distribution and diverted to any other township."

Laws of the state of Indiana, 1855, p. 176.

It is insisted by the appellant, that the act is contraventive of that provision of the state Constitution which requires all laws of the state to be of uniform operation throughout the state, which position the appellees deem to have been properly held untenable by the supreme court of the state in this same case. The court says: "It does not conflict with the 23d section of the 4th article of the Constitution of the state of Indiana, which requires all laws to be of uniform operation throughout the state; for the act is not only uniform in itself, but it produces uniformity in the subjects upon which it operates."

The entire subject-matters upon which the act in question proposes to operate is within the limits of the state of Indiana. She does not propose, by this legislative enactment, to assume control of any foreign matter whatever. And it has been held "that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered or restrained by the Constitution of the United States."

Mayor of New York v. *Miln*, 11 Pet. 102.

Inasmuch as the act does not propose to divert the congressional township fund, but expressly provides against its diversion and diminution, and for its faithful preservation and application to the specified use for which it was granted, it most certainly does not violate the act of Congress granting the lands to the several townships of the state. Such construction can only be given to the act in question by imputing to the state legislature an ignorance or duplicity inconsistent with common intelligence and common honesty.

It being a well-settled principle that the power of a state to levy taxes, to create a revenue for any specified object, is an incident of sovereignty, and only restricted by constitutional inhibitions; and there being no such constitutional prohibition—the sense of honor, justice, and equity of a state alone defining the limits within which that power shall be exercised—what feature of the law in question can be said to exceed the authority of the state? In the Constitution of the state of Indiana there is no feature, the appellees insist, prohibiting the levying and collecting of taxes such as contemplated by the school law in question. The Constitution of the state being silent as to the mode of distributing the common school fund, that burden was necessarily cast upon the legislature. In the exercise of this necessary incidental power, that body directs that all the funds raised to constitute a common school revenue be so distributed, taking into consideration the congressional township fund, as to insure an equality of educational facilities throughout the state.

The same power that can rightly divert a revenue enjoyed by peculiar localities, and disburse it throughout an entire state, most certainly possesses a sufficient authority over her own internal affairs, to take into consideration other funds in her efforts at placing all upon a uniform basis, as it respects the means of educating her people.

Mr. Justice **Catron** delivered the opinion of the court:

The 25th section of the judiciary act declares that where is drawn in question the construction of any statute of the United States, and the decision is against the right set up or claimed by either party under the act of Congress, such decision may be re-examined, and reversed or affirmed, in the Supreme Court, on writ of error.

Here it is claimed for the inhabitants of the township that the fund arising from the proceeds of the 16th section shall not be estimated in distributing the general school fund of the state derived from taxes paid into the state treasury. The acts of the legislature equalize the amount that shall be appropriated for the education of each scholar throughout the state, taking into the estimate the moneys derived from *the proceeds of the 16th section, [*69 with the proviso, that the whole of the pro-

ceeds shall be expended in the township. If it be more than an equal portion to each scholar elsewhere furnished by the state fund—still, the township has the benefit of such excess, but receives nothing from the treasury; and if it be less, then the deficiency is made up, so as to equalize according to the general provision.

And the question here is whether the state laws violate the acts of Congress providing that the proceeds of the 16th section shall be for the use of schools in the township. And our opinion is, that expending the proceeds of the 16th section for the exclusive use of schools "in the township" where the section exists, is a compliance with the legislation of Congress on the subject; nor is the state bound to provide any additional fund for a township receiving the bounty of Congress, no matter to what extent other parts of the state are supplied from the treasury.

The law is a perfectly just one; but if it were otherwise, and the school fund was distributed partially, nevertheless those receiving the bounty from Congress have no right to call on this court to interfere with the power exercised by the state legislature in laying and collecting taxes, and in appropriating them for educational purposes, at its discretion.

We hold that a true construction was given to the Acts of Congress referred to, and order that the judgment be affirmed.

WILLIAM CROSSMAN, Freeman G. Carey, and William M. F. Hewson, Testamentary Executors of Charles McMicken, Deceased,

v.

FRANKLIN PERIN.

(See S. C. 22 How. 282-285.)

Where bill is denied by answer, and unsupported by proof, relief refused.

Where, in a bill of review, praying relief from a decree obtained in a previous suit, the excuse set up by the complainant, for not appearing and defending the former suit, to wit: the fraud and imposition of the defendant, was fully and completely denied in the answer, and wholly unsupported by the proofs, and the failure to appear and defend, for aught that was shown, was attributable to his own neglect and inattention; held, that the allegations upon which relief in the bill rested, and upon which alone a rehearing could be granted in the case, consistent with the established practice of a court of chancery, were unsustained.

Submitted Dec. 19, 1859. Decided Jan. 3, 1860.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The case is stated by the court.

See, also, reports of the case in this court out of which this case arose.

59 U. S. (18 How.) 507; 61 U. S. (20 How.) 133.

Mr. **J. P. Benjamin** for appellants.

Mr. **F. Perin**, in person, and *Mr.* **L. M. Day** for appellee.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the eastern district of Louisiana.

The bill filed by McMicken in the court below is in the nature of a bill of review, praying relief from a decree obtained against him by Perin in a previous suit by means of fraud and imposition.

The suit by Perin charged McMicken with holding, in trust for his use, a valuable sugar plantation, situate in the parish of East Baton Rouge, on the Mississippi river, in the state of Louisiana; and sought a discharge of the trust and a conveyance of the title to the complainant.

The bill of review sets forth as the ground of fraud in the decree, that after the commencement of the former suit and service of the subpœna on McMicken, in an interview with *Perin on the subject of the suit, he [*284 agreed to discontinue it, and prosecute the same no further; upon which understanding the defendant acted, and discharged the solicitor retained to defend it, and omitted altogether any defense; and that in violation of the agreement, and in fraud of the rights of the defendant, he, Perin, proceeded with the suit in the absence and without the knowledge of the defendant, obtaining the decree in question by default, declaring the trust, and directing a conveyance of the plantation.

The bill of review further sets forth that the advances made by the complainant in the purchase of the property, and the liabilities incurred by way of raising incumbrances on the same in securing the title, far exceeded the sum stated by Perin in his bill, and which he proposed to reimburse and satisfy, and of all which he had full knowledge, but which he fraudulently suppressed and excluded from the decree, which the complainant is justly entitled to have allowed upon setting aside the purchase and declaring the trust for the benefit of Perin.

The defendant, in his answer to the bill of review, denies specifically the fraud charged therein against him; denies that he agreed to give up the suit, and not further prosecute the same, or that he gave any assurances to McMicken to that effect, or which were calculated to mislead or induce him to withdraw from the defense, or that any such understanding existed between the parties; but, on the contrary, since the filing of his bill he has, at all times, insisted upon his rights as set forth therein, and upon the prosecution of his claim to the property.

The defendant also denies that the omission to set forth in his bill any other sums than those allowed in the report of the master, and which entered into the decree, were with a view to an *ex parte* proceeding in the suit as charged by McMicken, and denies all fraud or concealment in respect to these accounts.

The answer of the defendant is directly responsive to the charges in the bill, and relates to facts within his knowledge, and, upon well settled principles of pleading, must be taken *as presenting the true state of the case, [*285 unless overcome by the proofs. The complainant, in view of this rule, has examined witnesses in support of the allegations, but they have wholly failed to sustain them.

The bill of Perin against McMicken to enforce the trust was filed in February, 1851. The subpœna was served personally in Novem-

ber, 1852. McMicken resided in the state of Ohio, and the service in the suit could be made only in the state of Louisiana. The decree *pro confesso* was entered in April, 1853, and the final decree in June, 1854. The suit seems not to have been hurried, with any unusual speed, to its final determination.

In February, 1855, a petition was presented to the court containing, substantially, the facts set forth afterwards in the bill of review, on behalf of McMicken, to set aside the decree, and to permit him to come in and defend, which, after hearing, was denied. Whereupon an appeal was taken to this court from the decree in the suit, and also from the order refusing to set aside the decree, and which were affirmed in December term, 1855. 18 How. 507; 20 How. 133.

The present bill was filed for a review of the decree and order thus affirmed by this court in January, 1857. The case was heard on pleadings and proofs, and a decree entered dismissing the bill in November of the same year, and is now before us on appeal.

The bill was dismissed upon the ground that the excuse set up by the complainant, to wit: the fraud and imposition of Perin, for not appearing and defending the former suit, was fully and completely denied in the answer, and wholly unsupported by the proofs. The failure, therefore, of the defendant to appear and defend, and his rights in that suit, for aught that was shown, was attributable to his own neglect and inattention.

The allegations upon which relief in the bill rested, and upon which alone a rehearing could be granted in the case, consistent with the established practice of a court of chancery, were unsustained.

This is familiar doctrine, and is decisive of the case.

The decree of the court below affirmed.

ALEXANDER REY. William R. Marshall, and Joseph M. Marshall, Partners under the Name, Style, and Firm of Marshall & Co., *Plffs. in Err.*,

v.

JAMES W. SIMPSON.

(See S. C. 22 How. 341-352.)

Bill and notes—proof of circumstances of indorsement, admissible—when note payable to order of one, is first indorsed by another, obligation of latter—pleading, when sufficient.

Parol proof of the attending circumstances under which indorsers placed their firm name upon the back of the note, is admissible under the general issue.

When a promissory note, made payable to a particular person or order, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties.

If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given he must be considered as a joint maker of the note.

If his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance he can only be held as a guarantor.

If the note was intended for discount, and he put his name on the back of it, with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser, and as such would be entitled to the privileges which belong to such indorsers.

Where persons placed their names as indorsers at the inception of the note, not as a collateral undertaking, but as joint promisors with the maker, they are as much affected by the consideration paid by the plaintiff, and as clearly liable in the character of original promisors, as they would have been if they had signed their names under the name of the other defendant upon the inside of the instrument.

Where the plaintiff alleged, that the defendants, whose firm name is on the back of the note, placed it there for the purpose of becoming sureties and security to him as payee for the amount therein specified, that allegation is all which is required by the Code of Minnesota territory, to maintain the suit against defendants as original promisors.

Argued and submitted Dec. 18, 1859. Decided Jan. 3, 1860.

IN ERROR to the Supreme Court of the Territory of Minnesota.

The history of the case and a full statement of the facts appear in the opinion of the court.

Messrs. **Brisbin & Bigelow, H. L. Stevens** and **H. W. Merrill,** for the plaintiff in error:

1. Marshall & Co. were not liable on the note as guarantors. Their undertaking, whatever it was, if regarded as a guaranty, was collateral, and was within the statute of frauds, and void; the same not having been reduced to writing, expressing the consideration. The note was simply indorsed in blank when it was delivered to Rey, and by him to Simpson, and parol evidence was inadmissible to vary the legal effect of this indorsement.

This point rests mainly upon the construction to be given to the Minnesota statute of frauds, and this is a literal transcript from the New York Revised Statutes.

NOTE.—*Indorser before payee, liability and rights of.*

With reference to the indorser before the payee, the decisions are not uniform. The first diversity of opinion is as to whether such an irregular indorser, where the indorsement was made at the inception of the note, should be held to be a joint maker or surety, as has been held in the Supreme Court of the United States, or as a guarantor.

In the following instances he has been held to be a joint maker or surety: Killian v. Ashley, 24 Ark. 515; Gilpin v. Marley, 4 Houst. 284; Massey v. Turner, 2 Houst. 79; Collins v. Everett, 4 Ga. 273 (last case is by statute); Lawrence v. Oakey, 14 La. 389; Chom v. Merrill, 9 La. Ann. 533; Childs v. Wyman, 44 Me. 441; Leonard v. Wilds, 36 Me. 265; Good v. Martin, 95 U. S. 90; Ives v. Bosley, 35 Md. 262; Walz v. Alback, 37 Md. 404; Hawks v. Phillips, 7 Gray, 284; Witterwax v. Paine, 2 Mich. 559; Rothchild v. Grix, 31 Mich. 150; Pierce v. Irvine, 1 Minn. 377; Schneider v. Schiffman, 20 Mo. 571; Martin v. Boyd, 11 N. H. 385 (see, however, Currier v. Fellows, 27 N. H. 369); Baker v. Robinson, 63 N. C. 191; Perkins v. Barstow, 6 R. I. 507; McCreary v. Bird, 12 Rich. 554; Strong v. Riker, 16 Vt. 557; Sylvester v. Downer, 20 Vt. 355.

And in the following a guarantor: Pierce v. Kennedy, 5 Cal. 138; contra, Jones v. Goodwin, 39 Cal. 493; Perkins v. Catlin, 11 Conn. 212; Ransom v. Sherwood, 26 Conn. 437; Clark v. Merriman, 25 Conn. 576; Webster v. Cobb, 17 Ill. 459; Knight v. Dunsmore, 12 Iowa, 35; Firman v. Blood, 2 Kan.

The construction of that statute has been settled in favor of the plaintiff in error.

Min. Rev. Stat. 268, §§ 281-282; 2 N. Y. Rev. Stat. 135, § 2, subdivision 2; *Hall* v. *Newcomb*, 7 Hill, 416; *Spies* v. *Gilmore*, 1 N. Y. 324; *Dunham* v. *Manrow*, 2 N. Y. 553; *Brewster* v. *Silence*, 8 N. Y. 207; *Ellis* v. *Brown*, 6 Barb. 282; *Waterbury* v. *Sinclair*, 16 How. Pr. 329.

2. Marshall & Co. are not chargeable as makers of the note in question. In support of this proposition, we refer to the proceeding point and authorities cited.

If parol evidence is inadmissible to change the contract of indorsement into a guaranty, it is equally inadmissible to change it into an absolute original promise. In so changing the contracts, not only must the promise be supplied by parol, but the consideration also.

This would, in effect, be a repeal of the statute of frauds.

Hall v. *Farmer*, 5 Den. 484; *Bradford* v. *Martin*, 3 Sand. 647; Story Prom. N. § 134.

In England it has long been held, that not only the promise must be in writing, but the consideration must be expressed in the instrument itself.

Wain v. *Warlters*, 5 East, 10; *Saunders* v. *Wakefield*, 7 B. & A. 595; *Morley* v. *Boothby*, 3 Bing. 107.

The statute of frauds in those states in which the courts have dissented from the above doctrine is in its language essentially different from the statute of Minnesota.

3d. The record shows that no agreement or contract has ever been written upon the back of the note, other than the mere indorsement. The indorsement is still in blank. The position of the Marshalls is that of second indorsers only. The note is negotiable, but they are not the payees. There are numerous cases which establish the rule that whenever the note is negotiable—payable to a third person or order, and is indorsed by a person other than the payee, he is not to be treated as an original promisor or maker, nor yet as guarantor, but simply as indorser.

Seabury v. *Hungerford*, 2 Hill, 84; *Hall* v. *Newcomb*, 3 Hill, 233; *Ellis* v. *Brown*, 6 Barb. 282; *Hough* v. *Gray*, 19 Wend. 202; 7 Hill, 416 to 426, note; *Spies* v. *Gilmore*, 1 N. Y. 321; *Cottrell* v. *Conklin*, 4 Duer, 45; *Taylor* v. *McCune*, 11 Pa. 461; *Crozer* v. *Chambers*, 1 *Spencer* (N. J.) 256; *Fear* v. *Dunlap*, 1 Greene (Pa.) 334; Story, Bills, § 134.

4. The complaint is defective.

Even this child of modern improvement, the complaint, must be sensible and state facts sufficient to constitute a cause of action, or like the somewhat discarded common-law declaration, the party must fail. An indorsment is a contract of transfer, by which the indorser contracts with, and in favor of the indorsee and every subsequent holder, and the note must be transferable or there is no legal indorsement.

Now, to enable Simpson to sue the Marshalls as indorsers, they must first have been either payees or indorsees, and thereby been able to transfer the note by indorsement; but the complaint shows the reverse of this.

See *Waterbury* v. *Sinclair*, 16 How. Pr. 329.

Moreover, no case can be found under any system of pleading, where the plaintiff has been allowed to recover against the defendant as guarantor, where the complaint was against him as indorser only. A guaranty is a special contract, and must be specially declared on.

Lamourieux v. *Hewett*, 5 Wend., 307; *Miller* v. *Gaston*, 2 Hill. 188; *Ellis* v. *Brown*, 6 Barb. 285.

Complaint is also defective on account of defect of parties. There is no joint cause of action stated in the complaint against the two Marshalls and Rey.

See *Allen* v. *Fosgate*, 11 How. Pr. 218.

The demurrer does not admit the truth of

496; Arnold v. Bryant, 8 Bush. 668; Van Doren v. Tjader, 1 Nev. 380; Champion v. Griffith, 13 Ohio. 228; Chandler v. Westfall, 30 Tex. 477; Watson v. Hunt, 6 Gratt. 633; Orrick v. Colston, 7 Gratt. 189. As a guarantor, if payee so elects. Burton v. Hansford, 10 West Va. 470; or if he write over a guaranty, Killian v. Ashley, 24 Ark. 515.

It is held in New York and some other states, that an indorsement of note, before its delivery to payee, will be presumed to be, in absence of evidence of the intention, for the accommodation of payee, and is an indorsement subsequent to the payees that indorser knew that the payee must indorse note before it became operative. Such an indorser cannot be held liable at the suit of the payee or of any person who has taken note of payee either after maturity, or with knowledge of the facts. Coulter v. Richmond, 59 N. Y. 478; Dale v. Moffitt, 22 Ind. 114; Frear v. Dunlap, 1 Iowa, 335, changed by law of 1851; Knight v. Dunsmore, 12 Iowa, 35; Marlenthal v. Taylor, 2 Minn. 147; McComb v. Thompson, 2 Minn. 139; Jennings v. Thomas, 13 Sm. & M. 617; Fegenbush v. Lang, 28 Pa. 193; Eilbert v. Finkbeinner, 68 Pa. 243; Cady v. Shepard, 12 Wis. 642. 13 Wis. 229. 18 Wis. 554; Lester v. Paine, 37 Barb. 617; Bacon v. Burnham, 37 N. Y. 614; Phelps v. Vischer, 50 N. Y. 74.

As between the parties, oral evidence is competent to show the circumstances of the giving of the note, its consideration and its indorsement, and that the indorsement was given to give the maker credit with payee. It is sufficient to show that it was indorsed with knowledge that the indorsement was required to give the maker credit. Meyer v. Hibsher, 47 N. Y. 265; Gfroehner v. McCarty, 2 Abb. N. C. 76; Draper v. Chase Mfg. Co. 2 Abb. N. C. 79; Smith v. Smith, 37 Superior Ct. 203; Coulter v. Richmond, 59 N. Y. 481; Moore v. Cross, 19 N. Y. 227; Clothier v. Adriance, 51 N. Y. 322; Austin v. Boyd, 24 Pick. 64; Luft v. Graham, 13 Abb. Pr. N. S. 175.

If transferee knew note was indorsed before payee overwrote his indorsement, he must, to recover of the original indorser, give the same extrinsic evidence which the payee would have to give. Phelps v. Vischer, 50 N. Y. 74.

The Supreme Court of the United States holds the irregular indorser an original promisor, a guarantor, or an indorser, according to the nature of the transaction and the understanding of the parties. Oral evidence is admissible to show the intent and understanding. If the indorsement was made to give the maker credit with the payee, or if indorser participated in the consideration of the note, he is to be considered a joint maker. If the indorsement was after the note was delivered to payee, at request of maker to procure further indulgence or forbearance for the maker, he can only be held as guarantor, and there must be legal proof of a consideration to uphold the promise unless it be shown that he was connected with the inception of the note. If note was intended for discount, and indorsement was to be inoperative until after payee indorsed, he is liable only as second indorser. Good v. Martin, 95 U. S. 90, and cases cited; Aff'g 1 Col. 165; 2 Col. 218; Schneider v. Schiffman, 20 Mo. 571; Irish v. Cutler, 31 Me. 536; Hawks v. Phillips, 7 Gray, 284; Pierse v. Irvine, 1 Minn. 369; Perkins v. Catlin, 11 Conn. 212.

Oral evidence is admissible to show when indorsement was made. In absence of evidence, undated indorsement will be presumed to have been made at inception of note. Good v. Martin, 95 U. S. 90; Badger v. Barnabee, 17 N. H. 120; Martin v. Boyd, 11 N. H. 387; Parkhurst v. Vail, 73 Ill. 343; Childs v. Wyman, 44 Me. 441; Gilpin v. Marley, 4 Houst. 284; Massey v. Turner, 2 Houst. 79.

the allegation and the complaint as to the purposes for which the defendant, Marshall & Co., indorsed the note, and of the reliance of the plaintiff upon the indorsement; because those allegations are not a statement of facts, but are merely matters of law. The Code in Minnesota requires that the complaint should state the facts constituting a cause of action. Under this statute the conclusion of law and matters of argument are not allowed to be stated, and the demurrer does not admit them to be true.

See *Barton* v. *Sackett*, 3 How. Pr. 358; 1 Chit. Pl. 213, 214, and 541; Story Eq. Pl. § 452, cases cited; *Hall* v. *Bartlett*, 9 Barb. 297.

Messrs. **Joseph H. Bradley** and **M. E. Ames**, for the defendant in error:

If in any case it is competent to show by parol, an agreement collateral to a bill of exchange or promissory note in their ordinary form, the facts admitted in these pleadings would be such a case, as understood by the counsel for the plaintiffs in error.

This court has settled that question in *Phillips* v. *Preston*, 5 How. 278; but in this case, the commercial contract of an indorser of a promissory note never was complete. The indorsement was made before the title had ever passed by the indorsement of a payee, and even before the note had been delivered to the payee, and it is admitted to have been done for the purpose of guarantying the payment thereof to the payee; in such case, the party who puts his name on the back of the paper authorizes the payee to write over it such words as may be necessary to embody the contract between them, and he may be treated either as a guarantor or as a party to the original undertaking. The current of decision is unbroken except where there are peculiar circumstances to modify, not to make them exceptions.

32 Me. 339; 36 Me. 147, 265; 1 N. H. 385; 11 N. H. 385; 7 Fost. 366; 9 Vt. 345; 12 Vt. 219; 16 Vt. 554; 17 Vt. 285; 7 Mass. 232; 9 Mass. 313; 11 Mass. 436; 19 Pick. 260; 24 Pick. 64; 24 Pick. 264; 8 Met. 504; 9 Cush. 104; 6 Conn. 317-320; 11 Conn. 213, 440; 13 Johns. 175; 14 Johns. 249; 1 Hill, 91; 7 Hill, 422; 17 Wend. 214, 215; 4 Watts. 448; 13 Pa. 446; 9 Ohio, 39; 13 Ohio, 328; 2 McL. 553; 13 Ill. 682; 1 Man. 428; 2 Mich. 555; 18 Mo. 74, 140; 5 Ben. 371; 2 Gill. 330; 6 Gill. 181, and authorities in Yellot's argument; 2 McCord, 388; 9 Tex. 615; 2 Cal. 485, 605; Story Prom. N. §§ 457, 469, 475, 476, 579, 480.

The contract is not prohibited by the Minnesota statute of frauds. The note itself shows the consideration. Every man who indorses such a paper, thereby promises to answer for "debt, default, or miscarriage of the maker." It is a note or memorandum expressing the consideration, that is, forbearance to the maker, and is in writing by the party to be charged thereon. It is a contract of suretyship, plain, intelligible, and well understood. It is put on this note for some purpose, for the very purpose which would be implied in an ordinary indorsement, except as to the person to whom, and for whom they are to be surety, and this may be proved by parol.

Bateman v. *Phillips*, 15 East, 272.

It is conceded in the argument, that where a person at the inception of a note not negotiable, indorses his name in blank on the back, he is liable as maker, and so as to notes made payable to bearer, or to A. B. or bearer. The indorser may be made liable to the payee, and to cases of negotiable paper indorsed in blank, after the same became due, but it is insisted there is a distinction between such paper, and negotiable paper.

The case of *Tillman* v. *Wheeler*, 17 Johns. 326, relied on by the plaintiff, was a case on a contract similar to the present, except that there was no proof of any privity or contract between payee and indorser, and on that ground alone the court decided he could not be held as guarantor.

It is submitted that these admissions cover this case. At the inception of this note, the defendants, Marshall & Co., indorsed their name in blank on the back of this note, when it was neither negotiated to them nor by them, and when, in point of fact, it was not negotiable, because it was still in the hands of the maker, and was not, and could not be negotiable until it was delivered to the payee.

See authorities first above cited.

It would exhaust the patience of this court to present any analysis of these cases, but it may be affirmed that they establish three propositions:

First. Whenever a man puts his name on the back of a promissory note, whether negotiable, assignable, or transferable by delivery while it is in the hands of the maker, he intends to make himself responsible for the default of the maker.

Second. In some cases that responsibility is to be worked out in favor of the payee by writing over the name of the indorser, his guarantee, or other form of obligation, and this may be done at any time before judgment.

Third. In others, it is held (and this seems to be the most just and rational result of all the cases) that such an indorsement is in itself (it being proved to have been made before the note was delivered to the payee, and that the note was never parted with, or indorsed by him) a guaranty by the indorser of the payment of the note to the payee; but the form is of little moment, and if the substance is, that it is or can be treated as a guaranty, this court will look to the substance and finally settle this question which has so long disturbed the judicial mind of the country.

Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the supreme court of the territory of Minnesota.

According to the transcript, the suit was commenced by James W. Simpson, the present defendant, on the 21st day of December, 1855, in the district court of the territory, for the second judicial district, against the plaintiffs in error, who were the original defendants. It was an action of assumpsit, and was brought upon a certain promissory note for the sum of $3,517.07½, bearing date at St. Paul, in that territory, on the 14th day of June, 1855, and was made payable to the order of the plaintiff six months after date, for value received. At the period of the date of the note, as well as at

the time the suit was instituted, two of the 347*] defendants, *William R. Marshall and Joseph M. Marshall, were partners, doing business under the style and firm of Marshall and Co.

As appears by the declaration, the note was made and signed by the defendant first named in the original suit, at the time and place it bears date.

And the plaintiff further alleges in the declaration, that after making and signing the note, the same defendant then and there delivered the note to the other two defendants; and that they then and there, by their partnership name, indorsed the same by writing the name of their firm on the back of the note, and then and there redelivered the same to the first-named defendant, who afterwards, and before the maturity of the note, delivered it so indorsed to the plaintiff. He also alleges that the defendants, William R. Marshall and Joseph M. Marshall, so indorsed the note for the purpose of guarantying the payment of the same, and of becoming sureties and security to him, as the payee thereof, for the amount therein specified; and that he, relying upon their indorsement, took the note, and paid the full consideration thereof to the first-named defendant.

Other matters, such as due presentment, nonpayment, and protest, are also alleged in the declaration, which it is unnecessary to notice at the present time, as the questions to be determined arise out of the allegations previously mentioned and described.

Personal service was made on each of the defendants, but the one first named did not appear; and after certain interlocutory proceedings, conforming to the laws of the territory and the practice of the court, he was defaulted.

On the 31st day of December, 1855, the counsel of the other two defendants served notice of a motion to strike out all that part of the declaration which sets forth the purpose for which it is alleged they indorse the note, and so much of the declaration, also, as alleges that the plaintiff took the note as payee, relying upon the indorsement, and paid to the first-named defendant the full consideration thereof, as before stated. That motion was 348*] subsequently heard before *the court; and on the 9th day of February, 1856, was denied and wholly overruled. After the motion was overruled, the defendants, whose firm name is on the back of the note, demurred specially to the declaration.

None of the causes of demurrer need be stated, as they will be sufficiently brought to view in considering the several propositions assumed by the counsel on the one side and the other, in the argument at the bar. Suffice it to say, that the demurrer was overruled; and on the 10th day of July, 1856, judgment was entered for the plaintiff against all of the defendants for the amount of the note, with interest and costs.

On the 18th day of September, 1856, the defendants sued out a writ of error, and removed the cause into the supreme court of the territory, where the judgment of the district court was in all things affirmed; and on the 4th day of February, 1857, a final judgment was entered for the plaintiff, that he recover the amount of the judgment rendered in the district court, with interest, costs, and ten per cent damages, amounting in the whole to the sum of $4,371.97. Whereupon the defendants sued out a writ of error to this court, which was properly docketed at the December term, 1857.

All civil suits in the courts of Minnesota are commenced by complaint; and suitors are enjoined by law, in framing their declarations, to give a statement of the facts constituting the cause of action, which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

Pursuant to that requirement, and the practice of the courts of the territory at the time the suit was commenced, the plaintiff in this case set forth the facts already recited as contained in the complaint or declaration.

Facts thus stated in the declaration, pursuant to the directions of the law of the territory, and which were material to the understanding of the rights of the parties to the controversy, could not, properly, be suppressed by the court. *Irrespective, therefore, of the question [*349 whether or not the motion of the defendants to strike out that part of the declaration was waived, because not pressed in the supreme court of the territory, no doubt is entertained by this court that the motion was properly overruled by the district court upon the merits.

Proof of the attending circumstances under which the defendants, William R. Marshall and Joseph M. Marshall, had placed their firm name upon the back of the note, would clearly have been admissible in a trial upon the general issue; and if so, no reason is perceived why it was not proper for the plaintiff, under the peculiar system of pleading which prevailed in the courts of the territory at the time the suit was commenced, to state those circumstances in the declaration. Beyond question, they were a part of the facts constituting the cause of action; and if so, they were expressly required to be stated by the law of the territory prescribing the rules of pleading in civil cases. And having been alleged in pursuance to such a requirement, and being material to a proper understanding of the rights of the parties to the suit, it must be considered, by analogy to the rules of pleading at common law, that they are admitted by the demurrer.

By the admitted facts, then, it appears the defendants, William R. Marshall and Joseph M. Marshall, placed their firm name on the back of the note at its inception, and before it had been passed or offered to the plaintiff. They placed their firm name there at the request of the other defendant, knowing that the note had not been indorsed by the payee, and with a view to give credit to the note, for the benefit of the immediate maker, at whose request they became a party to the same.

Whatever diversities of interpretation may be found in the authorities where either a blank indorsement or a full indorsement is made by a third party on the back of the note, payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker, or guarantor or indorser, there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract

350*] ought, in every case, to, to be *such as will carry into effect the intention of the parties; and in most instances it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. Story, Promissory Notes, §§ 58, 59, and 479.

When a promissory note made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such indorsers.

Decided cases are referred to by the counsel of the defendants, which seemingly deny that such parol proof of the attending circumstances of the transaction is admissible in evidence; but the weight of authority is greatly the other way, as is abundantly shown by the cases cited on the other side. Whenever a written contract is presented for construction, and its terms are ambiguous or indefinite, it is always allowable to weigh its language in connection with the surrounding circumstances and the subject-matter, and we see no reason, as question of principle, why any different rule should be adopted in a case like the present. Such evidence has always been received in the courts of 351*] Massachusetts, as appears from *numerous decisions, and the same rule prevails in most of the other states at the present time. 1 Am. Lead. Cas. 4th ed. 322. Repeated decisions to the same effect have been made in the courts of New York, and until within a recent period it appears to have been the settled doctrine in the courts of that state.

Recent decisions, it must be admitted, wear a different aspect; but they have not had the effect to produce a corresponding change in other states, and in our view, deny the admissibilty of parol evidence in cases where it clearly ought to be received. *Hawkes* v. *Phillips*, 7 Gray, 284.

Applying these principles to the present case, it is obvious that the contract of the two defendants whose firm name is upon the back of the note was an original undertaking, running clear of all questions arising out of the statute of frauds.

They placed their names there at the inception of the note, not as a collateral undertaking, but as joint promisors with the maker, and are as much affected by the consideration paid by the plaintiff, and as clearly liable in the character of original promisors, as they would have been if they had signed their names under the name of the other defendant upon the inside of the instrument. Numerous decisions in the state courts might be cited in support of the proposition as stated, but we think it unnecessary, as they will be found collated in the elementary works to which reference has already been made, and in many others which treat of this subject.

Another objection to the right of recovery in this case deserves a brief notice. It is insisted by the counsel of the defendants that the complaint or declaration is not sufficient to maintain this suit against these defendants as original promisors. That objection must be considered in connection with the system of pleading which prevailed in the courts of the territory at the time the suit was commenced. By that system, suitors were only required to state the facts which constituted the cause of action. In this case the plaintiff followed that mode of pleading, and we think he has set forth enough to constitute a substantial compliance with the law of the territory and the practice of the court where the suit was *instituted. He [*352 alleges, among other things, that the defendants, whose firm name is on the back of the note, placed it there for the purpose of becoming sureties and security to him as payee for the amount therein specified. That allegation, to use the language of the statute of Minnesota, is expressed in ordinary and concise language, and in such a manner as to be easily understood, and that is all which is required by the law of the territory prescribing the rules of pleading in civil cases. Under the system of pleading which prevailed in the courts of the territory, the objection cannot be sustained.

The judgment of the Supreme Court of the Territory is therefore, affirmed with costs.

JOHN C. HALE, *Plff. in Err.*,
v.
WILLIAM H. GAINES, and Maria Gaines, his Wife, Albert Belding, Henry Belding, and George Belding, Heirs and Legal Representatives of Ludovicus Belding, Deceased.

(See S. C. 22 How. 144-161.)

Entry sufficient to sustain ejectment in Arkansas—New Madrid certificate—plaintiff must claim right under act of Congress, to give this court jurisdiction—claim of defendant, in answer, not sufficient.

Where the plaintiff below derived his title through a pre-emption claim, as an occupant under the acts of Congress of 1830 and 1832, this entry was held to be valid by the state courts of Arkansas, and a

NOTE.—*What title or interest will support an action of ejectment*—see note, 18 L. R. A. 781.

sufficient legal title to sustain an action of ejectment.

Where the defendant relied on a survey made in June, 1838, founded on a New Madrid certificate; held, that until the survey was presented to the recorder of land titles at St. Louis, and recognized by him as proper and valid, it could have no force, as this was the only mode of location contemplated by the act of 1815.

The New Madrid survey of 1838 was altogether invalid, and properly rejected by the state courts.

The plaintiff in error must claim for himself some title, right, privilege, or exemption, under an act of Congress, etc., and the decision must be against his claim, to give this court jurisdiction.

Alleging a title in the United States, by way of defense, is not claiming a personal interest affecting the subject in litigation, within 25th section of the judiciary act.

Argued Dec. 16, 1859. Decided Jan. 9, 1860.

IN ERROR to the Circuit Court of the State of Arkansas.

This was an action of ejectment brought in the circuit court of Hot Springs county, Arkansas, by the defendants in error, to recover possession of a certain quarter section of land, being the tract on which the Hot Springs are located.

The trial resulted in a verdict and judgment in behalf of the plaintiffs for the recovery of the land in question, and $500 damages, with costs. This judgment was affirmed on appeal by the supreme court of Arkansas, except as to the damages, which were then remitted; whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **Fred P. Stanton,** for plaintiff in error:

The title of Belding's heirs.

The plaintiff below claimed under Ludovicus Belding, who occupied the land in 1829 and 1830 as a tenant of John Percifull. This state of facts presents the question whether, under the acts of 1830 and 1832, a person can occupy the relation of tenant to another, and yet be a "settler and occupant of public lands," so as to be entitled to the right of pre-emption.

If it be said that the plaintiff in error is concluded by the decision of the land office allowing the entry, we reply that the act of 1830 requires proof to be made to the satisfaction of the register and receiver; but these officers differed as to the tenancy, and the question was decided by the secretary of the interior. The entry was allowed by the order of the secretary.

See *Lytle* v. *Arkansas*, 9 How. 314; *Wilcox* v. *Jackson*, 13 Pet. 513; 3d vol. Opinions, Atty. Gen. 96.

We insist that the entry made by the tenant against his landlord was a fraud, not only upon the pre-emption law, but also upon the real settler. If, for a reason, the entry ought to have been allowed to Hale instead of to Belding's heirs, the former is entitled to keep possession, notwithstanding the erroneous action of the Secretary of the Interior. In order to determine this question, the facts must be examined; but the court below excluded all the facts.

See *Ross* v. *Barland*, 1 Pet. 65; *Stoddard* v. *Chambers*, 2 How. 318.

The act of 1814, already referred to as the foundation of Hale's title, relates back to the act of February 5, 1813.

Stat. at L. 2d vol. 797, 798.

These earliest among the pre-emption laws have no prohibition against a sale or transfer of the right derived under them, and hence such transfers were always treated as valid until subsequent laws made them null. The record shows Hale's title to be regularly derived from John Percifull, who settled on the land in 1812, and continued to ccupy it for many years afterwards.

Although in 1814 the land in question was in the county of Arkansas, one of the organized counties of the Missouri territory, and therefore supposed to be subject to settlement and pre-emption, the General Land Office subsequently held the contrary, because the Indian title had not then been extinguished. By the treaty with the Quapaw Indians, made November 14, 1824, the land was ceded to the government.

The reservation act above quoted was passed April 20, 1832.

The remedial act for the benefit of pre-emptioners under the act of 1814 was passed March 1, 1843 (5 Stat. 603), and as everything depends on the construction of this law, it is deemed proper to quote it at large, as follows:

An act to perfect the title to lands south of the Arkansas river, held under the New Madrid locations and pre-emption rights under the act of 1814.

Be it enacted, etc., that the locations heretofore made of warrants issued under the act of February 17, 1815, entitled "An Act for the Relief of the Inhabitants of the Late County of New Madrid Who Suffered by Earthquakes," which were made on the south side of the Arkansas river, if made in pursuance of the provisions of that act in other respects, shall be perfected into grants in like manner as if the Indian title to the lands on the south side of said river had been completely extinguished at the time of the passage of said act.

Sec. 2. "And be it further enacted, that in all cases in which the locations so made, etc., may have been sold, etc., the owner of the warrants, etc., shall have a right to enter other lands, etc."

Sec. 3. "And be it further enacted, that every settler on the public lands south of the Arkansas river, shall be entitled to the same benefits accruing under the provisions of the pre-emption act of 1814, as though they had resided north of said river."

Sec. 4. "And be it further enacted, that all Cherokee pre-emptions which have been or may be located . . . south of the base line in Arkansas, shall be confirmed, and patents shall issue as in other cases."

The Indian title to the lands north of the Arkansas river had been extinguished by the treaty with the Osages, made November 10, 1808.

7 Stat. 107.

In view of the rights of a bona fide settler on the Hot Springs tract in 1814, does the act of 1843 repeal the reservation act of 1832? The department holds the negative. Yet it is believed that the repugnance of the two statutes is such that they cannot be construed to stand together.

Not only the title, but the whole scope of the law indicates that the purpose of Congress was to remove the difficulty arising from the Indian title resting on the lands south of the

Arkansas in 1814, and subsequently. As a historical fact bearing on this point, the court is referred to the report of the committee which introduced the bill into the Senate.

Sen. Rep. No. 36, 2d sess. 27th Cong.

The act of 1843 intended to confirm the pre-emption rights south of the Arkansas river *ab initio*—that is to say, it intended to place the pre-emptor in the position he would have occupied if the Indian title had been previously extinguished. That Indian title was the only obstacle, and the professed object of the law of 1843 was to remove that obstacle, to cure that defect of title, and to give full force and effect to the law of 1814, south of the Arkansas as well as north of it.

"A remedial act shall be so construed as most effectually to meet the end in view, and to prevent a failure of the remedy."

Dwar. Stat. 614.

"Beneficial statutes, therefore, have always been taken and expounded *ultra* the strict letter, but not, it is well and wisely said, *contra* the letter."

Dwar. Stat. 623.

"Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative; but only so far as it is clearly and indisputably contradictory and contrary to the former act 'in the very matter,' and the repugnancy such that the two acts cannot be reconciled; for then *leges posteriores priores contrarias abrogant*."

Dwar. Stat. 530 and 531, and authorities there quoted.

The enactment of 1843 is, "that every settler south of the Arkansas shall be entitled." John Percifull was one of those settlers, and he is included in the very words of the law, as much so as if the settlers had been enumerated and called by name. The Hot Springs were reserved in 1832, but John Percifull was settled there in 1814. The repugnance of the two laws is "in the very matter;" they cannot stand together.

Against this construction have been quoted *Wilcox* v. *Jackson*, 13 Pet. 513, and *U. S.* v. *Gear*, 3 How. 120. Of these the latter alone deserves consideration, having an apparent application to the case in hand.

In the case of *Gear*, a lead mine was discovered by pre-emption, upon the ground that all the lands in a certain district were directed to be sold by a law passed in 1834, which law made some special exceptions, but did not except lead mines. This court held that the general law of 1807, which reserved all lead mines and salt springs from sale, was operative in the district mentioned, notwithstanding the broad terms of the law of 1834.

The facts in this case are almost the reverse of those now before the court. The act of 1807 was a general law reserving all salt springs and lead mines. On the other hand, the act of 1832 was a special reservation of an isolated exceptional tract of land, which at that time was already occupied by a settler.

The act of 1834, in *Gear's Case*, was an act of ordinary legislation, establishing a new district for the sale of lands.

On the contrary, again, the act of 1843 was a special act, designed to operate retrospectively upon a specified class of settlers, and to confirm a certain number of pre-emptions from their inception in 1814.

In the *Gear Case*, the law might very reasonably be understood to mean "all the lands in this district shall be sold as far as the general policy of the laws allow such sales, and no further." In the present case it would be necessary to interpolate in the law, words of exception, thus: "Every settler on the public lands south of the Arkansas river," except the old pioneer John Percifull, shall be entitled, etc.; the remedial policy of curing the defects of title under the act of 1814 shall not have its full effect; it shall cure everybody's title except John Percifull's.

Finally, in the one case, the general reservation was made long before the party had performed any act out of which his claim arose; in the other case, the act of settlement was performed long before the reservation, and the remedial act comes afterwards to recognize the meritorious character of the original act, and to remove an obstacle which prevented its operation at the time.

There is not a single argument used by the majority of the court in *Gear's Case* which has any bearing whatever on the present controversy.

Quære. Does the case of *Gear* v. *The U. S.* establish any thing more than this: that a subsequent law directing lead mines to be sold, does not so far repeal the act of 1807 as to make such mines subject to settlement and pre-emption?

It has been already stated that the reservation act of 1832 presents a similar difficulty in the way of the Belding title under the act of 1830, and the supplementary act of July 14, 1832, but there is this difference in the two cases; the two acts—that of the 20th of April and that of the 14th July, 1832—were passed at the same session of Congress, and of course, according to the established rule of construction, must have a much more intimate relation than the acts of 1832 and 1843. Inasmuch as Belding had acquired no right under the act of 1830, the reservation act of April might well be considered as an exception from the terms of the act passed in July following.

Unless this act of 1843 be construed to repeal the reservation act of 1832, it is admitted that no right accrues under the act of 1814. The land office having uniformly maintained the existing validity of the act of 1832, the parties to this record were never in a condition to make proof of their right to the satisfaction of the register and receiver. In 1851, the Secretary of the Interior authorized an investigation, and it was then that he allowed the heirs of Belding to make their entry as stated above, although he still insisted that the land was reserved from sale or entry by the law of 1832.

If the register and receiver constitute a judicial tribunal, from which there was no appeal under the laws of 1814 and 1830, then both parties stand upon precisely the same footing; nor can it be of any importance that the Secretary of the Interior has undertaken to pronounce in favor of the one and against the other. It was not his province to decide at all.

All the latter pre-emption laws provide for an appeal to the commissioner and finally to the Secretary. In the absence of any appellate

power, the general principle of law applicable, would pronounce the divided opinion to be equivalent to an adverse decision.

But it may be that the register and receiver, or either of them, have been so grossly partial or so plainly regardless of credible testimony, as to give evidence of actual fraud. Is the false decision of the register and receiver in such a case to preclude forever the just claims which have been either corruptly or capriciously ignored?

In the case of *Cunningham* v. *Ashley*, 14 How. 377, the register and receiver had not acted on the proof at all; yet it was held that the proof ought to have been satisfactory to them, and this court decreed in favor of the pre-emption. What is the distinction between refusing to hear proof at all, and refusing to give it a fair and rational bearing upon the rights of parties? According to the principle laid down in *Lytle* v. *Arkansas*, it is only when the register and receiver "act within the law, and the decision cannot be impeached for fraud or unfairness," that "it must be considered final."

In the cases quoted, however, the legal title had passed from the United States, and was in litigation between the parties. No such question is now presented to this court. Neither party to the record has the legal title; that still remains in the government. The utmost result of the present proceeding will be to transfer the mere possession from one party to the other, without any power on the part of the court to compel the issuance of a patent. If, however, the jurisdiction be such as to authorize the court to determine the possession according to the equitable rights of the parties under all the acts of Congress, there can be no doubt that the department will recognize and act upon the decision.

If the case is still in that condition which admits of doing justice through the action of the executive officers themselves, even undoing all that may have been improperly done, surely the court will not hesitate to leave the naked possession with that party which has the superior equity and is entitled to remain on the land.

The court below refused to hear any testimony, either to invalidate the entry made by Belding's heirs or to establish the pre-emption right of John Percifull. No opportunity was given to prove fraud which would make void the title of the plaintiffs below. The case must be sent back in order that the material facts may be determined by a jury.

The New Madrid Location.

This was not merely an outstanding title. Hale had purchased a portion of that interest, and produced it in his own right as a defense to the action. All testimony on this point was excluded, although all formal objections to the New Madrid certificate and survey were waived.

Attorney General Reverdy Johnson thought this New Madrid location good and valid.

5 vol. Opinions, 237.

Cushing thought the contrary.

See his Opinion, 30th August, 1854.

Messrs. **H. May, R. J. Brent, and Geo. C. Watkins,** for defendants in error:

This court has only jurisdiction to examine into the title of the plaintiffs in error so far as it is derived under an act of Congress, which has been misconstrued by the supreme court of the state of Arkansas, to the prejudice of the plaintiffs in error. It has no authority to decide whether the title of the defendants in error was properly maintained by the court below; in other words, the only question is, in what respect the court below erred in deciding that the plaintiffs in error had no title under the acts of Congress.

Miller v. *Nicholls*, 4 Wheat. 311; *Davis* v. *Packard*, 6 Pet. 41; *Williams* v. *Norris*, 12 Wheat. 117; *Crowell* v. *Randall*, 10 Pet. 368; *Mackay* v. *Dillon*, 4 How. 421; *Chouteau* v. *Eckhart*, 2 How. 344; *Pollard* v. *Kibbe*, 14 Pet. 353; *City of Mobile* v. *Eslava*, 16 Pet. 234; *Menard* v. *Aspasia*, 5 Pet. 505; *Matthews* v. *Zane*, 7 Wheat. 164.

2. The plaintiffs in error must derive title to themselves under the New Madrid warrant, and they have failed to do so. It is not enough to show outstanding title in somebody else under that claim.

Owings v. *Norwood*, 5 Cranch, 344; *Fisher* v. *Cockerell*, 5 Pet. 248; *Henderson* v. *Tennessee*, 10 How. 311.

In this case it does not appear by the record that Francis Langlois or his legal representatives ever made the location of the New Madrid grant, but the same was located by Hammond and Rector, 27th Jan., 1819; but the title of these locations is not sufficiently shown by the exhibits in the record, nor does it appear that the original grant in lieu of which this New Madrid certificate issued, was ever surrendered to the government, nor is there any proof of the New Madrid grant itself, but the secondary proof relied upon shows that this New Madrid grant was located prior to any public survey.

3. As to the New Madrid grants without patent, they confer no legal title, and the courts of the United States must disregard these equitable claims.

See 21 How. 481.

They must be located on lands then authorized to be sold, and they must be located within one year from 26th April, 1822.

21 How. 426.

In this last case the entry was in 1818, and the patent in 1827; but as the land was not authorized to be sold in 1818 when located, both title and patent were held void.

The counsel for the defendants in error cites the following decisions under the New Madrid acts:

Lessieur v. *Price*, 12 How. 60; *Barry* v. *Gamble*, 3 How. 51; *Bagnell* v. *Broderick*, 13 Pet. 436; *Cabunne* v. *Lindell*, 12 Mo. 184; *Wear* v. *Bryant*, 5 Mo. 160; *Kirk* v. *Green*, 10 Mo. 253; *Mitchell* v. *Tucker*, 10 Mo. 262; *Rector* v. *Welsh*, 1 Mo. 238; *Kennett* v. *Cole*, Co. Ct. 13 Mo. 140.

The counsel reviewed Langlois' claim, and stated the following objections to it:

1. On the subjects that application was made to the surveyor-general of Missouri for a survey, on January 27, 1819, and a survey made on July 16, 1820.

(*a*) The application was not the location. The survey was not the location. The location was not made so as to become the inception of the title, until returned to the recorder with plat, notice, etc., and approved by him, and recorded, etc.

Bagnell v. *Broderick*, 13 Pet. 436; *Barry* v. *Gamble*, 3 How. 51; *Lessieur* v. *Price*, 12 How. 60, above cited.

(*b*) The Indian title was not extinguished at the time of the passage of the New Madrid act. The tract of country was not public land, the sale of which, in the language of the act of February 17, 1815, is authorized by law.

See 7 U. S. Stat. at L. 176; *Gaines* v. *Nicholson*, 9 How. 365; *Scott* v. *Sandford*, 19 How. 404.

The Indian right of possession is sacred, and cannot be disturbed without their consent.

Opinion of Mr. Wirt, 2 Ins. and Opin. No. 100, p. 58; No. 25, p. 28; Opinion of Mr. Butler, 2 Ins. and Opin. No. 54, p. 814; No. 59, p. 91; see, also, 2 Ins. and Opin. No. 10, p. 10; No. 11, p. 11; No. 12, p. 13; No. 23, p. 25; No. 787, p. 816.

(*c*) At the date of the supposed location, the lands in question were not authorized to be sold. The lands had not been surveyed. The location could, under the most liberal interpretation of the law, only be made on lands authorized to be sold at the time of location.

See *Mills* v. *Stoddard*, 8 How. 365; *Stoddard* v. *Chambers*, 2 How. 284; *Barry* v. *Gamble*, 3 How. 53.

The case of *Easton* v. *Salsbury*, 23 Mo. 100, is predicated upon these decisions, and is a strong authority to the effect that a New Madrid location is void when made upon land reserved from sale by reason of its being covered by a Spanish claim.

(*d*) At the time of the supposed survey in 1820, there was no authority for locating a New Madrid claim in the territory of Arkansas, which had been organized by the act of March 2, 1819.

(*e*) The survey is not evidence of title; it is only of the steps in which the claimant is the actor. The evidence of title does not remain in the office of the surveyor-general, or emanate from it. The patent certificate, when issued by the recorder, is the evidence upon which ejectment is to be maintained.

All the foregoing objections are but a baseless fabrication, resting upon a mere supposition. There never was a survey, or what is the same thing, there is no evidence of it.

No title passes under the patent certificate, so called, for June 16, 1838.

1. Because, after the admission of Arkansas as a state, in 1836, there was no authority in the surveyor-general of Arkansas to order a survey in 1837, or for one to be made in 1838 or returned to the recorder of land titles of Missouri.

2. Because, by the act of April 26, 1822, the time for making locations had absolutely expired, and never was extended, except in a qualified manner, for 18 months, by act of March 2, 1831, in a particular class of cases, of which this is not one.

3. Because the land had been reserved by the act of April 20, 1832.

4. Because the land was appropriated on, and by the act of May 29, 1830, by means of the Belding pre-emption.

The junior certificate on the elder right is superior to the senior certificate on the junior right. The inception of title governs.

9 How. 234; 6 Smedes & M. 789; 5 Cranch, 234; 4 Wheat. 488; 9 Cranch, 164; 3 Scam. 79, 339; 16 Ark. 9, 434.

Mr. Justice **Catron** delivered the opinion of the court:

A contest for the ownership of the Hot Springs, in Arkansas, has been pending for some years before the General Land *Of- [*158 fice, and in the courts of that state. One party derived their title through a pre-emption claim, as an occupant under the acts of Congress of 1830 and 1832, and the other by the location of a New Madrid warrant on the same land.

In December, 1851, the heirs of Belding were allowed to enter the quarter section, including the springs. This entry was held to be valid by the state courts, and to clothe them with a sufficient legal title to sustain an action of ejectment, according to the laws of Arkansas. They held the decision of the register and receiver, in favor of the occupant claimants, to be conclusive evidence of title, as against all persons who could not show a better opposing claim.

As between the titles of the United States and Belding's heirs, the state courts did not decide; but only, that the outstanding title in the United States could not be relied on by the defendant in this action; nor is the validity of the entry of Belding's heirs drawn in question in this court.

The defendant relied on a survey made in June, 1838, founded on a New Madrid certificate for 200 arpents.

To support this survey, an application was produced, dated 27th January, 1819, signed by S. Hammond and Elias Rector, addressed to William Rector, surveyor of the public lands, etc., asking to have surveyed and to be allowed to enter the recorder's certificate for 200 arpents, granted by him to Francis Langlois, or his legal representatives, and dated the 26th November, 1818 (No. 467). The survey to be made in a square tract; the lines to correspond to the cardinal points, and to include the Hot Springs in the center. In 1818, the spring was in the Indian country, to which, of course, no public surveys extended. And as the act of 1815 (3 Stat. at L. 211), providing for New Madrid sufferers, only allowed them to enter their warrants on lands "the sale of which was authorized by law," the unsurveyed lands could not be legally appropriated; and, of necessity, the surveyor-general disregarded the application to have a survey made for Langlois. And thus the claim stood from 1818 to 1838.

The defendant offered in evidence the certificate of a private survey of the claim of Langlois, made by James S. Conway, *D. S., [*159 dated July 16th, 1820, which includes the spring. This paper the court also rejected.

Until the survey on Langlois' claim was presented to the recorder of land titles at St. Louis, and recognized by him as proper and valid, it could have no force, as this was the only mode of location contemplated by the act of 1815 (3 Stat. at L. 211). So it has been

uniformly held. *Bagnell* v. *Broderick*, 13 Pet. 436; *Lessieur* v. *Price*, 12 How. 9.

The act of April 26th, 1822, validated locations of New Madrid certificates then existing, and which had been made in advance of the public surveys; but the 2d section of the act declared that future locations should conform to the public surveys, and that all such warrants should be located within one year after the passage of the act.

As the public surveys then existing in Missouri and Arkansas territory were open to satisfy these claims, there was no difficulty in complying with the act of 1822 (3 Stat. at L. 668).

Reliance is placed on the act of Congress of March, 1843 (5 Stat. at L. 603), to maintain the survey of 1838, of the New Madrid certificate. That act provides, that locations before that time made on New Madrid warrants, on the South side of Arkansas river, if made in pursuance of the act of 1815 (3 Stat. at L. 211) in other respects, shall be perfected into grants, in like manner as if the Indian title to the lands on the south side of the river had been completely extinguished at the time of the passage of said act of 1815. The act of 1843 (5 Stat. at L. 603) does not apply to the survey and location of Langlois made in 1838, for several reasons:

1st. The sale of the land thus surveyed was not authorized by law; the act of April 20th, 1832 (4 Stat. at L. 505), having reserved from location or sale the Hot Springs, and four sections of land including them as their center.

2d. The attempted location was void, because barred by the act of 26th April, 1822 (3 Stat. at L. 668), which act was not repealed or modified by the act of 1843. This act referred to locations made on the south of the river Arkansas, of lands regularly surveyed and subject to sale, and which locations had been made on or before the 26th April, 1823, when the bar was interposed.

We are of opinion that the New Madrid sur-[*160*] vey of 1838 *was altogether invalid, and properly rejected by the state courts.

It has been earnestly pressed on our consideration, that the entry of Belding's heirs is also void, because the land it covers was not subject to entry by an occupant claimant, or anyone else, after the act of April 20th, 1832 (4 Stat. at L. 505), had reserved it from sale.

Admitting it to be true, that the act of April, 1832 (4 Stat. at L. 505), was passed when no individual claimant had a vested right to enter the land in dispute, still the 25th section of the judiciary act only gives jurisdiction to this court in cases where the decision of the state court draws in question the validity of an authority exercised under the United States, and the decision is against its validity. Here, however, the decision was in favor of the defendant's entry, and sustained the authority exercised by the department of public lands, in allowing Belding's heirs to purchase. Moreover, the plaintiff in error is not in a condition to draw in question the validity of Belding's entry. He relies on an outstanding title in the United States to defeat the action. Being a trespasser, without title in himself, he cannot be heard to set up such title. "To give jurisdiction to this court, the party must claim for himself, and not for a third person, in whose title he has no interest." *Henderson* v. *Tennessee*, 10 How. 323. The plaintiff in error must claim (for himself) some title, right, privilege, or exemption, under an act of Congress, etc., and the decision must be against his claim, to give this court jurisdiction. Setting up a title in the United States, by way of defense, is not claiming a personal interest affecting the subject in litigation. This is the established construction of the 25th section of the judiciary act. *Montgomery* v. *Hernandis*, 12 Wheat. 132.

If it was allowed to rely on the United States title in this instance, the right might be decided against the government, where it was no party and had not been heard.

A claim is set up in defense, that John Percifull was entitled to a preference of entry under the act of 1814 (3 Stat. at L. 121); which act, it is insisted, was revived by that of 1843 (5 Stat. at L. 603), § 3. Suppose *that [*161 Percifull's right to appropriate the land in dispute was undoubted, and that the register and receiver had allowed the heirs of Belding to enter wrongfully; still, the courts of Arkansas, in this action of ejectment, had no right to interfere, and set up Percifull's rejected claim.

But this is of little consequence, as, when the act of April, 1832 (4 Stat. at L. 505), was passed, reserving the Hot Springs from sale, Percifull had no vested interest in the land that a court of justice could recognize. Then, the United States government was the legal owner, and had the power to reserve it from sale; so that the offer to purchase in 1851, under the assumed preference to entry claimed for Percifull, was inadmissible. Had the entry been allowed, in face of the act of Congress, such proceeding would have been merely void.

These being the only questions within our jurisdiction worthy of consideration in the causes Nos. 15, 16, 17, 18, and 19, it is ordered that the respective judgments rendered therein, by the Supreme Court of Arkansas, be affirmed.

STEPHEN O. NELSON, Ellison Black Smith, Henry C. Walker, and Thos. A. Nelson, Partners under the Firm of S. O. Nelson & Co., *Appts.*,

v.

LUCIUS C. LELAND, John H. Cooke, Duncan C. Williams, and McRae, Coffman & Co., Claimants of the Steamer Brigadier-General R. H. Stokes.

(See S. C. 22 How. 48-56.)

Collision between flat boat and steamer—where both boats in fault, damages and costs divided—admiralty jurisdiction.

In case of collision on the Yazoo river, between flat boat and steamer, held that the flat boat was in fault. It should have had steady and fixed lights, and occupied near the shore of the river, giving a sufficient passage to the ascending steamboat, and kept on a straight line of the water and not in a diagonal course.

NOTE.—*Collision. Rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes, 13 L. ed. U. S. 537; 35 L. ed. 453.

There was also fault in the steamer. Seeing the light ahead the master should have stopped his boat at once, and reversed her wheels, until the locality of the light was clearly ascertained. He could have backed his boat, until he avoided the flat boat

In cases where both boats are in fault, the damages and also the costs, must be divided between them.

The admiralty jurisdiction applies to all navigable waters except to a commerce exclusively within a state.

Argued Jan. 5, 1860. Decided Jan. 16, 1860.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The libel in this case was filed in the district court of the United States for the eastern district of Louisiana, by appellants, against the steamer Brigadier-General R. H. Stokes, to recover damages resulting from a collision. The claimants first pleaded to the jurisdiction, and then denied that the steamer was in fault. The district court entered a decree in favor of the libelants, for $7,616.44, with five per cent interest and costs. The circuit court, on appeal, held that the admiralty court had no jurisdiction, and reversed this decree; whereupon the libelants appealed to this court.

A further statement of the case appears in the opinion of the court.

April 9, 1858, "Mr. Gillet, of counsel for the appellees, moved the court to dismiss this appeal on the ground of a want of jurisdiction originally in the district court, on consideration whereof, it is the opinion of this court that the question of jurisdiction in the lower court is a proper one for appeal to this court, and for argument when the case is regularly reached, and that this court have jurisdiction on such appeal; whereupon it is now here ordered by the court, that the motion to dismiss this appeal on that ground be, and the same is hereby overruled." Per Mr. Chief Justice Taney.

Mr. **Albert Pike,** for appellants:

The limits of the admiralty jurisdiction of the courts of the United States under the Constitution are not those of the admiralty jurisdiction in England. The grant in the Constitution extending judicial power "to all cases of admiralty and maritime jurisdiction," is neither to be limited to, nor interpreted by, what were cases of admiralty jurisdiction in England at that day.

Waring v. *Clarke,* 5 How. 441; *N. J. Steam Nav. Co.* v. *Merchants' Bank,* 6 How. 344; *Newton* v. *Stebbins,* 10 How. 586.

It was within the constitutional power of Congress to enact that this jurisdiction should extend to the great fresh-water lakes and the rivers connecting the same.

The Genesee Chief, 12 How. 443; see, also, *The Vengeance,* 3 Dall. 297; *The Betsey,* 4 Cranch, 443.

The admiralty jurisdiction extends upon our great navigable rivers above tide-waters, in the absence of any law of Congress extending the jurisdiction; and under the Constitution itself.

The Genesee Chief, 12 How. 443; *Fretz* v. *Bull,* 12 How. 468; *Goslee* v. *Shute,* 59 U. S. (18 How.) 463; *Culbertson* v. *The Southern Belle,* 59 U. S. (18 How.) 584.

Messrs. **R. H. Gillet** and **C. Cushing** for appellees:

Congress can confer no broader jurisdiction than is authorized by the Constitution.

Marbury v. *Madison,* 1 Cranch, 137; *United States* v. *Yale Todd,* 13 How. 52, note.

The language of the Constitution must be construed to mean what it did at the time it was written.

Cathcart v. *Robinson,* 5 Pet. 264, 280; *Flavell's Case,* 8 Watts & S. 197; *Ex parte Wells,* 59 U. S. (18 How.) 307, 311.

At the time of framing the Constitution, the words "admiralty and maritime jurisdiction" had a distinct legal meaning, as much as the words "judicial power."

United States v. *Ferreira,* 13 How. 40; *De Lovio* v. *Boit,* 2 Gall. 398, 471.

In law, at the date of our Constitution, navigable waters extended no further than the tide ebbed and flowed, and from the last bridges seaward.

Ex parte Jennings, 6 Cow. 518, 528; *Hooker* v. *Cummings,* 20 Johns. 90, 99; *Palmer* v. *Mulligan,* 3 Cai. 307; *Adams* v. *Pease,* 2 Conn. 481; *Ingraham* v. *Wilkinson,* 4 Pick. 268, 272; *Berry* v. *Carle,* 3 Greenl. 269, 274; *Cates* v. *Wadlington,* 1 McCord, 582; *Commonwealth* v. *Chapin,* 5 Pick. 199; *Miles* v. *Rose,* 5 Taunt. 705; *King* v. *The Inhabitants of Hanwood,* 2 Doug. 439.

The act of 1845, extending the admiralty jurisdiction to the lakes and navigable waters connecting them, distinctly recognizes this view. 5 Stat. at L. 726.

This court had then settled the law, and the country was acting under it, as the following cases will show:

The Thomas Jefferson, 10 Wheat. 428; *Peyroux* v. *Howard,* 7 Pet. 324; *Waring* v. *Clarke,* 5 How. 441; *The Orleans* v. *Phœbus,* 11 Pet. 175, 183; *U. S.* v. *Coombs,* 12 Pet. 72, 76.

The act of 1845 did not alter the law except as to the lakes and their connecting waters, if in fact it altered it there.

If the territorial jurisdiction is not bounded by the ebbing and flowing of the tide, then it is not and cannot be limited by any definite boundaries.

This case is not within the ruling of *The Genesee Chief,* and therefore must be dismissed.

12 How. 443, 458.

The steamer in this case is not averred to have been enrolled and licensed for the coasting trade, nor engaged in a commerce between different states and territories. It is excluded by the express words of the decision in the case of *The Genesee Chief;* and without now revoking that decision, this court must decree that it has no jurisdiction over it, and therefore must dismiss it.

Further argument of counsel to the merits of the case, being confined to the facts involved, is not here given.

*Mr. Justice **McLean** delivered the [*50 opinion of the court:

This is an appeal in admiralty from the circuit court of the United States of the eastern district of Louisiana.

The libelants allege that they were the consignees of a certain flat boat called "Clear the Track," and of three hundred and sixty-six

bales of cotton, which were shipped to them by various persons by said flat boat; that said boat left Sardinia, on Yakana river, in the state of Mississippi, on the 19th of February, 1853, bound for New Orleans; that on the 2d of March ensuing, on said voyage, descending the Yazoo river, about eight miles below the head of Honey Island, and within the admiralty jurisdiction, about four o'clock on the morning of said day, the flat boat, being a stanch, tight, and well built vessel, completely rigged and well provided with tackle, apparel, and furniture, and having on board a full complement of men to navigate the boat, being about the middle of the said Yazoo river, leaving sufficient space on either side for a steamboat or other large vessel to pass, and having a light upon the flat boat, the captain and crew of the boat being up, the steamboat Brigadier-General R. H. Stokes, ascending the said river, struck the flat boat "Clear the Track" in the bows, which caused her to fill with water, and become a complete wreck; that the steamboat rung her bell, recognizing the light of the flat boat, but continuing to run up the middle of the river.

In their answers, the respondents say that the collision set forth in the libel occurred on the Yazoo river, about fifty miles above the foot of said island, and more than two hundred miles above the mouth of the Yazoo, where it falls into the Mississippi river; and that the entire length of the Yazoo river is within the state of Mississippi; and they allege that the district court has not jurisdiction of the matters and things, or the claim alleged in the libel against the respondent. And the respondent denies that the collision was caused or did happen by any fault, negligence, or want of skill in the officers or crew of the steamboat; and they say it was caused by the unskilful management of the flat boat; and the proper place for the flat boat, it is said, was at the shore at 51*] night; and that *there was not sufficient space for the steamboat to pass between the flat boat and the shore.

D. B. Miller says: I have seen the flat boat; she seemed to have a sufficient number of hands on board, and to be well managed. From the size of the boat, witness thinks she was suitable for the navigation of the Yazoo and Mississippi rivers, and from her size she would carry three hundred and fifty bales of cotton and more.

Jackson Harris is of the same opinion. James D. Bell examined the boat well, and considered her strong and well built. Saw her loaded with three hundred and forty bales of cotton, and says she would have carried fifty more bales safely. Capt. Williams was captain of the flat boat "Clear the Track" when the collision occurred. Besides himself, he had five hands and one passenger, who also worked. Witness began his trip at Sardinia, on the Yakana river. The flat boat had three hundred and seventy-one bales of cotton on board. Nothing of importance occurred until the morning of the second of March, 1853, when a steamer was heard coming up the river, which afterwards proved to be The Brigadier-General R. H. Stokes. Witness had laid down about twelve o'clock that night, but was shortly afterwards awakened by Johnson, one of his hands, who informed him a steamboat was approaching, and he desired witness to be on deck. Witness saw the steamer approaching, at a distance of about half a mile. A light on deck was immediately prepared. At this time, the steamboat was about four or five hundred yards out of sight round the point. The witness ordered his men, four of whom were on deck at the time, to throw the boat out from the point, so as to give the steamer room to pass. Continued efforts were made for this purpose, until the collision occurred.

When the boats came together, all hands were at the oars, except Mr. Johnson, who held the light. The steamboat could be seen across the point. It was some fifteen minutes, the steamboat being in full view, before the boats came into collision. The flat boat was struck on the first stanchion from the corner of the bow nearest the point of the nosing, about three feet from the jackstaff of the steamer. The collision was *very severe—so great [*52 as to knock every one down on the flat boat. Witness was knocked down senseless by the crane neck of the oar, but he saw all the others fall before he fell. When witness recovered from the effect of the blow, he perceived the steamer had passed out of his view. Every effort was made to stop the hole made in the flat boat by the steamer, and, by working the pump, to keep the boat from sinking. The boat floated down some twenty-five miles before they could land her. In less than an hour after the collision, the boat sank six feet deeper in the water, and became unmanageable; and a landing was made, with great difficulty, at some three or four o'clock in the afternoon.

The steamer Stacy came down the river the next day, and she took on two hundred bales of the cotton, including the thirty-five on shore. Before the arrival of The Stacy, witness had engaged the steamboat McLean to go up and take up the cotton that could be saved.

Witness has been engaged in flat boating on the Yazoo river for the last eighteen years. He does not consider the place where the collision happened as unsafe to run a flat boat at night, and that it is not usual to tie up flat boats in that part of the river.

The witness says the flat boat had a torch made of split pine boards, as usual on such occasions. The Stacy met the flat boat in a very narrow part of the river, much narrower than where the flat boat met The Stokes. The Stacy was much nearer the flat boat when she rang her bell than The Stokes, but she backed out of the way. The Stacy is double the size of The Stokes, it being the largest boat that runs up the Yazoo.

Mr. Johnson is corroborated by others in his statement. Thomas Barnes says the steamer did not change her course after seeing the flat boat. The steamer was not hurt. Her jackstaff was knocked off, which was replaced. Did not hear Captain Williams offer any assistance to the flat boat. At the time the steamer struck the flat boat she was nearly in full headway.

Witness thinks there was time enough for the steamer to *get out of the way of the [*53 flat boat. The master of the boat entered a regular protest against the steamer. A number

of witnesses referred to facts which have no material bearing in the case.

On the part of the respondent, it was proved by William F. Mouldin, the pilot on The Yazoo since 1845, and was so acting on The Stokes when the collision occurred, eight miles from the head of Honey Island. The bell was rung to stop at Hall's Landing. Directly after ringing the large bell to land, saw a light, as he supposed at the landing. The river was narrow and the current swift. After running a short distance, and rounding the point, saw the flat boat about three hundred yards above the steamer. He immediately rang the bell to stop the engines, and then to back her, which was done. When she had made about six revolutions the collision took place. The steamboat was nearly at a stand. The flat boat was floating nearly broadside down the river. There was no possible means by which a collision could be avoided. The steamboat could not pass on either side of the flat boat. This, however, is controverted by other witnesses, who say that there was space on each side of the flat boat for the steamer to pass up the river.

That the light on the flat boat was seen some two or three hundred yards by the steamer approaching the flat boat, is admitted; but it is urged that a steady light should have appeared on the flat boat; that a waving lighted torch often misleads an ascending boat, on the supposition that it is on shore, and designates a landing place. Several of the witnesses say, that on observing the approach of the flat boat, the wheel of the steamer was reversed, and some five or six revolutions had been performed when the collision occurred. Some of the witnesses think that the force of the steamer was checked, so that its movement up the river could scarcely be perceived when the steamer struck the flat boat.

It has happened in this case, as in all other cases of collision, that the witnesses on board of their respective boats, from the circumstances which surrounded them, and the favorable impressions naturally felt in regard to the 54*] efforts made by their *respective crews to save the property and lives under their charge, differ widely in their opinions. The steamboat received but little or no injury by the collision; but the flat boat, in its structure and cargo, received material injury. The evidence fully proves this, not only in regard to the flat boat and cargo, but also as to the expense and loss to which the owner was subjected.

It is unnecessary to go into detail to show the facts proved. It is enough to know the character of the transaction, and the responsibilities incurred by the respective parties.

The general rule is, where two vessels meet each other, one propelled by steam and the other by the winds, the steamer must give way, and avoid a collision. To this no one can object; but, like other general rules, it may be subject to exceptions.

The Yazoo extends, from its junction with the Mississippi river, some two hundred miles and upwards into the state of Mississippi, and in some parts its navigation requires care and experience. Its channel widens and deepens as the volume of water increases; but it is a narrow river, and its course is crooked—but The Stacey and other boats, of a large class for inland boats, navigate it with success.

Several of the steamboat witnesses think that a flat boat, laden with three hundred and seventy bales of cotton, ought not to run on a dark night, but should be tied up, where the channel is narrow, and have fixed lights, which distinguish it from a place of landing. Other witnesses differ from the above, and say that an inland navigation so long and important as this, ought to be left free to the enterprise of its inhabitants. This is more congenial to the spirit of our people than a regulation which would retard commerce, without any adequate beneficial results. No measure of this character could well be adopted, without an accurate survey of the river, in which the points of danger should be designated. Until this shall be done, it would seem most judicious not to go beyond a regulation for boats, passing each other in ascending and descending this river, having lights, and giving notice of their approach. There are regulations which apply to our internal *navigation, embracing our [*55 rivers and other waters. Under these, every master of a boat should act with a presumed knowledge of his duty, and be held responsible accordingly.

We think, in several particulars, the captain of the flat boat was in fault. He should have had one or more steady and fixed lights on one or more conspicuous parts of his boat. He should have been careful, by having the upper and lower end sweeps or oars so worked as to have occupied near the shore of the river, giving a sufficient passage to the ascending steamboat. Especially he should have so guided his boat as to have kept it on a straight line of the water, and not on a diagonal course. It is easily perceived that, from the position of the flat boat, it was difficult, if not impracticable, to ascend the river by the steamer without striking the flat boat, in the position it occupied.

But we think there was also fault in the steamer. In rounding the point, it is admitted, the steamer was as least three hundred yards below the flat boat. Seeing the light ahead, the master, in the use of ordinary caution, should have stopped his boat at once, and reversed her wheels, until the locality of the light was clearly ascertained. It is no excuse, that he mistook the light for a place of landing. The commander cannot lessen his responsibility by alleging his mistake. He is bound to make no mistake, for it is his duty to stop his boat where he doubts, until he ascertains the facts. Had this been done, the collision could not have occurred. He could have backed his boat, until he avoided the flat boat. In not having done this, the steamer was in fault, and the damages must be divided between the two boats, and also the costs.

Some doubts have been suggested whether, in the exercise of the admiralty jurisdiction, some limit may not be interposed.

Under the English system, the ebb and flow of the tide, with few, if any, exceptions, established the fact of navigability; and this was the course of decision in this country until recently.

The vast extent of our fertile country, its increasing commerce, its inland seas, bays, and rivers, open to us a commercial *pros- [*56

perity in the future which no nation ever enjoyed. Our contracted views of the English admiralty, which was limited by the ebb and flow of the tide, were discarded, and the more liberal principles of the civil law, equally embraced by the Constitution, were adopted.

This law is commercial in its character, and applies to all navigable waters, except to a commerce exclusively within a state. Many of our leading rivers are sometimes unnavigable; but this cannot affect their navigability at other times. A commerce carried on between two or more states is subject to the laws and regulations of Congress, and to the admiralty jurisdiction.

Upon the whole, the decree of the circuit court is reversed, and the cause is remanded, under the above order of this court.

Mr. Justice **Campbell**, dissenting:

The decree in the circuit court, dismissing the libel in this cause, was rendered before the judgment in this court in the case of *Jackson* v. *The Magnolia*, 20 How. 296, was given. There was no material differences in the cases. The reasons for the judgment of the circuit court in this case are contained in the opinion filed by me in that case. I do not consider it necessary or proper to repeat them here. I concur in the judgment of the court upon the merits of the cause.

Mr. Justice **Catron** concurs with the opinion of the court, because the question of jurisdiction, involved in this cause, was ruled in the case of *The Magnolia*, referred to by Mr. Justice Campbell.

MARY FORT ADAMS, Adm'x of John Hagan, Jr., Deceased, *Appt.*,

v.

JOHN S. PRESTON and Caroline M. Preston, his Wife.

(See S. C. 22 How. 473-491.)

Judgment of state court cannot be reviewed, as contrary to state law—United States courts have no jurisdiction of insolvencies settled in state courts—cancelation of mortgages in Louisiana—appearance of creditor in insolvent proceedings waives payment by insolvent.

This court cannot review a judgment of the parish court of New Orleans, for any irregularity or illegality in the proceedings of that court, if either existed, when there could have been an appeal to the supreme court of Louisiana for its correction.

This court has never done so, in any case in which the subject-matter of a suit was within the jurisdiction of a state court, upon the allegation that its judgment had been given contrary to the laws of the state.

The parish court of New Orleans had, by law, full power over the property ceded by an insolvent, and over the claims of creditors, and exercised its jurisdiction, and the legality of its judgment cannot be questioned by this court.

The courts of the United States have no jurisdiction over the settlement of insolvencies in the state courts. The parish court had exclusive jurisdiction.

The erasure and cancelation of mortgages may be made in Louisiana, by the judgment of a court of competent jurisdiction; where it has the effect of a *res judicata*.

After the erasure and cancelation so made, there can be no subsequent reinscription of a mortgage.

Neither the reinscription nor the assignment to the plaintiff could have the effect to give to the plaintiff any claim upon property of the insolvent, which had been sold under the judgment of a court having jurisdiction in insolvency.

The appearance in the *concurso* of the creditors, and acquiescence with them in fixing the terms for the sale of the property of the insolvent, must be taken as a waiver of all rights of the payment of judgments against the insolvent.

Argued Dec. 30, 1859. Decided Jan. 16, 1860.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The history of the case, and a very full statement of the facts involved, appear in the opinion of the court.

Messrs. **Miles Taylor** and **Alex. T. Steele**, for appellant:

1. A mortgage in the state of Louisiana, duly inscribed in the register of mortgages, in the parish where the debtor has his domicil, will affect or bind the slaves of the debtor, no matter in what part of the state such slaves may be employed.

C. C. 453, 454, 458, 461, 3216, 3238, 3246, 3247, 3248, 3250; *Hyams* v. *Smith*, 6 La. Ann. 363; *Patin* v. *Creditors*, 9 La. 71; *Hooper* v. *The Union Bank of La.* 10 Rob. La. 63; 11 Rob. La. 20; *Cumming* v. *Biossatt*, 2 La. Ann. 794; *Crouch* v. *Lockett*, 3 La. Ann. 121; *Bibb* v. *Union Bank*, 3 La. Ann. 334; *Spencer* v. *Amis*, 12 La. Ann. 127; *Voorhies* v. *De Blanc*, 12 La. Ann. 864.

2. No mortgage of any kind existed in favor of the heirs of Hampton upon the slaves, which are the object of the present action, on the 2d day of February, 1841, when they filed their intervention in the suit then pending in the parish court of New Orleans, wherein the syndics of the creditors of Thomas Barrett were plaintiffs and Robert Bell was defendant, nor at any time thereafter, nor did any privilege exist on them in favor of the heirs of Hampton; and these slaves were then affected by, and subject to, the judicial mortgages resulting from the judgments duly recorded against Thomas Barrett in the parish of New Orleans, where he had his domicil.

C. C. 3333; Transcript, 104 to 108; C. C. 2216, 3246, 3247, 3248, 3250, 3238, 3289, 3317, 3318, 3290.

3. The proceedings had in the case of *The Syndics of the Creditors of Thomas Barrett* v. *Robert Bell*, in the parish court of New Orleans, upon the intervention of the heirs of Hampton filed therein, were and are, so far as to the mortgage rights of the Union Bank on the property of the insolvent Barrett *res inter alios acta*, and can have in law or equity no effect in sheltering the slaves in question from pursuit, when the object is to subject them to the operation of the judicial mortgages which existed in favor of that bank at the time of making such intervention. Neither was there anything in the proceedings of the case of

NOTE.—*Jurisdiction of United States Supreme Court; to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws. It is for state courts to construe their own statutes. Supreme Court will not review their decisions except when specially authorised to by statute*—see note to Jackson v. Lamphire, 7 L. ed. U. S. 679; and note to Commercial B'k v. Buckingham, 12 L. ed. U. S. 169.

Barrett v. *His Creditors*, 4 Rob. La. 408, which could have had any such effect.

Bullard & Curry's Dig. 479, *et seq.* §§ 10, 11, 12, 15, 16, 31, 35, 44, 45, 46; *Brown* v. *Kenner*, 3 Mart. 278; *Saul* v. *Creditors*, 7 Mart. N. S 425; *Rivas* v. *Hunstock*, 2 Rob. La. 187; *Egerton* v. *Creditors*, 2 Rob. La. 201; *Coiron* v. *Millaudon*, 3 La. Ann. 664; *Gravier* v. *Lafon*, 7 Mart. N. S. 613; *Pandelly* v. *Creditors*, 9 La. 387; *Morgan* v. *Syndics*, 4 La. 174; *Morgan, Dorsey, & Co.* v. *Their Creditors*, 19 La. 84; *Suc. of Petayvin*, 10 Rob. La. 118; 1 La. Ann. 92; C. C. 1169, 1170; *Robert* v. *Creditors*, 2 La. Ann. 535; *Lee* v. *Creditors*, 2 La. Ann. 994; *West* v. *Creditors*, 3 La. Ann. 532; *Williams* v. *Nicholson*, 5 La. Ann. 720.

In conclusion, we claim that at the date of Barrett's surrender and afterwards, the heirs of Wade Hampton had no mortgage upon the slaves of Barrett which we now desire to subject to the payment of our debt, and that at the same time the Union Bank did have a mortgage on those slaves; that the heirs of Hampton (of whom the defendants are two) received the property in payment of a debt which they claimed to be due to them with mortgage without any payment whatever, and that the Union Bank received nothing; and, that the sale of the property to Hampton's heirs did not cancel any mortgages which were upon the property, and that the questions presented in this case were not and could not have been examined in the case of *The Syndics of Barrett* v. *Bell*, or of *Barrett* v. *His Creditors*, and also that the plea of prescription filed by defendants, could not apply to the case; and also that the acts of the syndics, in pretending to cancel the mortgages of the Union Bank, were void.

These are all the questions raised by the pleadings.

***Mr.* J. P. Benjamin**, for appellees:

1. The bill must be dismissed for want of proper parties. This objection was taken in the court below, and is insurmountable.

The bill prays to annul a judgment rendered in a suit between the syndics of Thomas Barrett and Robert Bell and the heirs of Wade Hampton intervening; yet, neither of the original parties to the suit is before the court, and only one out of the three intervening parties.

It seeks to set aside a sale made by Barrett's syndic and Robert Bell to the three heirs of Wade Hampton; yet none of the vendors are before the court, and only one of three purchasers is made party.

The bill attempts to excuse the want of parties that it admits to be necessary, by averring them to be beyond the jurisdiction of the court.

This excuse cannot avail.

Shields v. *Barrow*, 17 How. 130; *Coiron* v. *Millaudon*, 19 How. 113.

2. The parish court of New Orleans was vested by law with full power over all the property ceded by the insolvent, and over the respective claims of the creditors.

Any error or illegality in the proceedings of the parish court should have been corrected by appeal to the supreme court of Louisiana.

Tarver v. *Tarver*, 9 Pet. 174; *Gaines* v. *Chew*, 2 How. 619, 644; *Fouvergne* v. *City of N. O.* 18 How. 471.

That the law of Louisiana vested in the parish court full and conclusive jurisdiction over the property surrendered and the distribution of its proceeds against the creditors, is too clear to admit of dispute.

Insolvent law of La. of 1817; insolvent law of La. 13th March, 1837; act of legislature, La. 1826.

All the property previously owned by the insolvent become vested in the creditors represented by the syndics as their trustees.

Schroeder v. *Nicholson*, 2 La. 354; *Morgan* v. *Creditors*, 7 La. 62; *Dwight* v. *Simon*, 4 La. Ann. 492.

And all creditors who are parties to the insolvent proceedings are absolutely prohibited from seeking remedies in any other court, even of the state of Louisiana, than that in which the insolvency is pending.

Jacobs v. *Bogart*, 7 Rob. La. 162; *Marsh* v. *Marsh*, 9 Rob. La. 46; *Tyler* v. *Creditors*, 9 Rob. La. 373.

And not only is this so, but previously existing suits in other courts are all required by law to be transferred to the court having jurisdiction of the insolvency, and to be there cumulated with the insolvent proceedings.

Code of Prac. art. 165, § 3.

3. If, however, it be pretended that the circuit court had jurisdiction of the complainant's demand on the ground of the frauds charged in the bill, the answer is, that those frauds are denied in the answer, and not one scintilla of proof has been offered in support of them.

4. Should it be decided by the court that the foregoing points are not sustainable, and that the merits of the controversy between the parties are open for examination, then it is contended in behalf of appellees:

I. That complainant has no such mortgage rights as are alleged by him, because the mortgages were canceled many years before he acquired the judgments assigned to him.

These mortgages were canceled by consent of complainant's assignor.

Independently of this consent, they were canceled by the syndics by virtue of power vested in them by law, and this was done on the 2d of June, 1841.

These mortgages claimed by complainant were also ordered to be erased and canceled by judgment of the court rendered contradictorily with the Union Bank, more than four years before the transfer by the bank to the complainant.

The complainant seems to think, that because the law (C. C. 3333) provides that mortgages cease to have effect after a lapse of ten years from the registry, unless the registry be renewed, it is, therefore, in the power of a mortgagee to revive a mortgage legally canceled and erased by the *ex parte* act of reinscribing it on the books of the mortgage office. No argument can be needed on such a pretention.

Observe, in the transfer from the bank, to Hagan, the bank does not profess to sell any mortgage claims; does not pretend that there then, 1849, existed any inscription of the judgments, but simply transfers its claim without any warranty. The idea on which this suit was brought, is plainly an after-thought, and the suit itself purely a speculation in litigation.

The appearance and action of the bank in the concursor or meeting of creditors, and fixing

the terms of sale of the property, was a legal waiver of any right to follow the property, and an agreement to look alone to the proceeds in the hands of their agents, the syndics.

Egerton v. *Creditors*, 2 Rob. 201; *Saul* v. *Creditors*, 7 Mart. N. S. 446, 447.

Finally, the sale of the property by order of court in the partition suit extinguished the mortgages, and left the parties entitled to them no other recourse than to claim the proceeds of the sale. The law is the same in probate and insolvent sales.

Fabre v. *Hepp*, 7 La. Ann. 5; *Gilmore* v. *Menard*, 9 La. Ann. 212; *Williamson* v. *Creditors*, 5 Mart. 620; *Kohn, Syndic*, v. *Marsh*, 3 Rob. La. 48.

The rights of the Union Bank as judgment creditors were finally settled in the parish court, and the judgments therein rendered for the application of the proceeds of the sale to the payment of Hampton's heirs; and the judgments finally homologating the accounts of the syndics, are final and conclusive adjudications of the subject-matter of this suit, and form *res judicata* against complainant.

Morgan v. *Creditors*, 4 La. 174; *Ory* v. *Creditors*, 12 La. 121; *Lang* v. *Creditors*, 14 La. 237; *Smith* v. *De La Lande*, 1 Rob. La. 384; *Egerton* v. *Creditors*, 2 Rob. La. 201; *Coiron* v. *Millaudon*, 3 La. Ann. 664.

And it makes no difference that the price was not actually paid to the syndics, but retained by Hampton's heirs in satisfaction of their claim, as this was their legal right.

Goodale v. *Creditors*, 8 La. 302; *Rodrigues* v. *Dupertrand*, 1 Rob. La. 535; *Robert* v. *Creditors*, 2 La. Ann. 535.

Complainant's claim is barred by prescription. The suit to annul the judgments and decrees of the parish court is barred by the lapse of one year.

La. Code of Pr. 607, 713.

And the mere lapse of time, long acquiescence, and laches of the complainant and assignors, from the sale in 1841 till the filing of the bill in 1853, coupled with the fact that the complainant is a mere assignee of a right to file a bill in equity for fraud, form a sufficient ground for the dismissal of the bill.

2 Story Eq. Jur. § 1520, and authorities there cited; *Prosser* v. *Edmonds*, 1 You. & Coll. 481; *Ward* v. *Van Bokkelen*, 2 Paige, Ch. 289; *Worsham* v. *Brown*, 4 Ga. 284.

The complainant's right to enforce his mortgage, even if it were valid, is prescribed by the lapse of ten years.

C. C. 3495, 3374, § 6, 3508, 3444; *Lanusse* v. *Minturn*, 11 La. 256.

The original inscriptions of the mortgages claimed by Hampton's heirs were valid, and the registry of the sale from Leroy Pope to Barrett created a privilege in their favor, and operated as a valid reinscription of the original mortgages.

C. C. 3315, 3316; *Mallard* v. *Carpenter*, 6 La. Ann. 397; *Sauvinet* v. *Landreaux*, 1 La. Ann. 220; *Ells* v. *Sims*, 2 La. Ann. 251; *Bonnafe* v. *Lane*, 5 La. Ann. 227.

The heirs of Hampton were legally and rightfully recognized as entitled to the privilege accorded by law to partnership creditors, in the partnership assets.

C. C. 2806, 2794.

Mr. Justice **Wayne** delivered the opinion of the court:

We have given our best consideration to this record, in connection with the minute statement made from it by the counsel of the complainant, without having been able to find any cause for the reversal of the judgment.

The plaintiff sued the defendants, John S. Preston and *Caroline M. Preston, his [*481 wife, as the joint possessors of one hundred and thirteen negroes, and their increase, to subject them, and the revenues which had been derived from their labor, to the payment of certain judgments which the plaintiff says he owns, as the assignee of the Union Bank of Louisiana.

Those judgments had been obtained by that bank against Thomas Barrett, a resident of the city of New Orleans. He alleges that Barrett was the owner of the slaves when the judgments were obtained, and that, by reason of that fact, and the bank's assignment to him, he had a judicial mortgage upon them, their increase and revenues, to pay the judgments.

The suit was brought in the third district court of New Orleans, when the defendants were sojourners there; and being cited to answer, they appeared. Being citizens of the state of South Carolina, they removed the cause to the states circuit court for the eastern district of Louisiana, in which it was filed in the chancery side of the docket. There the defendants filed a dilatory exception in bar of the action against them; which being overruled, they were required to answer. And they did so.

They neither admit nor deny the original validity of the judgments against Barrett, nor the assignment of them to the plaintiff; and they admit that the one hundred and thirteen slaves had belonged to Barrett; but giving at the same time their narrative of the manner in which Barrett had acquired title to them and the judicial proceedings under which they bought the property. They state, in their answer, that Wade Hampton, of South Carolina, being the owner of Whitehall plantation, in the parish of St. James, in Louisiana, sold it on the 8th April, 1829, to Leroy Pope, for $100,000, payable in twenty years from the 1st day of January, 1830, with interest at six per cent per annum, payable annually. That the seller took from Pope a mortgage on the plantation, and also an obligation that he would add to the plantation seventy working hands, and mortgage them to Hampton, with their increase, to secure the payment of Pope's purchase and interest. Pope, on the 23d of February following, complied with his obligation, by mortgaging seventy working hands and* thirty-one [*482 children to Hampton. He was then a resident of the parish of St. James.

Pope, two years afterwards, on the 18th March, 1833, sold the plantation and slaves to Thomas Barrett, of New Orleans, for $151,034. In payment, Barrett assumed to pay the debt of $100,000, and the accruing interest annually, to Hampton, and received the property, subject to the rights of Hampton upon the plantation and slaves. Two days afterwards, Barrett conveyed one half of his purchase to Robert Bell, with an agreement that Bell's interest should be considered as having attached from the day of Barrett's purchase. Barrett failed to pay the interest; and Hampton being dead.

his heirs brought suits for it, and these judgments were obtained against him in January, 1838, March, 1839, and April, 1839. The judgments were recorded in New Orleans, where Barrett lived; but the mortgages and conveyances given to Hampton, and his conveyance of the plantation, were recorded, when they were executed, in the parish of St. James, where the slaves were, and where Pope and Bell both lived.

Barrett became embarrassed, and applied for the benefit of the insolvent laws of Louisiana, on the 12th May, 1840. In the schedule of property surrendered to his creditors is found an item of Whitehall plantation and one hundred and fifty slaves, valued at $210,000, subject to the bond for $100,000, and the interest due thereon.

A meeting of Barrett's creditors was held on the 15th June, 1840. Syndics were elected by them, with general discretionary powers, particularly with the power to sue for the partition of any property whatsoever held and owned by the insolvent jointly with others, and to claim partition in kind or by sale; also, to appoint agents for the disposal of property out of New Orleans. Amongst the creditors at this meeting who elected the syndics, was the Bank of Louisiana, by its representative, its president. In October, after this meeting of the creditors, the heirs of Hampton intervened in the insolvent proceedings, claimed their rights under the mortgages upon Whitehall and upon the negroes; and they took a rule upon Magoffin and Morgan, the syndics of the creditors, to 483*] show cause why the *plantation and negroes should not be sold, and the proceeds applied to the payment of their claim. The rule was made absolute, by a judgment recognizing their right as mortgagees, and ordering a sale of the property.

At a subsequent meeting of the creditors, at which the Union Bank of Louisiana was again represented by its president, the creditors gave to the syndics a power to raise all mortgages recorded against the insolvent on any estate owned by him alone, or jointly with other persons, which had been surrendered to his creditors, with authority to make partition of the same with the coproprietors, either amicably or judicially.

Upon the petition of the syndics to the judge of the parish court of New Orleans, that act of the creditors was homologated, and the syndics were authorized by the court to do all which it empowered them to perform, by the votes of the creditors who appeared, or who were represented at the meeting.

In conformity with such powers, the syndics instituted a suit, alleging that Whitehall plantation and slaves had been purchased for the joint account of Barrett & Bell, and that an action of partition was necessary, to enable them to liquidate that special partnership. They also asked that the proceeds of the crop made on the plantation might be deposited in bank, subject to the order of the court; that an inventory and appraisement of the property should be made and returned into court; and that such proceedings might be had as would lead to a prompt and final settlement of the partnership.

Bell united in this petition, and declared himself to be a creditor of the partnership; prayed for a settlement of its affairs, and for the allowance in his favor of a lien on the partnership property, for such sum as might be found due to him.

The heirs of Hampton intervened in this partition suit, stating their claims upon the property as mortgage creditors; and insisted that the property should be sold, subject to the assumptions, by whoever might become at the sale vendee, for the payment of their claim, principal and interest.

*On the 6th of February, 1841, the [*484 court gave a judgment, sustaining the claims of Hampton's heirs, and directing the sale of the property, with the condition, "that the vendees should assume the payment to Mary Hampton, John S. Preston and wife, and John L. Manning and wife, of $100,000, payable on the 1st of January, 1856, with six per cent interest from the 1st of January, 1841; and further, that it should be taken as a term and condition of the sale, that the purchaser should specially mortgage and keep mortgaged the plantation to the intervenors, and the eighty-one slaves described in the inventory, to them and their heirs and assigns."

The property was advertised and sold by the sheriff, pursuant to this judgment; was bought by the heirs of Hampton for $116,000; was paid for by surrendering to the sheriff the bond of Leroy Pope for $100,000, and by applying arrears of interest due on that bond to the payment of $16,000. An account was filed a few days afterwards, by the heirs of Hampton, of the whole amount due them, and after giving credit for the $116,000, and there was still remaining due $11,248.11½.

A rule was then taken on both the plaintiff and defendants, by the heirs of Hampton, for them to show cause why the account should not be approved, and their demand against the partnership of Barrett & Bell be liquidated, at the sum of $11,248.11½; and why the same should not be paid out of any money belonging to the partnership.

Upon the rule a judgment was rendered on the 23d April, 1844, according to its purport, declaring that, after having credited the account with $116,000, there was still due to the heirs of Hampton, by the partnership of Barrett & Bell, the sum of $11,248.11½, and a judgment was passed in their favor for that sum, against Mrs. Caroline Bell, the heir of Robert Bell and J. B. Hullen, who had been elected the syndic of the creditors in the place of Magoffin and Morgan. A representative of the Union Bank was present, and voting for Hullen.

A final judgment was afterwards rendered, settling all matters in dispute between the parties to the suit. The proceeds *of the [*485 crop were appropriated to the payment of legal charges; and that being insufficient for that purpose, the heirs of Hampton were required to pay $2,020.51, in satisfaction of them—it being declared that the legal charges were higher in rank than their privilege upon the copartnership fund. The heirs paid the amount, and that was a final settlement of all the matters in controversy between plaintiff, defendants and interveners.

Contemporary with the proceedings in the partition suit, the matters connected with Bar-

rett's insolvency were concluded in the same court.

Among other acts done by the syndics, Magoffin and Morgan, was their petition to the parish court of New Orleans to be discharged from their office of syndics in the insolvency of Thomas Barrett and Thomas Barrett & Co. They annexed to their petition an account of the collections and disbursements which had been made by them since their last account had been filed. They showed that they were, as syndics, parties to a number of suits, which were still pending; refer particularly to the partition suit instituted by them, and still pending, against Robert Bell, as the partner of Barrett; pray that the creditors of the insolvent may be ordered to meet to elect other syndics, on account of their not being able to act longer in that capacity, as their private affairs compelled them to leave the state of Louisiana.

The court gave an order upon this petition, that the parties interested show cause, within ten days from the publication of the order, why the accounts of the syndics should not be homologated, why the funds stated by the syndics should not be distributed in accordance therewith, and why the syndics should not be discharged. And it further ordered, that a meeting of the creditors should be held on Wednesday, the 9th May, to elect another syndic in place of Magoffin and Morgan.

Such a meeting was held. James B. Hullen was elected by the creditors sole syndic, with all the powers which had been conferred by the creditors at former meetings upon Magoffin and Morgan. They were then discharged by the court from their functions as syndics, upon 486*] their paying the *balances in their hands to the parties entitled thereto, reserving to themselves, however, whatever claim they might have on the sale of the Whitehall plantation; and James B. Hullen was confirmed as sole syndic of Barrett and Thomas Barrett & Co. This order was given by the court on the 20th May, 1842.

Seven days after the meeting of the creditors had been held, pursuant to the order of the court, Christopher Adams, Jr., President of the Union Bank, filed a paper in the court, acknowledging himself to be fully cognizant of all the proceedings of the meeting; that he was present at it; that the bank was a creditor; that Hullen had been unanimously elected by the creditors sole syndic, in place of the former syndics, on the same terms and conditions that they had been, with the same powers which the creditors had conferred upon the former syndics; and further shows that at the meeting on the 9th May, 1842, he had voted for the dispensation of Hullen from giving the security required by law to be given by syndics.

This narrative discloses the connection of the Hamptons with the proceedings of the syndics, and in the partnership suit which they had brought against Bell to settle his claim as a partner in the purchase of the Whitehall plantation and slaves. Thus matters remained for nine years, no one supposing that there was any irregularity in the judicial proceedings under which the heirs of Hampton had bought the property, the bank all the time acquiescing in the result. Indeed, nothing was done without the knowledge of the bank; everything that was done was with its approbation. The record shows that every step taken by the syndics for the settlement of Barrett's insolvency was in conformity with the powers which the creditors had given to them. But nine years after the final and conclusive settlement of the whole matter in controversy, the president and directors of the bank assigned to the plaintiff in this suit five judgments, which the bank had obtained against Thomas Barrett in 1838 and 1839. Upon this assignment it is that the plaintiff now claims that these judgments were a mortgage upon the Whitehall plantation and slaves. He *alleges that all the pro- [*487 ceedings in the parish court of the parish and city of New Orleans, in the matter of the insolvency, were irregular; that the disposition of property surrendered by Barrett for his creditors, and the creditors of Thomas Barrett & Co., "were irregular, insufficient, null, and void, and had been procured by fraudulent combination between the heirs of Hampton with Bell, and with the syndics of the creditors, for the purpose of defrauding the Union Bank particularly. He also alleges that the Union Bank has not been a party to the suit of the syndics, and that neither the bank nor himself are in any way bound by its proceedings. And the fraud with which he charges the defendants is, that they claimed as creditors of Barrett, under the mortgage which Leroy Pope had made for their ancestor, Hampton, when the plantation was bought from him, and which Barrett assumed to pay when he purchased from Pope, well knowing at the time that the efficacy of the inscription of the mortgages upon both plantation and slaves had expired, according to law, without any renewal of the registry of them. The defendants deny, in their answer, the fraud charged, or fraud of any kind, in their intervention in the proceedings in insolvency. No attempt was made to prove it; consequently, the plaintiff's whole case depends upon his assertion that there are irregularities in the suit, and in the rendition of a judgment, and under which the heirs of Hampton purchased the property at sheriff's sale, which made that judgment a nullity. The plaintiff is the assignee of the Union Bank, and the argument in support of his claim as assignee is, that he is entitled to a judgment, subjecting the property to the payment of the judgments which the bank had obtained against Barrett, unless the mortgages of the bank were extinguished by the sale made by the sheriff to the heirs of Hampton, and unless the settlement between the syndics, Robert Bell, and the heirs of Hampton, upon the judgments rendered in the cases of the syndics and Bell, are *res judicata*.

These positions are, in themselves, an abandonment of the charge of fraud originally made, and for no other purpose than to give to the circuit court jurisdiction of the case *against the defendants, and without [*488 which the court could not have taken jurisdiction. With what propriety, then, can this court now be called upon to review a judgment of the parish court of New Orleans for any irregularity or illegality in the proceedings of that court, if either existed, when there could have been an appeal to the supreme court of Louisiana for its correction? This court has never done so in any case in which the subject-matter of a suit,

being within the jurisdiction of a state court, upon the allegation that its judgment had been given contrary to the law of a state. See the cases of *Fouvergne* v. *City of N. O.* 18 How. 471; *Gaines* v. *Chew*, 2 How. 619, 644; and *Tarver* v. *Tarver*, 9 Pet. 174. The parish court of New Orleans had, by law, full power over all the property ceded by the insolvent, and over the claims of each of the creditors.

It exercised its jurisdiction, and the legality of its judgment cannot be questioned by this court. Besides, the courts of the United States have no jurisdiction over the settlement of insolvencies in the state courts. The parish court had not only jurisdiction, but exclusive jurisdiction, over the property surrendered, and the distribution of it among the creditors of the insolvent. By the laws of Louisiana, the property surrendered becomes vested in the creditors, represented by the syndics as their trustee. *Schroeder* v. *Nicholson*, 2 La. 354; *Morgan* v. *Creditors*, 7 La. 62; *Dwight* v. *Simon*, 4 La. Ann. 492. And the creditors of an insolvent who become parties to the insolvent proceedings are prohibited from seeking remedies in any other court of the state of Louisiana. *Jacobs* v. *Bogart*, 7 Rob. La. 162; *Marsh* v. *Marsh*, 9 Rob. La. 46; *Tyler* v. *Creditors*, 9 Rob. La. 372. It is also declared, in the Civil Code, art. 165, § 3, "that, in all matters relative to failures, all suits already commenced, or which may be subsequently instituted against the debtor, must be carried before the court in which the failure has been declared;" and "where a party claims from the syndics goods which had been surrendered by an insolvent, the suit may be brought before the court where the *concurso* is pending." 2 Rob. La. 348.

489*] *The want of jurisdiction, then, in the courts of the United States, to review the proceedings of the parish court of New Orleans, in a case of insolvency, is, of itself, sufficient to prevent the court from giving to the plaintiff a decree in this suit.

There are, however, other grounds sufficient, to be found in the record, from which we have concluded that the plaintiff has neither an equitable claim against the defendants in this proceeding, nor any right, under the law of Louisiana, to subject the property in controversy to the judgments of which he is the assignee. But we shall confine ourselves to the discussion of one of them.

The judgments of the Union Bank if they ever had, at any time, mortgage rights against the Whitehall plantation and the slaves upon it, better than the mortgages given by Leroy Pope at the time of his purchase, and which were assumed by Barrett when he bought the property, and which were equally obligatory upon Bell, when himself and Barrett formed their particular partnership in respect to that property, those judgments had been legally canceled before they were assigned to the plaintiff by the bank. It will be found, at pages 20 and 21 of the record, that the assignor of the plaintiff united with the other creditors in giving to the syndics the power to raise all mortgages granted by or recorded by Thomas Barrett, or Thomas Barrett & Co., on any real estate owned by Barrett, jointly with other persons, and surrendered by him to his creditors, with power also to effect partitions of the said property with his co-proprietors, either amicably or judicially, etc., etc.

The creditors, too, authorized the syndics, or either of them, to vote, deliberate, and give their opinion for them, at any subsequent meeting of the creditors of Barrett, or Thomas Barrett & Co. And the powers so given to the syndics were homologated by the judge of the parish court of New Orleans. Under such a power, the syndics might have erased the judicial mortgages of the bank in the fair and bona fide discharge of their relation to the creditors as their trustees, and the bank would have been bound by their action. But *they pro- [*490 ceeded, according to law, to have the judicial mortgages of the bank canceled; and they were canceled on the 1st of February, 1841. This cancelation was made by the syndics, in conformity with the 32d section of the act of February, 1817, entitled, "An Act Relative to the Voluntary Surrender of Property, and to the Mode of Proceeding, as well for the Direction as for the Disposal of Debtors' Estates," etc., etc. The erasure and cancelation of mortgages may be made in Louisiana, by consent or by order of the court. Articles 3335, 3336. In this instance, the erasure was made by the judgment of a court of competent jurisdiction; when, by the latter, it has the effect of a *res judicata*. 7 Rob. La. 382, 518; 11 Rob. La. 171. After the erasure so made, there can be no subsequent reinscription of a mortgage. That which was made in 1848 revived no lien upon the property which the bank's mortgages may have had before they were erased. But there was another erasure of the bank's judicial mortgages in a suit brought by Barrett against it, before its assignment was made of its judgments against Barrett to Hagan, the plaintiff. Rec. 83, 88, 94, 99, 103. It was done by a court having competent jurisdiction, and it concluded the right of the bank to convey its judgments to the plaintiff as judicial mortgages, though they might be transferred as judgments to entitle the assignee to a participation in any unadministered proceeds made from the sale of the property surrendered by the insolvent for his creditors. But neither the reinscription of 1848, nor the assignment to the plaintiff, could have the effect to give to the plaintiff any claim upon property of the insolvent which had been sold under the judgment of a court having jurisdiction in insolvency. The property now claimed by the plaintiff, as subject to his assignment, had been recognized by the judgment of the parish court to be subject to the claims of the heirs of Hampton; had been ordered by the court to be sold by the sheriff; had been sold by him, and adjudicated to the purchasers; and the consideration money of the purchase had been accounted for by the sheriff to the syndics of the insolvent, and by them accounted for to the court, in strict accordance with its order, nine years before the bank made an *as- [*491 signment to Hagan. The sale could not have been in any way subject to the judicial mortgages of the bank, nor could it in any way effect the property purchased by the defendants. Indeed, there can be no doubt that, after the appearance of the bank in the *concurso* of the creditors, and its acquiescence with them in fixing the terms for the sale of the property of the insolvent, it must be taken as a waiver by the

bank of all its rights to pursue it for the payment of its judgments against Barrett, the insolvent, and that it would look to the proceeds of its sale, as the creditors did, for the satisfaction of their respective claims. *Egerton* v. *Creditors*, 2 Rob. La. 201; *Saul* v. *Creditors*, 7 Mart. N. S. 446, 467. Without pursuing the discussion further, we have concluded that the bank, when it assigned its judgments to the plaintiff, had no mortgage lien on the Whitehall plantation and slaves to transfer; that the language of the assignment, interpreted by the acknowledged acts of the bank in the insolvency, cannot mean any such transfer, and that the judgment and sale under the partition suit barred the bank from making such an assignment, and the plaintiff from any such claim as he has made in his bill.

We direct the affirmance of the decree of the circuit court.

J. J. B. WHITE (*Defendant*), and Gilbert S. Hawkins and Peter J. Cockburn, Composing the Firm of Oakey, Hawkins, & Co., and Mrs. W. C. W. Faust, Widow, and Mrs. Rebecca J. White, Aided and Assisted by her Husband, J. J. B. White (*Interveners*), *Plffs. in Err.*,

v.

HAMILTON M. WRIGHT, and the Sole Assignee of the Rights and Interests of the late Commercial Firm of Wright, Williams, & Co.

(See S. C. 22 How. 19-23.)

Decision of state court, when reviewable.

This court has no jurisdiction to revise the decision of a state court where there is no complaint that the obligation of a contract has been impaired, nor that any right has been claimed and refused under any treaty or act of Congress.

Argued Jan. 20, 1860. Decided Jan. 23, 1860.

IN ERROR to the Supreme Court of the State of Louisiana for the Eastern District.

This action was commenced by petition in the fourth district court of New Orleans, by Wright, Williams, & Co., in liquidation, against J. J. B. White. Oakey, Hawkins, & Co. intervened under the practice in Louisiana. Subsequently Mrs. R. J. White and Mrs. W. C. W. Faust also intervened. After various proceedings, the above court dismissed the petition.

The plaintiffs appealed to the supreme court of the state. The following is the opinion of the supreme court:

This is an attachment suit for the recovery of $9,509.32, with eight per cent per annum interest, from the 9th day of June, 1855, for money advanced in payment of defendant's draft given on a final settlement of his account with Hill, McLean, & Co., his former factors. One hundred and fifty-four bales of cotton were attached as the property of the defendants, on board the steamboat Sally Robinson, at the port of New Orleans, consigned in the name of P. O'Donnel to Oakey, Hawkins, & Co. The consignees, Oakey, Hawkins, & Co., intervened in the suit, and claimed the cotton as the property of O'Donnel. On November 25, 1856, Oakey, Hawkins, & Co. obtained an order of court permitting them to bond the cotton, and accordingly, on 27th day of same month, gave bond and security as required by order of court. On the same day, to wit, Nov. 27, 1856, Rebecca J. White, the wife of the defendant, and Mrs. W. C. W. Faust filed their petition of intervention in this suit, and claimed the cotton attached as their joint, undivided, separate property. To this petition of intervention the plaintiff pleaded, in his answer thereto, the following peremptory exception: "That the cotton claimed had been delivered on bond anterior to the filing of the intervention to Oakey, Hawkins, & Co., and is not now in court," and prayed that the intervention be dismissed.

On May 29, 1857, the plaintiff filed a supplementary petition, in which he alleged that since the institution of this suit he had obtained a judgment in the circuit court of Yazoo county, in the state of Mississippi, against the defendant, for the same subject-matters stated in the original petition filed in this cause, and prayed for judgment as in said original petition, and that defendant decided to answer thereto. After the filing of the supplemental petition the attorney appointed to represent the defendant filed the following exception: "That the original cause of action, if any existed, has been merged in the judgment rendered in the state of Mississippi and the proceedings therein had, as shown by the supplemental petition and documents annexed; that this court, by the said proceedings of plaintiffs, has been devested of jurisdiction in the matters in controversy, and this suit should be dismissed at plaintiff's cost. Defendant further pleads *res judicata*."

The interveners also filed an exception to the supplemental petition as follows: "That the same is a change of the original cause of action and is contrary to law; and further pleaded the exception of *res judicata*."

1. The intervention of Oakey, Hawkins, & Co. is unsustained by the evidence. It does not appear that O'Donnel was the owner of the cotton attached, or that it was even shipped with his knowledge or consent, nor does it appear that he or the consignees were in possession of the bill of lading prior to the attachment of the cotton by the plaintiff. This intervention, therefore, must be dismissed.

2. The peremptory exception filed by the plaintiff should have been sustained. The bond given by Oakey, Hawkins, & Co. was only a substitute for the property attached with regard to the plaintiff, and not as to the interveners or third parties, claiming title thereto. The interveners cannot avail themselves of the bond, and their remedy was against the property itself, in the hands of the party having possession of it.

Dorr v. *Kershaw*, 18 La. 57; *Beal* v. *Alexander*, 1 Rob. La. 277; 7 Rob. 349.

3. The exception filed by the attorney appointed to represent the defendant should have been overruled. The plaintiff had the right under the law of Louisiana, to sue the defendant in the courts of this state, and also in the courts of Mississippi at the same time, and for the same cause of action. This right necessarily carries with it the accessory right to prosecute the suit in the courts of the two different

states, to final judgments on the merits. This right is remedial, and is intended to secure to the creditor all possible means for the collection of his debt in different jurisdictions. If the exception filed on behalf of defendant were sufficient in law to dismiss the plaintiff's action, the right to institute separate actions in different states for the same debt, would be nugatory; for so soon as a judgment should be obtained in one state, it could be made the means of dismissing the suit in the other, and thereby deprive the creditor of the fruits of his diligence in the undecided suit.

Conceding that the account sued on was merged in the Mississippi judgment, the debt was not thereby extinguished, but established to be due and owing from the defendant to the plaintiff. This judgment in Louisiana is only evidence of the existence of the debt for the recovery of which this suit was instituted, the affidavit was made, the attachment bond was given and the writ of attachment issued, and there is no legal reason why this judgment should not be substituted, by way of amendment, as the cause of action in place of the account, for the purpose of maintaining the attachment.

The fact that the judgment is for a greater amount than claimed and sworn to by the plaintiff is immaterial, for the reason that the attachment is only valid as against the property for the amount sworn to, whatever may be the amount claimed in the petition.

The supplemental petition did not change the substance of the demand. The prayer of the original petition is, that the attachment be maintained and that the defendant be condemned to pay the sum of $9,509.32 and interest, with privilege upon the property attached, and the prayer of the supplemental petition is the same.

It is, therefore, ordered, adjudged, and decreed, that the interventions of Oakey, Hawkins, & Co., and of Mrs. White and Mrs. Faust, be dismissed at their cost; and it is further ordered, adjudged, and decreed that the judgment be avoided and reversed; and proceeding to render such judgment as should have been rendered by the lower court, it is ordered, adjudged, and decreed, that the plaintiff do have and recover of the defendant the sum of $9,509.32, with five per cent per annum, interest thereon, from the 9th day of June, 1855, and costs of the lower court; and that plaintiffs' privilege upon the property attached be recognized and enforced. It is further ordered and decreed, that the defendants pay one third of the costs of this appeal; that Oakey, Hawkins, & Co. pay one third, and Mrs. White and Mrs. Faust the remaining third.

A petition for a rehearing by the defendant and interveners having been refused, they sued out writs of error to this court.

On motion by defendant in error to dismiss for want of jurisdiction.

No counsel appeared for the plaintiffs in error.

Mr. **J. P. Benjamin** for defendant in error.

Mr. Justice **McLean** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Louisiana.

The defendant in error, by his counsel, J. P. Benjamin, Esq., moves the court that the writ of error issued in this cause be dismissed, for the reason that this case is not one in which the court has jurisdiction to revise the decision of the supreme court of Louisiana.

*On looking into the record, there appears to be no ground on which this writ of error can be maintained. There is no complaint that the obligation of a contract has been impaired, nor that any right has been claimed and refused under any treaty or act of Congress. [*23

The cause must, therefore, be dismissed for want of jurisdiction.

SIDNEY E. COLLINS, *Appt.*,

v.

DRURY THOMPSON, William F. Cleveland, and James Campbell's Widow, Heirs and Devisees.

(See S. C. 22 How. 246-256.)

Where fraudulent arrangement has been given up, and a fair one substituted, fraud is cured.

The arrangement between the parties in respect to the property entered into with a view to the institution of the suit, which is complained of as fraudulent, having been given up, and a new one substituted, which was not only unexceptionable, but highly equitable and just as concerned the complainant, the charge of fraud and imposition depending upon it, even if it originally had any foundation, falls with it.

The facts of the case were examined; and the court held that there is no foundation whatever, not even colorable, for the charge of fraud set forth in the bill.

Argued Dec. 29, 1859. Decided Jan. 23, 1860.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

The history of the case, and a statement of the facts, appear in the opinion of the court.

Messrs. **W. H. Seward** and **K. B. Sewall**, for appellant:

The appellant claims to have the deeds of 1844, 1849 and 1851 set aside, on the following grounds:

I. Illegality.

The transaction in Texas of 1844 was either the sale of a pretended title, the land being held adversely to both parties; or,

It was champertous or "savored of champerty," against which equity will relieve.

Wood v. *Downes*, 18 Ves. 120; *Reynell* v. *Sprye*, 8 Hare, 222, 272; S. C. *Affirmed on Appeal*, 13 Eng. L. & Eq. 74; *Stevens* v. *Bagwell*, 15 Ves. 139; *Arden* v. *Patterson*, 5 John. Ch. 44, 51; *Berrien* v. *McLane*, 1 Hoffm. Ch. 421, 424.

The maxim *in pari delicto* is no objection to relief, for it does not apply. The parties here are not equally guilty, and equity will relieve "the more excusable of the two."

Reynell v. *Sprye*, 13 Eng. L. & Eq. 95; *Osborne* v. *Williams*, 18 Ves. 379; *Hatch* v. *Hatch*, 9 Ves. 292; *Cook* v. *Colyer*, 2 B. Mon. 71; *Williams* v. *Carter*, 3 Dana, 198, 201.

II. Mistake—Ignorance.

NOTE.—*Deeds, when void for fraud, insanity, drunkenness, etc.*—see note to Harding v. Handy, 6 L. ed. U. S. 429.

Appellant was induced to act in ignorance of his rights—their value—the costs of enforcing them, and of the fraudulent combination which had been formed, and was all the time operating to obtain, control and appropriate them.

Evans v. *Llewllyn*, 2 Bro. C. C. 150; *Sturge* v. *Sturge*, 12 Beav. 229; *Hitchcock* v. *Giddings*, 4 Price, 135.

III. Fraud.

The deed of 1844 was without consideration, and therefore, considered as a sale, was void (*sine pretio nulla venditio est*, D. 18, 1, 2), and cannot afterwards be set up as a gift.

Bridgman v. *Green*, 2 Ves. 628.

Besides, it states on its face a pecuniary consideration contrary to the truth, which of itself affords a presumption of fraud.

Hawes v. *Wyatt*, 3 Bro. C. C. 156; *Bridgman* v. *Green*, 2 Ves. 627.

This accords with the civil law which says: "Where an engagement has no consideration, or, which is the same thing, where the consideration for which it is contracted is false, the engagement is null, and so is the contract which includes it." (Poth. Obl. 42), and for which there was *condictio*, or a specific mode of redress at law. D. 12, 7.

There was fraudulent concealment—*suppressio veri*—on the part of Thompson and others.

Bowman v. *Bates*, 2 Bibb. 52; *Torry* v. *Buck*, 1 Green Ch. 366.

Imperfect information is equivalent to concealment.

Walker v. *Symonds*, 3 Swanst. 73; *Fallendi causa obscure loquitur*, D. 18, 1, 43, 8, 2.

There was misrepresentation—*suggestio falsi*—by Thompson and others.

Broderick v. *Broderick*, 1 P. Wms. 240; *Reynell* v. *Sprye*, 8 Hare, 222; *S. C. affirmed*, 13 L. & Eq. 74; *Smith* v. *Richards*, 13 Pet. 26; *Tyler* v. *Black*, 13 How. 231; *Boyce* v. *Grundy*, 3 Pet. 210.

A concurrence of all these circumstances of illegality and fraud—*juncta juvant*.

The above considerations apply with equal force to the deeds of 1849 and 1851, for these were based on and grew out of the same original transaction of 1844, and are infected with all its vices.

Wood v. *Downes*, 18 Ves. 122, 123; *Reynell* v. *Sprye*, 8 Hare, 269, 270; S. C., 13 Eng. L. & Eq. 100, 101.

The deeds of 1849 and 1851 were also void, on the ground that they were obtained by persons standing in confidential relations to Collins, and by undue influence and abuse of confidence.

Cooke v. *Lamotte*, 11 L. & Eq. 33, 34; *Osmand* v. *Fitzroy*, 3 P. Wms. 129; *Whelan* v. *Whelan*, 3 Cow. 537; *Purcell* v. *Macnamara*, 14 Ves. 91, 107.

Of surprise and circumvention under a pressure of circumstances, which deprived appellant of that free agency and self protecting ability essential to fair dealing.

Pickett v. *Loggon*, 14 Ves. 215; 1 Story, Eq. §§ 239, 251.

Gross inadequacy of consideration, accompanied by the circumstances of fraud and imposition above referred to.

Wood v. *Abrey*, 3 Madd. 417; *Byers* v. *Surget*, 19 How. 311; *Huguenin* v. *Baseley*, 14 Ves. 273; *Harding* v. *Handy*, 11 Wheat. 124; 1 Story Eq. § 246.

IV. There has been no confirmation.

Savery v. *King*, 35 Eng. L. & Eq. 100, 110; *Butler* v. *Haskell*, 4 Desaus, 651, 712, 714; *McCants* v. *Bee*, 1 McCord, Ch. 383, 391; *Broddus* v. *McCall*, 3 Call. 546; *Cherry* v. *Newsom*, 3 Yer. 369.

V. There is no bar to relief from lapse of time. Appellant was not fully informed of the circumstances of the fraud till about January, 1855.

Veazie v. *Williams*, 8 How. 134, 158.

Messrs. **R. H. Smith** and **J. P. Benjamin**, for appellees:

The charge is not only one of actual fraud stated with care and deliberation, but it is a case of submission and award, and an execution of that award by complainant, and of long acquiescence in it. The bill assumes the position of assailing a binding decision; of claiming a second adjudication, because the first was made in fraud, executed and acquiesced in under ignorance of, and delusion by reason of, this fraud, of which, in all its elements and proportions, complainant asserts he was informed when he filed his bill, and the features of which he pretends to exhibit to the court, and which exhibition, in its detail and whole, is false.

The following extract from the opinion of the court in *Eyre* v. *Potter*, 15 How. 56, furnishes the rule applicable to this cause:

The case made by the bill "is one of actual, positive fraud charged, and to be judged of according to its features and character as delineated by complainant and according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable by a court of equity with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated."

See, also, *Price* v. *Berrington*, 7 Eng. L. & Eq. 254, 259, 260; *Curson* v. *Belworthy*, 22 Eng. L. & Eq. 1, 5, 11.

The plaintiff shows that there was a matter between the parties to be determined; that a reference of it was made—an award given; that plaintiff performed it and has acquiesced in it.

He stands in his pleadings in the position of a party seeking to assail a judgment for actual fraud, and must come under the rule applicable to such a case.

Price v. *Williams*, 1 Ves. Jr. 365, and cases referred to in the notes; *Knox* v. *Symonds*, 1 Ves. Jr. 369, and cases in note; *Herrick* v. *Blair*, 1 Johns. Ch. 101; *Brown* v. *Green*, 7 Conn. 542; *Bumpass* v. *Webb*, 4 Port. (Ala.) 70; 2 Hen. & Munf. 408; *Head* v. *Muir*, 3 Rand. 131; *Dougherty* v. *McWhorter*, 7 Yerg. 258.

The following cases are instances of ratifications, or of acquiescence in awards.

Johnson's Exrs. v. *Ketchum*, 3 Green's Ch. (N. J.) 369; *McRae* v. *Bucks*, 2 Stew. & P. 158; *McDaniel* v. *Bell*, 3 Hayw. (Tenn.) 264.

The bill is of the character of a bill for a new trial, and the rule in reference to such bills is strict. There must be fraud or accident unmixed with neglect. See the foregoing authorities.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the southern district of Alabama.

The bill was filed by Collins, to set aside certain conveyances of a tract of land situate in the city of Mobile, and particularly a deed from him to the defendants, bearing date the 15th February, 1851, on the ground of fraud and imposition in the procurement of said conveyances.

The pleadings and proofs are very voluminous the pleadings alone covering nearly one hundred, and including the proofs, exceeding five hundred, closely printed octavo pages. The bill is very inartificially drawn, being stuffed with minute and tedious detail of what might have been proper evidence of facts constituting the ground of the complaint, instead of a concise and orderly statement of the facts themselves. This has led to an equally minute and extended statement of the grounds of the defense in the several answers of the defendants.

In looking closely, however, into the case, and into the nature and grounds of the relief sought, and principles upon which it must be sustained, if at all, it will be found that the questions really involved, as well as the material facts upon which their determination depend, are few and simple, and call for no very extended discussion.

The father of Collins, the complainant, died in 1811, seised of an interest in the tract of land in dispute. He left three sons, the complainant being then some two years old. The tract subsequently passed into the possession of one Joshua Kennedy, by collusion between Inerarity, the administrator of Collins, the elder, and **248***] Kennedy, the latter also afterwards *obtaining a deed of the land from the heirs at law by fraudulent representations.

In 1844, Thompson, one of the defendants in the present suit, residing in the city of Mobile, and having some knowledge of the original title of Collins to the land, and of the means by which the heirs had been deprived of it, visited the complainant, then residing in Texas, and being the only surviving heir, with a view to purchase his title, or to obtain an arrangement with him in respect to it, so that a suit might be instituted for the recovery of the estate. An arrangement was agreed to accordingly, and a conveyance of the land executed by the complainant and his wife to Thompson; also a power of attorney, authorizing him to institute suits for the recovery of the land—Thompson, at the same time, executing a bond of indemnity to the complainant against all costs and responsibilities, in consequence of the suit. The complainant was to receive $10,000 in the event of a recovery. A suit was subsequently instituted in the name of the complainant against the heirs of Kennedy, in April, 1844, in the circuit court of the United States for the southern district of Alabama; was heard upon the pleadings and proofs at the April term of the court, in 1847, and a decree rendered in his favor; which, on an appeal to this court, was affirmed at the December term, 1850. The case, as reported in this court, will be found in 10 How. 174.

The litigation extended over a period of some seven years; and, in the progress of it, besides Thompson who had made the original arrangement with the complainant, three other persons had become interested, and had contributed their services and money in bringing it to a successful termination.

After the affirmance of the decree in this court, and confirmation of the title in complainant, all the parties concerned met in the city of Mobile, at the office of the solicitors, for the adjustment of their respective claims to the property recovered. Its value had increased, during the progress of the suit, from about $100,000, according to the estimate, to some two or three times that amount. The complainant had originally stipulated for the sum of $10,000. In this adjustment, one *third of the whole estate was set apart [***249** to him, and one sixth to each of the other four persons. Conveyances according to this division were executed on the 15th February, 1851. The complainant, therefore, according to the general estimate, received $100,000, and the other four associates $50,000 each.

Now, the fraud alleged in the bill, and which is mainly relied on for setting aside this adjustment and division of the estate between the parties, is placed on two grounds: (1) In obtaining the deed of the land, powers of attorney and other stipulations relating to the title, dated the 13th January, 1844, preparatory to the institution of the suit in which the property was recovered; and (2) in the adjustment and division of the property among the several parties above mentioned, after the recovery had taken place, and which was consummated by the deed of 15th February, 1851.

1. It is insisted on behalf of the complainant that, at the time he executed the deed, powers of attorney, and the other writings, in 1844, he was unacquainted with the value of the property or the condition of the title; that Thompson, who procured these instruments, and the authority to commence the suit, was well acquainted with both; that he fraudulently depreciated the value of the property, and exaggerated the difficulties and expense attending the litigation, and thereby deceived the complainant. This is the substance of the charge.

There is, however, a very brief but most conclusive answer to it, upon the pleadings and proofs in the case. It is, that Mr. Justice Campbell, whose firm had been subsequently employed by Thompson to bring the suit against the heirs of Kennedy, declined the retainer, and refused to have anything to do with it, unless the complainant should not only be made sole plaintiff in the suit, but should have a substantial interest in the estate sought to be recovered; should attend as the party in

interest in conducting the proceedings, and take part in the preparation for trial; and insisted that the preliminary arrangement made by Thompson, including the deed of the property and agreement for the payment of the $10,000, should be abrogated and given up. All of which was agreed to by Thompson and the 250*] other parties concerned; and the *suit was commenced and carried on to a final determination under this new arrangement. The complainant attended and participated in the preparation of the case, assisted in procuring and in the examination of the witnesses, and admits, in his bill, that he attended every term of the court at Mobile, while the cause was pending, and until the decree in his favor.

The whole arrangement, therefore, between the parties, in respect to the property, entered into with a view to the institution of the suit, which is complained of, having been given up, and a new one substituted, which was not only unexceptionable, but highly equitable and just as concerned the complainant, the charge of fraud and imposition depending upon it, even if originally it had any foundation, falls with it. We shall not stop to inquire into the merits or justice of that arrangement, for, having been given up, they are wholly immaterial in any view of the case, as presented upon the evidence before us.

2. The remaining ground of fraud relied on in the bill, is that on the day of the arrival of the complainant at the city of Mobile, from his residence in Texas, and which was his first visit to the city after the judgment in his favor in this court, he was requested to attend at the office of the solicitors, in the evening, and attended accordingly, where he met the defendants, and was then, for the first time, informed that they had been interested in the prosecution of the suit, and had expended much time and money in the litigation, and were, therefore, expected to participate in the division of the property recovered. That complainant was taken by surprise when the suggestion was made at the meeting, by the solicitor, that, in the division, one sixth part of the estate should be given to each of the defendants, and including Primrose, and only one third to himself. That he was unprepared to act with judgment in the matter, having been wholly unadvised of the object of the meeting, or of the persons who were to be present; that no time was given him for reflection or counsel; that he was ignorant of the value of the property, and incapable of acting understandingly upon the subject, and had no information as to the amount he was thus sud- 251*] denly called on to give away. *That a deed was immediately prepared by the solicitor, to carry into effect the division as suggested, and was executed; and that this meeting was arranged by preconcert, and after consultation between the defendants and others, for the purpose of entrapping and deceiving the complainant.

The deed referred to is that of 15th February, 1851, which is sought to be set aside. This is the second ground of fraud substantially as charged in the bill; and it will be necessary to look into the answers and proofs in the case, with a view to see if it is sustained.

The answer of Thompson, which is responsive to this particular charge, is a denial of every material fact and circumstance upon which the allegation of fraud rests. It states, that one or two days after the arrival of the complainant at Mobile, he requested him (the respondent) to go with him to the office of the solicitor that evening; that he had made an appointment with the solicitor to meet the respondent, and other persons interested in the suit, there, in order to come to an understanding and adjustment of their respective interests. The matters of the adjustment formed the subject of their conversation during the afternoon, and down to the time of the meeting. That the respondent explained to him the understanding he had with his associates, the other defendants, the services they had rendered in the suit, and the advances of money made therein; that, after all the parties had assembled at the office, the subject was again talked over at length, and, in the course of the conversation, the solicitor was referred to, and desired to suggest what, in his judgment, would be a reasonable adjustment and division of the property. Whereupon, he suggested a division into six parts—two parts to the complainant, and one to Thompson and each of his three associates; that this appeared to be generally acquiesced in, and it was proposed by some one that the papers should be drawn and executed. But the solicitor objected, and advised them to postpone the execution, and reflect upon the matter, and when they had come to a determination among themselves, it would be time enough to make out the papers; that the complainant expressed great pleasure and satisfaction at the division; *other of the [*252 parties were not satisfied. But, in a few days, all met at the office of Primrose, one of the parties in interest, when the deed of the 15th of February, 1851, was voluntarily executed, carrying into effect the division.

The answer of Cleveland, another of the defendants, is equally explicit. He states that the subject of the division was talked over at the office of the solicitor; that all expressed satisfaction at the division suggested, except Primrose, who objected to the allowance of two shares to the complainant, he insisting that the time and labor of others had chiefly contributed to the success of the suit; and that complainant had originally expressed a willingness to be content with a small sum; that the solicitor repelled the idea, and said, that although others had been chiefly instrumental in carrying the case through, the title was in the complainant, and he ought to have the largest share; that the solicitor advised the parties to consider the matter, and if he could aid them to call on him; that the deed carrying into effect the division was not executed till several days, and respondent thinks a week, after this, at the office of Primrose.

James Campbell, another of the defendants, states that, after the meeting at the office, the subject of the interests of the parties was talked over; that upon the division suggested by the solicitor all concurred, except Primrose, who represented his claims higher than those of complainant; that he had rendered greater services, and was entitled to a greater share. He depreciated complainant's title to the estate,

insisting that he alone could have made nothing out of it, and had always said he would be satisfied with some negroes and cattle; that the solicitor replied to him, that without complainant's title there could have been no recovery; and that, whatever others had done, still the title was in the complainant, and that he, the solicitor, had undertaken the suit with the distinct understanding and agreement that complainant was to have a substantial interest in the recovery. The respondent denies that the deed was drawn or executed the evening of the meeting, nor until several days afterwards.

These several answers are directly responsive 253*] to the charges *in the bill, and are to be taken as true, unless overcome by the proofs. Instead of impeaching, the proofs are all in support of them.

Primrose, a witness on the part of the complainant, and who was one of the parties in interest, and present at this meeting, confirms the facts as above stated. In his answer to 43d interrogatory, he says, in substance, that, after conversation at the meeting relating to the subject before them, all seemed willing to leave the division to the solicitor, who thereupon suggested one third to the complainant, and one sixth to each of the others; that he (the witness) objected, as giving too great a share to the complainant, and that he made some remarks about the condition of the title, when he and the others undertook the suit; that complainant at that time had said he would be satisfied with a comparatively small sum, and that the solicitor replied to him, that the title to the property was in the complainant, besides making other observations which he (the witness) did not recollect.

This witness further says, in answer to the 43d cross interrogatory, speaking of the division, "All but myself did acquiesce. So far as I could judge the complainant was satisfied, and I was disappointed." "Judge Campbell maintained Collins' right to two shares against me. The parties talked some of the matters over freely and considerably. It consumed a winter's evening, or greater part of it." "I do know Collins was pleased, and considered the settlement fair, just, and liberal towards him."

Judge Campbell, the solicitor, has also been a witness in the case. He states, that after some reference to the subject at the meeting, and interchange of views, one of the parties stated that he was willing to abide by his opinion as to the share he should be entitled to, and others indicated a wish that he would make some suggestions as to the proper adjustment. In answer to which, he suggested a division of the property into six parts, and that two should be assigned to the complainant; that Primrose expressed dissatisfaction, insisting the part to be assigned the complainant was too large; that his title was good for nothing, and that the suc- 254*] cess in the *suit was owing to the ability with which it was prosecuted; that complainant did not expect so large a share; that he had said all he wanted was a few negroes and some cattle.

The witness further states that he took pains to answer these objections; and after some further conversation, the parties left his office; that he told them when they left to take into consideraion what had been said, and that if he could be of any service to them, to call at his office again; that no agreement was arrived at that evening, and no papers drawn up of any agreement between the parties; that the deed of February, 1851, was not prepared by him till several days after this, and that he had not learned of its execution till the week after its preparation.

It is useless to pursue the inquiry further, as the proofs in the case are all one way, and show that there is no foundation whatever, not even colorable, for the charge of fraud set forth in the bill.

Besides the entire want of proof to sustain it, the evidence shows that possession of the property was taken by the parties jointly, after the settlement, in the summer of 1851. Extensive and valuable improvements were made in the course of the years 1852-'53, under the direction of the complainant and others. The sales in 1853 had amounted to $92,000, as stated in the bill.

The property continued under the joint management of the parties for the period of some three years, without complaint or dissatisfaction on the part of Collins, when suddenly, without any apparent reason or changed condition of affairs between him and his associates, he seems to have taken up the delusion that he had been circumvented and deceived into an inequitable settlement of the estate among the parties, in February, 1851, and for the first time set up a claim to the whole of it.

It is suggested in the bill, that the large sales made of the property in 1852-'53 afforded the complainant the first evidence of the great value of the estate; and it appears, from other portions of the case, that the increased and increasing value of the property had the effect to unsettle the views and *opinions upon [*255 which he had acted in the settlement with his associates in February, 1851, and led to a strong desire to recall and review them.

But this suggested ignorance of the great value of the property at the time of the settlement is against all the proof in the case. His bill, filed against the heirs of Kennedy in April, 1844, for the recovery of this property, contains the following allegation: "Your orator charges that the said property was worth $20,000 and upwards in 1820, $75,000 in 1830, and is probably worth $200,000 at this time."

The great value of the property, compared with the consideration paid by Kennedy, was a very material fact in the case. Besides, the complainant had spent much of the time pending that litigation in the city of Mobile, in which the property was situate, and must have been familiar with its value, present and prospective. He was then in the prime of life, and possessed of more than ordinary intelligence in business matters, as is apparent from his correspondence, to be found in the record.

Having succeeded in the recovery, and obtained possession of the estate, he seems to have forgotten the obligations he was under to his associates. Their exertions and means had been mainly instrumental in raising him from poverty to affluence. They had advised him of his claim or title to the property, collected the necessary evidence to establish it, employed the counsel, and even furnished him (Collins) with the means of support, to enable him to coöperate in the prosecution of the suit pending the liti-

gation. The suit was severely contested, and was of some seven years' duration.

Still stronger evidence that, after his success, he was ready to forget his obligations to those mainly contributing to it, is the fact that his solicitor has not even escaped his insinuations of bad faith in his connection with the suit, though it was disclaimed on the argument by his counsel; thus contradicting all his opinions and feelings, strongly and repeatedly expressed pending the suit, and long after its termination and the settlement between the parties. The solicitor had no interest in the property or its 256*] distribution. His fee was not *dependent upon it. He was, therefore, wholly disinterested in the matter, and well situated to act as the friend of all parties in the settlement.

As we have already stated, before the commencement of the suit, he refused to be connected with it, unless the complainant should be permitted to have a substantial interest in the estate, and repudiated the arrangement by which he was to receive only $10,000. After the recovery, and in the settlement among the parties, he stood firmly by this original understanding, and insisted that he should have a double share. So far as appears from the evidence, it is entirely owing to the sense of justice and firmness of Judge Campbell (the solicitor) that the complainant is now in the possession and enjoyment of some $100,000 of his patrimonial inheritance, instead of the $10,000 for which he himself had stipulated.

The decree of the court below is affirmed.

46*] JOHN OVERTON, Robert C. Brinkley, Robertson Topp, and James Jenkins,

v.

ELIJAH CHEEK & George U. Cheek.

(See S. C. 22 How. 46-48.)

Writ of error without seal is void—omission of writ, effect of.

When no writ of error has been certified with the transcript, and the paper purporting to be a writ of error, being without seal, was void, and two terms of this court have intervened, not including the present term, since the transcript was certified without a writ of error, the cause must be dismissed.

Argued Jan. 23, 1860. Decided Jan. 24, 1860.

IN ERROR to the Circuit Court of the United States for the District of West Tennessee.

This action was brought in the court below by the defendants on a bond, in the penal sum of $10,000.

The trial in the court below resulted in a verdict and judgment in behalf of the plaintiffs for $4,750; whereupon defendants sued out this writ of error. The facts upon which the judgment of this court depend, appear in the opinion of the court.

On motion to dismiss.

Mr. **R. H. Gillet** for plaintiffs in error.

Messrs. **Davidge** and **Ingle**, for defendants in error:

It is submitted—

1. That in order to give jurisdiction to this court, the writ of error must be under the seal of the circuit court. whose clerk is authorized to issue it.

Act of Congress of May 8th, 1792, § 9 (1 Stat. at L. 278).

2. That the writ of error must be returned at the ensuing term. If a term intervene, the objection is fatal.

Hamilton v. *Moore*, 3 Dall. 371; *The Virginia* v. *West*, 19 How. 182; *Villalobos* v. *United States*, 6 How. 18; *U. S.* v. *Curry*, 6 How. 106.

3. That there must be annexed to and returned with the writ, an authenticated transcript of the record. Without the writ, the transcript is filed without authority of law; and a writ of error without the record of the court to be reviewed, or reasons for not returning it, is not returned. Here the writ of error comes back as it went out. There is no return, and hence no jurisdiction.

4. The writ does not appear to have been filed in the circuit court.

Brooks v. *Norris*, 11 How. 204.

5. There was no citation and no legal evidence of the waiver of the citation. The transcript filed does show that the citation was waived; but that transcript is not legally before this court, not having been returned in obedience to process.

6. That the transcript was not returned in conformity with law and the rules of this court.

For the above reasons a motion is made that this cause be dismissed.

Mr. Justice **McLean** delivered the opinion of the court:

This purports to be a writ of error to the circuit court of the United States for the district of west Tennessee.

By reference to the transcript, it appears that the judgment of the circuit court was rendered the 16th of April, 1857. At the ensuing term of the supreme court, the transcript was filed.

It appears that a writ of error in the circuit court was allowed, in open court, and signed by the clerk the 17th day of April, 1857, which was returnable to the Supreme Court on the first Monday of December, 1857. But this writ had no seal, nor was it returned with the transcript to the *Supreme Court. But on [*48 the 27th of December, 1859, a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed.

From this it appears that no writ of error has been certified with the transcript, and that the paper purporting to be a writ of error, which was filed in December last, being without seal, was void. Two terms of this court have intervened, not including the present term, since the transcript was certified, without a writ of error.

The cause must, therefore, be dismissed for these irregularities, without noticing others apparent on the record.

NOTE.—*Necessity of seal on writ or process*—see note, 20 L. R. A. 424.

1*] *JOEL PARKER, *Plff. in Err.*,
v.
ALONZO L. KANE.

(See S. C. 22 How. 1-19.)

State decision in partition action, not inquirable into incollateral action—jurisdiction of Wisconsin court—state decree in former chancery suit, for same cause of action, conclusive—unrecorded deed is inoperative as to bona fide purchasers in Wisconsin—complete description in deed, not controlled by more general one, nor by declarations or prior negotiations of parties.

In ejectment to recover land in Milwaukee, this court, conformably to their established doctrine, recognize the validity and binding operation of the orders and decrees of a Wisconsin court in a partition action, and determine that this court cannot inquire whether errors or irregularities exist in them in this collateral action.

The jurisdiction of the circuit court of Milwaukee, under the statute of Wisconsin, extends to the ascertainment and determination of the rights of the parties in matters of partition, and its decree is final and effectual for their adjustment. That court also has power to quiet a disputed title.

The reversal of the decree of the circuit court by the Supreme Court in a chancery suit to quiet the title, and its decision that the guardian should account for the proceeds of the sale in his hands, implies that the recorded deed did not convey a legal title.

Whether the voluntary dismissal of the bill, as to the guardian, subsequently to its return in the circuit court, will qualify this decree, or limit its effect as *res judicata* of the legal right, *quære.*

Where a bill in chancery cause was for the same as this ejectment suit, and the decrees of the courts of Wisconsin in the chancery suit embraced the decision of the same questions as involved here, they are conclusive of this controversy.

A deed destroyed and never placed upon record as to bona fide purchasers without notice, is inoperative, under the statutes of Wisconsin in relation to the registry of deeds.

Where the description of the property conveyed, as lots numbers one and six of the fractional quarter, is a complete identification of the land, a more general and less definite description cannot control this; but whatever is inconsistent with it will be rejected, unless there is something in the deed, or the local situation of the property, or the possession enjoyed, to modify the application of this rule.

It cannot be controlled by the declarations of the parties, or by proof of negotiations or agreements on which the deed was executed.

Argued Jan. 9, 1860. Decided Jan. 30, 1860.

IN ERROR to the District Court of the United States for the District of Wisconsin.

This was an action of ejectment brought in the court below by Parker, the present plaintiff in error, against the defendant in error, to recover a certain tract of land situated in the county of Milwaukee, in the state of Wisconsin. Both parties endeavored to connect themselves with the title of one William E. Dunbar (who had received from the United States a patent for the land in question), by certain conveyances and legal proceedings which are set out in the opinion of the court.

The trial below resulted in a verdict and judgment for the defendant, and the plaintiffs brought the case to this court on a writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **A. W. Machen and R. J. Gittings,** for plaintiff in error:

1. The deed from Dunbar to Montague, dated Dec. 18, 1837, conveys one fourth part of all the northeast quarter section 21, which lies east of the river. The language of the description is, "one equal, undivided fourth part of the following-described parcel or tract of land, to wit: parts 1 and 6, being that part of the northeast quarter lying east of the Milwaukee river, in section —, p. 21," etc.

The grammatical construction refers the words "being that part of the northeast quarter," etc., to the preceding words "parcel or tract of land," and thus shows the parcel intended to be conveyed.

Lots "one and six" may be rejected, and the description is perfect. Reject the latter portion of the description, and nothing would be conveyed.

It seems absurd to say that a part which may be rejected without impairing the efficacy of the deed, should control and limit the part which cannot be rejected, and leave a sufficient description.

Evans v. *Corley*, 8 Rich. (S. C.) 315; *Abbott* v. *Pike*, 33 Me. 204; *Worthington* v. *Hylyer*, 4 Mass. 196; *Jackson* v. *Loomis*, 18 Johns. 81.

The extraneous circumstances and cotemporaneous construction show the same thing.

Salisbury v. *Adams*, 19 Pick. 253; *Thatcher* v. *Howland*, 2 Met. 41; *French* v. *Carhart*, 1 N. Y. 96; *Stone* v. *Clark*, 1 Met. 378; *Reed* v. *Prop. Locks & Canals*, 8 How. 289.

If, however, there were a well-founded doubt respecting the reference made by the explana-

NOTE.—*What is a sufficient delivery of a deed to pass the title*—see note to Tompkins v. Wheeler, 10 L. ed. U. S. 903.

Cancelation or surrender of deed by parties; its effect on title.

Executed and recorded deeds under seal can be surrendered and canceled only by other deeds under seal. Acquiescence expressed by parol and mutual understanding that a title shall be released cannot be made a substitute for a deed of release or surrender. Washington v. Ogden, 1 Black, 450; Suydam v. Beals, 4 McLean, 12.

A deed is not avoided by the seal being torn off by the grantor; or by a third person with his consent. Cutts v. U. S. 1 Gall. 69.

The grant is not affected by cutting out the seals, and signatures and attestation of a deed after acknowledgment and delivery. Frost v. Peacock, 4 Edw. 678.

If a stranger tears the seal from a deed, it will not invalidate it. Rees v. Overbaugh, 6 Cow. 746; Every v. Merwin, 6 Cow. 360.

Where the seals of a deed are torn off it is for the jury to decide with what intent it was done. Palm. 403; 1 Vent. 297; Bull. N. P. 268.

The cancelation of a deed will not devest property which has once vested by transmutation of possession. Marshall v. Fisk, 6 Mass. 32; Bottsford v. Morehouse, 4 Conn. 550; Holbrook v. Tirrell, 9 Pick. 105; Hatch v. Hatch, 9 Pick. 311; Dando v. Tremper, 2 Johns. 87; Lewis v. Payne, 8 Cow. 75.

An unconditional delivery of a deed fairly made cannot be revoked by any act of the party executing it. Woodman v. Coolbrooth, 7 Greenl. 181; Frisbie v. McCarty, 1 Stew. & Port. 61.

Where A conveyed to B and took back a mortgage and they subsequently canceled and gave up the deed and mortgage it was held that the legal estate was in A. The mortgage passed the legal estate to him; and the canceling of the deeds does not devest property which has vested by transmutation of possession. Jackson v. Chase, 2 Johns. 84.

Title cannot be devested by the destruction or surrender of the grant. Thus when A held an unrecorded deed from B and procured him to execute a new deed to C, and destroyed the deed to himself, it was held that the title remained in A, notwithstanding C's deed was recorded. Raynor v. Wilson, 6 Hill, 469.

Though the cancelation or redelivery of a deed

tory words, the deed must be construed most favorably for the grantee.

Hall v. *Gittings*, 2 H. & J. 380; *Hawkins* v. *Handson*, 1 H. & McH. 523; *Cocheco Man. Co.* v. *Whittier*, 10 N. H. 311, and cases cited.

2. If these constructions of the deed of December 18, 1837, are not admitted, the plaintiff contends that he has a good title to that part of the southwest quarter which is in controversy, derived from the conveyance by Dunbar to Montague of one half of the quarter section in question, in the spring of 1836, and the quitclaim deed of Montague to the plaintiff, of December 30, 1850.

(*a*) It is clear that the legal title to one full half of that all part of the northeast quarter of section 21 which lies east of the river, passed from the original deed from Dunbar to Montague in 1836.

(*b*) It was not revested or devested by the delivery up of the deed by Montague in 1837, nor by the destruction of it, if indeed it is destroyed. The cancelation of the deed by an agreement of parties does not revest the title.

Parker v. *Kane*, 4 Wis. 12, and cases cited; *Agri. Ins. Co.* v. *Fitzgerald*, 16 Q. B. 423; 4 Eng. L. & Eq. 215.

A grantee who has thus surrendered his deed, may perhaps be estopped from setting up his title, or precluded from giving evidence of its existence, where justice requires it; but the plaintiff is not thus estopped, nor is he, upon any sound principle, in any way precluded from introducing evidence of the execution and delivery of the deed of 1836, and setting up title to the ten acres which he claims under it, five of which are in controversy in this suit, unless the deed of December 18, 1837, embraces this tract, and thus gives him a valid title under that deed.

Blade v. *Noland*, 12 Wend. 175.

The party is precluded from offering evidence of the deed which has been canceled upon the ground of estoppel.

Farrar v. *Farrar*, 4 N. H. 195; *Mussey* v. *Holt*, 4 Fost. N. H. 248.

The estoppel being founded upon equity, extends no further than equity carries it.

B. & W. R. Co. v. *Sparhawk*, 5 Met. 469; *Brewer* v. *B. & W. R. Co.* 5 Met. 478; *Howard* v. *Hudson*, 2 El. & Bl. 9; 2 Smith's L. C. Am. ed. 1855, 642, 643; *Carpenter* v. *Thompson*, 3 N. H. 204.

Again; it was not material that the first deed was not upon record, because the purchases by C. J. Kane were at judicial sales, and no notice was necessary.

The rule *caveat emptor* applies to such sales. The purchaser has no better title than the party whose right is sold.

Bashore v. *Whisler*, 3 Watts, 493; *King* v. *Gunnison*, 4 Pa. 171; *Chase* v. *Woodbury*, 6 Cush. 143, 148; *Philips* v. *Johnson*, 14 B. Mon. 172; *Freeman* v. *Hill*, 1 Dev. & B. Eq. 392; *Dudley* v. *Cole*, 1 Dev. & B. Eq. 436; *Simmons* v. *Tillery*, 1 Overt. (Tenn.) 274, 286; *Bank* v. *Martin*, 7 Md. 342; *Georgetown* v. *Smith*, 4 Cranch, C. C. 91.

A. L. Kane takes from C. J. Kane with actual notice; but this is not essential, as he derives his title from the judicial sales.

The bill in equity prosecuted by the plaintiff against Tweedy, Kane, Montague, and others, furnishes no bar to this suit. That was a bill to obtain a reformation of the second deed from Dunbar to Montague, and of the deed from Montague to Fisk, in order that those deeds should so describe the land as to relieve the case from further controversy.

In determining the effect of the suit, the court and decree will look to the whole record, and not merely to what the counsel have caused to be filed as a decree.

Bainbridge v. *Baddeley*, 2 Phil. Ch. 710; *Guest* v. *Warren*, 9 Exch. (Wels. H. & G.) 379; Hob. 53.

The insertion, in a decree, of matter which ought not to be there, cannot affect the right of the party entitled.

Holland v. *Cruft*, 3 Gray, 187; see *Mondel* v. *Steel*, 8 M. & W. 858, 872.

In fact, the supreme court of Wisconsin understood the bill to be for a reformation of the deed only. In the opinion it is said: "The cause or matter of complaint to relieve him, from which the complainant filed his bill in this cause, originated in a mistake committed in the descriptive part of the deed executed on Dec. 18, 1837," etc.; and then it is said that the cause for such a bill had occurred, and was complete upon the delivery of the defective deed.

The decree of the Supreme Court affirmed the decree of the court below as to Kane, Waldo, and Brown, and reversed it as to all the rest; by which the court doubtless meant to affirm the decree so far only as it determined the matters in issue. Brown had disclaimed, and his disclaimer was not controverted. Kane

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will not reinvest the title, yet it is competent for one who has granted land to A, to convey the same land to B for a valuable consideration, and by the consent and agreement of A; and equity will restrain A from setting up his title against B. Dennison v. Ely, 1 Barb. 610; Schut v. Large, 6 Barb. 373.

Surrender or destruction of a deed duly executed and delivered will not devest the estate conveyed by it. Nicholson v. Halsey, 1 Johns. Ch. 417; Parshall v. Shirts, 54 Barb. 99; Cranmer v. Porter, 41 Cal. 462.

The cancelation or destruction of a deed once duly executed and delivered, so as to become operative, is utterly ineffectual to reinvest the title in the grantor, even though intended so to operate by the parties. To produce this effect, there must be a reconveyance or a decree of cancelation. Girnon v. Davis, 36 Ala. 589; Carver v. McNulty, 39 Pa. St. 473; Schaeffer v. Tithian, 17 Ind. 463; Chessman v. Whittemore, 23 Pick. 231; Rifener v. Bowman, 53 Pa. 313.

Surrender of a deed given on a secret trust, does not devest the title nor free the trustee from the trust. Kimball v. Greig, 47 Ala. 230.

Tearing off the names of the grantors in a deed with the mutual consent of all parties, will not operate to reinvest the title, although done under the supposition that such will be the effect. Steel v. Steel, 4 Allen, 417.

Canceling of an unrecorded deed, by agreement of the parties, with intent thereby to revest the title in the grantor, as between them and all subsequent claimants under them, is, in some of the states, permitted to operate as a reconveyance and revest the title in the grantor. Mussey v. Holt, 24 N. H. 248; Nason v. Grant, 21 Me. 160; Faulks v. Burns, 16 N. J. Eq. 250; Beauchamp's Will, 4 T. B. Mon. 361; see, also, Farrar v. Farrar, 4 N. H. 191; Commonwealth v. Dudley, 10 Mass. 403; Barrett v. Thorndike, 1 Greenl. 78.

Where one voluntarily surrenders a deed to be destroyed, he cannot afterwards avail himself of any obscurity or uncertainty in its contents. Jackson v. Gardner, 8 Johns. 394.

and Waldo had insisted upon the statute of limitations of ten years, applicable to remedies for mistakes; and the decree of the court below and the court above, gave them the benefit of it. A decree was entered against Tweedy, because he had not pleaded the statute.

The plaintiff submits, therefore, that the plaintiff's equitable title to have relief, on account of the mistake in the second deed, Dunbar to Montague, and the deed Montague to Fisk, were the only matters in issue in that suit, and that he failed to sustain his suit against Kane and Waldo, only upon the ground that that remedy was barred by the statute. This furnishes no bar to any other remedy which he seeks, and no decree which the court could enter would bar the present suit.

Bainbrigge v. *Baddeley*, 2 Ph. Ch. 705; *Mason's Exrs.* v. *Alston*, 9 N. Y. 28; *Callander* v. *Dittrich*, 4 Scott, N. R. 682; *Kelsey* v. *Murphy*, 26 Pa. 78; *Buttrick* v. *Holden*, 8 Cush. 233; *Pleasants* v. *Clements*, 2 Leigh. 474; *Hotchkiss* v. *Nichols*, 3 Day, 138; *McNamara* v. *Arthur*, 2 Ball. & B. 353: *Lessee of Wright* v. *Deklyne*, Pet. C. C. 198, 202.

(*a*) The opinion, therefore, expressed by the judge respecting the right of Montague and the plaintiff to assert a title at law under the first deed, may be regarded only as a mere *dictum*.

(*b*) As to the 3-16, the plaintiff could not set up a legal title under the first deed, when the bill was filed, unless the deed of 1837 covered the whole. He obtained Montague's quitclaim deed by filing that bill. He was, therefore, remediless at law, unless the description in the deed from Montague to Fisk were construed to pass the legal title to all the northeast quarter 21, and the plaintiff was not contending for that construction in that case, because he was not then asserting his legal title.

After all the discussion which the court saw fit to offer upon that subject, its view of complainant's case was "entirely based upon a mistake made in the description contained in the deed from Dunbar to Montague, dated Dec. 18, 1837, and not at all affected by the cancelation of the prior deeds, showing that all the opinion, excepting the first deed, was extrajudicial.

Palmer v. *Temple*, 9 A. & E. 521; *University* v. *Maultsby*, 2 Jones, Eq. (N. C.) 241; *N. E. Bank* v. *Lewis*, 8 Pick. 113.

(*c*) It is clear that the decree of a court of equity cannot be evidence of a legal title, or operate as a bar to an action of ejectment.

Hickey v. *Stewart*, 3 How. 750; *Neafie* v. *Neafie*, 7 Johns. Ch. 4.

(*d*) Even if the issue had been the same, the decree would be no estoppel, because the object of the suit was different.

Behrens v. *Sieveking*, 2 N. Y. Cr. 602.

(*e*) Decision of the court of Wisconsin founded upon the statute of limitations of that state, does not bar a suit in the courts of the United States.

Pease v. *Peck*, 18 How. 595; *Union Bank* v. *Jolly*, 18 How. 503; *Suydam* v. *Broadnax*, 14 Pet. 67.

The second branch of the case relates to the title of the plaintiff in lot one, and what is claimed by the defendant to be lot six.

The question arising is whether any valid and binding partition has been made.

The plaintiff claims that in these proceedings the circuit court of the first circuit in Wisconsin, exceeded its jurisdiction.

D'Arcy v. *Ketchum*, 11 How. 165.

It does not follow, because a court has authority to render a judgment in a cause, that any judgment which it may render in that cause is within its jurisdiction, and therefore, if wrong, merely erroneous.

8 How. 542; 11 Pick. 503.

It is a familiar principle of law, that any court, when it is in the exercise of a special jurisdiction conferred by statutes, and *quoad hoc* like an inferior court. The statutory bar must appear by the proceedings to have been strictly pursued.

Thatcher v. *Powell*, 6 Wheat. 119; *Shriver* v. *Lynn*, 2 How. 43; *Williamson* v. *Berry*, 8 How. 495; *Watson* v. *Bodell*, 14 M. & W. 69; *Shivers* v. *Wilson*, 5 Harr. & J. 133; *Gittings* v. *Hall*, 1 Harr. & J. 23; *Johnson* v. *Kraner*, 2 H. & McH. 243; *Jackson* v. *Brown*, 3 Johns. 459; *Denning* v. *Corwin*, 11 Wend. 647; *Mayhew* v. *Davis*, 4 McLean, 219; *Hardy* v. *Summers*, 10 Gill & J. 323; *Boswell* v. *Otis*, 9 How. 336, 348; 4 McLean, 262.

Upon these principles the plaintiff alleges that the judgment and proceedings in the admitted partition are void, and he alleges further, that no partition has ever been completed.

See *Elliott* v. *Peirsol*, 1 Pet. 340; *Wilcox* v. *Jackson*, 13 Pet. 511; *Reg.* v. *St. George*, 4 El. & B. 520, 525.

The action of the supreme court of Wisconsin upon the appeal, except that part reversing the decree of the circuit court establishing the acts of surveyor, cannot serve to cure any of the defects of jurisdiction.

Pease v. *Peck*, 18 How. 598; *Latham* v. *Edgerton*, 9 Cow. 227; *Carroll* v. *Carroll*, 16 How. 275.

Upon the third branch of the case, the plaintiff claims the sale by the administrator of Dunbar is void, because the guardian had not been appointed to protect the interests of his minor children.

Laws of Wis. 1839, p. 317, § 29; p. 325, § 4; p. 211, § 97; p. 298, § 13; *Messinger* v. *Kintner*, 4 Binn. 97; *Smith* v. *Rice*, 11 Mass. 507; *Bennett* v. *Hamill*, 2 Sch. & Lef. 566, 577.

Mr. **James S. Brown**, for the defendant in error:

1. Can a man who, receiving the deed of some piece of land, voluntarily destroys it and resorts to parol proof of its contents and of the extent of the grant to him, thus obtaining by indirection what the law prohibits? We do not deny that the title vested by a deed cannot be revested by its destruction, nor do we deny that the contents of the lost deed could be proven by parol; but when a party seeks to recover real estate, he must establish his title by legal proof. If it was evidenced by a deed, and the deed be not produced, he must show its loss without his default, or he will be prohibited from giving parol proof of its contents. In this case, the testimony of the plaintiff shows that it was destroyed by the grantee voluntarily, with the very object of preventing its use as testimony. He, therefore, was excluded by his own act, in destroying the highest evidence, from a resort to secondary evidence.

Farrar v. *Farrar*, 4 N. H. 491.

This was established by the supreme court of Wisconsin, as a rule of right and title between these very parties, and the plaintiff is bound by it.

Parker v. *Kane*, 4 Wis. 12.

2. All the questions raised by the plaintiff in his suit of ejectment have been decided against him in the state courts and the highest tribunals of the state.

A suit was instituted for the partition of lots one and six, in which both the plaintiffs in this suit and the grantor of the defendant, were parties.

See Rev. Stat. of Wis. 49, p. 570.

Counsel reviewed the proceedings in this action, and contended that they were final.

3. A bill for the partition of the southwest 40 acres was filed, in which Kane and Parker were parties.

For the purpose of enabling the court properly to adjudicate upon the interests of the parties, and of establishing his rights to the ten acres in question in this ejectment suit, Parker filed his bill in chancery, in the nature of a cross-bill, setting forth substantially the same facts upon which he here seeks to recover.

To this bill Kane and others filed answers, and a decree was entered confirming the title of Kane, under the deed of the guardian, and also disaffirming every right of Parker under the alleged deed from Dunbar.

From this decree the plaintiff in this suit (Parker) appealed to the supreme court of Wisconsin; and by them the decree of the court below was affirmed as to Kane, and the whole matter was thereby disposed of.

Parker v. *Kane*, 4 Wis. 1.

The whole matter thereby became *res adjudicata*, and no court can collaterally set aside those decrees. *Gould* v. *Stanton*, 16 Conn. 12; *Wendell* v. *Lewis*, 6 Paige, 233; *Woodruff* v. *Cook*, 2 Edw. Ch. 259; *Bank of the U. S.* v. *Beverly*, 1 How. 134; *Kerr* v. *Watts*, 6 Wheat. 550; *Hopkins* v. *Lee*, 6 Wheat. 109; *Washington Bridge Co.* v. *Stewart*, 3 How. 413; *Outram* v. *Morewood*, 3 East, 346; *Eastmure* v. *Laws*, 5 Bing. N. C. 450; *Manchester Mills*, Doug. 222.

And this court has, in cases where adjudications have been made by inferior tribunals, recognized the necessity of leaving titles undisturbed.

Grignon v. *Astor*, 2 How. 319; see, also, *U. S.* v. *Booth*, 21 How. 506; *Haskell* v. *Raoul*, 1 McCord Ch. 22; *Kennedy* v. *Meredith*, 4 Mon. 409; *Campbell* v. *Price*, 3 Munf. 227; *White* v. *Atkinson*, 2 Call. 376; *Dodd* v. *Astor*, 2 Barb. Ch. 395; *Schurmann* v. *Weatherhead*, 1 East, 541; *Downer* v. *Cross*, 2 Wis. 371; *Cole* v. *Clark*, 3 Wis. 329.

5. The grantor of the defendant was a purchaser in good faith at the sale by the guardian. The Stat. of Wisconsin protected him against an unrecorded deed.

Rev. Stat. 1849, p. 329, § 24; Rev. Stat. 1839, p. 180, § 10.

The language of the statute is so strong as almost to exclude the question sometimes raised as to judicial sales; but the effect given by statute to the deeds both of guardian and administrator, places them in the same condition with deeds by parties.

Rev. Stat. 1849, p. 420, § 58; Rev. Stat. 1839, p. 284, § 21; p. 316, § 25.

6. At the hearing, an objection to the sale by the administrator was made, because no guardian had been appointed by the court to represent the minor heirs. Our answer to this is that all the steps prescribed by the statutes are conceded to have been taken, and that the appointment of the guardian for that purpose was not required. The administrator represented the estate.

Rev. Stat. 1839, p. 316; *Grignon* v. *Astor*, 2 How. 319.

Mr Justice **Campbell** delivered the opinion of the court:

The plaintiff sued in ejectment to recover certain parcels of land included in the northeast fractional quarter of section twenty-one, in township seven north, of range twenty-two east, in the district of lands subject to sale at Green bay, and are situated in the city of Milwaukee.

The fractional quarter is subdivided into three lots. Lot number one is north of a line running east and west, that bisects the quarter section; lot number six corresponds to the southeast quarter of the quarter section; and the third lot is a tract of forty acres, and is known as the southwest quarter of the northeast quarter of the section, township and range above mentioned.

A patent issued to William E. Dunbar for this fractional quarter, in 1837, from the United States, in which the land is described as "the lot number one, and south half of the north-*east quarter of section twenty-one, in [*12 township number seven north, of range twenty-two east, of the district of lands," etc. In the same year, Dunbar and wife conveyed to Richard Montague "one equal undivided fourth part of the following-described parcel or tract of land, *viz.:* Lots one (1) and six (6), being a part of the northeast quarter lying east of the Milwaukee river, in section number twenty-one, in township number seven (7) north, of range twenty-two east," etc.

The plaintiff, upon the trial of the cause in the district court, connected himself with this deed (which was duly recorded) by legal conveyances. Besides the title under this deed, he exhibited a title from Dunbar and wife to an undivided fourth of the whole fraction; all of which lies east of Milwaukee river. That the plaintiff had, at one time, a title to an undivided half of lots one and six, was not disputed; but his claim to an undivided fourth of the southwest quarter of the fraction, under the deed of Dunbar to Montague, was a matter of controversy.

The defendant connected himself with the patent of Dunbar, by showing a sale by the administrator of his estate, under the authority of the court of probate of Milwaukee, of an undivided one half of the entire fractional quarter patented to him, and a sale and conveyance by the guardian of the heirs of Dunbar, of an undivided fourth part of the southwest quarter of the fraction, under a decree of the circuit court of Milwaukee, sitting in chancery, and a purchase by persons under whom he claims.

The defendant, to repel the claim of the

plaintiff to any interest in the land possessed by him in lots numbers one and six, produced the record of proceedings and decrees in the circuit court of Milwaukee county, in chancery, for the partition of those lots among the plaintiff and his co-tenants, with the latter of whom the defendant is a privy in estate. This record shows that a petition was made by the co-tenants of the plaintiff for a partition of these lots, according to their rights and interests. The plaintiff was made a party, appeared and answered, and there was a decretal order for a partition. Commissioners were appointed to divide the lots, 13*] who made *a report to the court that appointed them. That the plaintiff made objections to the proceedings; was overruled, and afterwards appealed to the Supreme Court. That the Supreme Court revised the proceedings of the circuit court, and affirmed its decree in the most important particulars, and gave some directions, which, being fulfilled to the satisfaction of the circuit court, a final order of confirmation, and to vest the title in the parties to their several allotments, was made.

The plaintiff objects to these proceedings:

1st. That there was no authority to make a several partition between the complainants. 2d. There was no authority to make a partition subjecting the land set off as his share to an easement. 3d. There was no authority to make a partition by a plat, without the establishment of permanent monuments. 4th. There was no reference to a proper person to inquire into the situation of the premises, after the decree settling the rights of the parties. 5th. The commissioners had no power to set apart and designate any portion of the land for sale, as they undertook to do. 6th. The court did not ascertain and distinctly declare whether any part or what part should be sold; but its language was hypothetical and uncertain. All the subsequent proceedings must fall, for want of the foundation of such a decree. 7th. It does not appear that all the commissioners met together, in the performance of their several duties, as required by the statute.

The statutes of Wisconsin provide for the partition of estates held in common, by a bill in equity, filed in the circuit court of the county in which the land is, and for sale of the premises when a partition would be prejudicial to the owners. The court, upon the hearing, may determine and declare the rights, titles, an interests of the parties to the proceedings, and order a partition. It may appoint commissioners to execute the decree, who are required to make an ample report of their proceedings to the court, in which it can be confirmed or set aside. When a partition is completed, the court may enter a decree; and thereupon the partition is declared to be "firm and effectual forever," and "to bind and conclude" all the parties named therein.

14*] *The decrees are subject to the revising power of the supreme court. In reference to the objections made by the plaintiff, it is sufficient to say that some of them were made in the courts of Wisconsin without effect, and all might have been urged there at a proper stage in the proceedings. *Kane* v. *Parker*, 4 Wis. 123.

That it sufficiently appears that the subject was within the jurisdiction of those courts, and the proper parties were before them; and this court, conformably to their established doctrine, acknowledge the validity and binding operation of these orders and decrees, and determine that this court cannot inquire whether errors or irregularities exist in them in this collateral action. *Thompson* v. *Tolmie*, 2 Pet. 157; *Grignon* v. *Astor*, 2 How. 319; *Beauregard* v. *New Orleans*, 18 How. 407.

At the time that the partition of lots numbers one and six was sought for, a petition was filed in the same court by the same parties for a partition of the southwest quarter of the fractional quarter section described in Dunbar's patent. The plaintiff had an acknowledged interest in that parcel, independently of his claim under Montague, and was made a party to that suit.

In his answer to the petition he refers to this claim under Montague, and the mesne conveyances that connect him with the deed of Dunbar to Montague. He stated that, it being uncertain whether that deed of Dunbar would be sustained as sufficient by the court to convey a legal title to a fourth part of that parcel, he designed to file a bill in equity, for the purpose of having his title ascertained, and to have his conveyances reformed, if need be, so that his claim under that deed could be established and confirmed. In the same month he filed in the same court a bill in equity against the heirs of Dunbar and their guardian, and the purchasers under the decrees, obtained by the administrator and guardian, for the sale of the parcels in the fractional quarter described in Dunbar's patent.

He charges in this bill that Montague was equally interested with Dunbar, at the date of his entry in the land office, in the entire fraction, and furnished the money for the purpose of *making it; that Dunbar gave to Mon- [*15 tague a deed for one half, according to the description in the certificate of purchase from the register of the land office. That by a subsequent contract his interest was reduced to one fourth. That his first deed not being recorded, he surrendered it to Dunbar, who destroyed it. That the deed for the fourth part was made to fulfill the agreement for title to a fourth of the whole fraction; and that Dunbar represented this deed to be sufficient, and during his life acknowledged that it was sufficient, and that Montague was a joint and equal owner with him.

He avers that these facts constitute him the owner of one fourth of the entire fraction, either at law or in equity. He refers to the sales of a larger interest than they really owned, by the heirs of Dunbar, through their guardian, and to the pendency of the suits of partition. He prays that the court will require the defendants in the bill to release their title to the interest embraced in his claim, and that his conveyances may be reformed, if need be, to express his legal and equitable rights; but if the court should decide that the guardian of the children of Dunbar had conveyed a good and valid title as against him, he prayed for a personal decree for the proceeds of his sale. He also prayed that this suit might be heard with the partition suit of the claimants under Dunbar's administrator and the guardian, and for all general and equitable relief.

The purchasers asserted in their answers the superiority of their legal and equitable title, and

pleaded that they were bona fide purchasers, and all, except one, also pleaded the statute of limitations. The guardian answered, that he had made the sale in good faith, under a valid decree, and under the belief that his wards were entitled to the estate.

The circuit court, upon the pleadings and proofs, dismissed the bill of the plaintiff, and declared in the decree that the defendants had a valid title as bona fide purchasers, not affected by the registered deed from Dunbar to Montague.

From this decree the plaintiff appealed to the Supreme Court. That court affirmed the decree of the circuit court as to all the purchasers ex-
16*] cept one. They say the plaintiff is *not entitled to relief under the first deed of Dunbar to Montague, which had been destroyed; for, admitting that the destruction of the deed did not disturb the title, nevertheless, in view of the statute of frauds, and the rule of evidence that statute established, a grantee in a deed, who had voluntarily, and without fraud or mistake, destroyed his deed, could not establish his title. One of the purchasers, who had notice of the plaintiff's claim, and had failed to plead the statute of limitations, was decreed to release his title to the plaintiff, and the guardian was required to account to him for the price he had received. *Parker* v. *Kane*, 4 Wis. 1. The defendant is a privy in estate with the successful litigants in this cause, and relies upon the decree as a bar.

We have seen that the jurisdiction of the circuit court of Milwaukee, under the statute of Wisconsin, in matters of partition, extends to the ascertainment and determination of the rights of the parties in matters of partition, and that its decree is final and effectual for their adjustment. That court is also clothed with power, at the suit of a person having a legal title and possession, to call any claimant before it, to quiet a disputed title. Rev. Stat. Wis. 573, § 20; 417, § 34.

The bill seems to have been framed on the distinct and declared purpose of obtaining from the courts of Wisconsin an authoritative declaration of the legal as well as equitable rights of these parties under their conflicting titles, with a view to the partition of the entire fractional quarter section, suits for which were then pending; and the prayer of the bill, that if the conveyance of the guardian "passed a good and valid title against the plaintiff," that then he might be indemnified by a decree for the proceeds of the sale in the hands of the guardian, submitted the legal as well as the equitable relations of the parties, under their respective titles, to the judgment of the court.

The reversal of the decree of the circuit court by the supreme court, and their decision that the guardian should account for the proceeds of the sale in his hands, is a direct response to this prayer, and implies that the recorded deed of Dunbar to Montague did not convey a legal title
17*] to this fraction. *We question whether the voluntary dismissal of the bill, as to Martineau, the guardian, subsequent to its return in the circuit court, will qualify this decree, or limit its effect as *res judicata* of the legal right. 30 Miss. 66; 2 Freem. Ch. 158; 9 Simon, 411; Eng. Orders in Ch. 1845, n. 117.

In Great Britain, a chancellor might have considered this as a case in which to take the opinion of a court of law, or to stay proceedings in the partition and cross suits until an action of law had been tried, to determine the legal title. *Rochester* v. *Lee*, 1 McN. & G. 467; *Clapp* v. *Bromagham*, 9 Cow. 530. But such a proceeding could not be expected in a state where the powers of the courts of law and equity are exercised by the same persons. The parties to this ejectment and the suit in chancery court of Wisconsin are the same, or are privies in estate. The same parcel of land is the subject of controversy, and the object of the suit, if not identical, is closely related.

The object of the bill in chancery, as we have seen, was to obtain from the court a decision upon the legal and equitable titles of the plaintiff, with the immediate view to a partition. If the decision had been made in his favor, it is true that a change of possession would not have taken place, as an immediate consequence, but it would have conclusively established the right of the plaintiff, either in an action of ejectment or upon a writ of right.

The object of the suit of the plaintiff in chancery was to obtain a recognition of the sufficiency of his deeds, as entitling him to the land, or to supply their defects, or to afford him indemnity, by subjecting the price that his adversaries had paid for the land to a tortious vendor having the legal title.

The object of the ejectment suit is to recover the land by means of the title disclosed in the deeds. A portion of the judges find in the two suits *eundem causam petendi*, and that the decrees of the circuit and supreme courts of Wisconsin embraced the decision of the same questions, and are conclusive of this controversy. *Bank of U. S.* v. *Beverly*, 1 How. 135. But if the plaintiff is not concluded by the proceedings of the *courts of Wisconsin, the question [*18 arises, whether his legal title will support his claim to the interest in the southwest quarter of the fraction.

The first deed from Dunbar to Montague was destroyed before the second was made, and it never was placed upon record. The decree of the courts of Wisconsin shows that the purchasers of the guardian were bona fide purchasers without notice. That deed is, therefore, inoperative, under the statutes of Wisconsin, in relation to the registry of deeds. Territorial statutes of Wisconsin, 179, § 10; Rev. Stat. of Wis. 329, 350. §§ 24, 34, 35.

We agree with the supreme court of Wisconsin, that the recorded deed from Dunbar to Montague did not convey any part of the fractional quarter, except that contained in lots numbers one and six. Lot number one is a subdivision of the fractional quarter section, and is designated in the plat of survey, as well as in the patent. Lot number six is referred to in the pleadings and proofs as a known and recognized parcel, corresponding with an official subdivision; and, upon referring to the official surveys in the general land office, we find that it is, as we had supposed it from the evidence in the record to be, noted there. The deed of Dunbar designates these subdivisions as the corpus of his conveyance; and, as a further description, adds, "being that part of the northeast quarter lying east of the Milwaukee river."

These lots lie east of the Milwaukee river, but

there is within the fractional quarter a tract equally distinct, and marked as lots numbers one and six, and this fact has occasioned this controversy. The description of the property conveyed as lots numbers one and six of the fractional quarter is a complete identification of the land, having reference to the official surveys of the United States, according to which their sales are made. The more general and less definite description cannot control this; but whatever is inconsistent with it will be rejected, unless there is something in the deed, or the local situation of the property, or of the possession enjoyed, to modify the application of this rule. It cannot be controlled by the declarations of the parties, or by proof of the negotiations 19* | *or agreements on which the deed was executed. *Hall* v. *Combes*, Cro. Eliz. 368; *Jackson* v. *Moore*, 6 Cow. 706; *Drew* v. *Drew*, 8 Foster, 489; 4 Cruise, Dig. 292; 35 N. H. 121.

Upon the whole case, we are of opinion there is no error in the record injurious to the plaintiff, and that the judgment of the district court must be affirmed.

Dissenting, Mr. Justice **Clifford.**

CHARLES KOCK, *Plff. in Err.*,
v.
LOUIS EMMERLING.

(See S. C. 22 How. 69-75.)

Broker's commission on sale, when earned.

Broker's commission on the sale of real estate is earned and due, when the terms of the contract as to the sale were specific and unmistakable, and everything was done that could be done by the purchaser to carry out the contract, although the vendor, without any reason, refused to complete it, unless there was an express understanding that the vendor was to pay nothing, unless he should choose to make the sale.

Argued Jan. 10, 1860. Decided Jan. 30, 1860.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **Albert Pike**, for plaintiff in error:

We submit that the court below erred in law in holding that where no sale was effected, the owner declining to close the contract on the terms which he had offered to accept, the broker was still entitled to his commission. For what reason Kock declined, we do not learn from the testimony. Perhaps it was one that he could not, in courtesy or justice to third persons, communicate to the proposed purchaser. We can imagine many reasons for declining to complete such a contract, which it would not be proper for him to state. Neither by the common law nor by the law of Louisiana was this broker entitled to any commissions.

In support of this proposition the counsel cited and examined at some length the cases of *Broad* v. *Thomas*, 7 Bing. 99; *Read* v. *Rann*, 10 Barn. & C. 438; *Dalton* v. *Irvin*, 4 C. & P. 289.

The law is the same in Louisiana.

In *Blanc* v. *N. O. Imp. Co.* 2 Rob. La. 63, the court held that the civil law and French authorities, which held that an agent is entitled to be reimbursed the expenses incurred in executing an agency, even when unsuccessful, are not applicable where the contract is one that shows the intention of the parties to have been that the principal should pay nothing unless the object of the agency was effected, and then a percentage.

A rehearing was moved for, and the attention of the court called to arts. 2986 and 2991 of La. Code.

The court refused a rehearing. This art. 2991, is a literal translation of art. 1999 of the Code Napoleon, and that is the reproduction of the law laid down by Pothier.

Contrat de Mandat, ch. III., § 1, No. 68. Also, No. 69, No. 74.

The distinction between a broker or intermediary and a commission merchant or auctioneer employed to sell, was stated in *Beal* v. *McKiernan*, 6 La. 417.

So again, it was decided in *Didion* v. *Duralde*, 2 Rob. 163, that in the contract of brokerage, nothing is to be paid unless a bargain is effected.

Some cases followed in Louisiana, which seem at first sight to some extent to qualify those already cited.

Counsel then examined the cases of *Gottschalk* v. *Jennings*, 1 La. Ann. 5; *Jenkins* v. *Trott*, 3 La. Ann. 671; *Levistones* v. *Landreaux*, 6 La. Ann. 26; *Lestrade* v. *Perrera*, 6 La. Ann. 398.

It will be seen that in all these cases the sale was effected and concluded with the identical purchaser, procured by the broker, and at the price and on the terms arranged by his intervention. It was, therefore, reasonably considered as in some sort a fraud upon him in each case, to discharge him and then close the contract, as a trick to have the benefit of his services without paying for them. In each case the employer received the purchase money, and there was, therefore, reason in each why he should pay the broker his commissions.

In *De Santos* v. *Taney*, 13 La. Ann. 151, in Nov. 1857, the very question in this case came before the same court. In that case, a real estate broker, employed to find a purchaser for the house, had done so. The price and terms were agreed to and settled and accepted by the defendant in writing. The bill of sale was drawn and ready, when a dispute arose as to who should pay certain taxes, and the matter was broken off. The court affirmed the decision in *Blanc* v. *The Improvement and Bkg. Co.* and *Didion* v. *Duralde;* and said that in all the cases relied on by the broker, the contract was consummated, though through bad faith toward the broker on the part of his principal, it had been suspended and apparently abandoned. The court said, "Negotiations for sales through brokers, interrupted and broken off at every stage of progress to completion, are of daily occurrence. But all the authorities confirm the doctrine of Judge Martin, as we understand it, that no brokerage is due until the sale is completed and executed, that is to say, until the

NOTE.—*When a broker to sell real estate is entitled to commissions*—see note to McGavock v. Woodlief, 15 L. ed. U. S. 884; and note to Lunney v. Healey, 44 L. R. A. 593.

consideration of the sale has passed to the vendor." Thus it is settled by the legitimate interpreter of the law of Louisiana, as the law of that state under its code, that as is the law in England, the broker, if paid at all, is paid by way of commission—*i. e.*, by a percentage upon the money actually received on a completed sale; and that if there be no sale he is entitled to nothing.

Mr. **J. P. Benjamin**, for defendant in error:

This case is a very simple one. Emmerling, a real estate broker, was employed by Kock to find a purchaser for a plantation at the price of $250.000. A purchaser was found by the broker, with whom the bargain was made by Kock at the price fixed by himself. After making a verbal agreement for the sale, Kock changed his mind and refused to sell. The question is, whether he can lawfully refuse to pay his broker the commission earned, on the ground that the sale was not actually effected, when it was his own act that prevented the accomplishment of the sale.

The judge below decided rightly that the commissions were due.

C. C. 2035; *Rightor* v. *Aleman*, 4 Rob. La. 45; *Wells* v. *Smith*, 3 La. 501; *Levistones* v. *Landreaux*, 6 La. Ann. 26; *Lestrade* v. *Perrera*, 6 La. Ann. 398; *McGavock* v. *Woodlief*, 20 How. 221.

Respectfully submitted.

Mr. Justice McLean, delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the eastern district of Louisiana.

An action was brought by Emmerling, an alien, against Kock, a citizen of Louisiana, for the sum of $5,000, on the purchase and sale of real estate.

Emmerling, it seems, being a broker, and engaged in the purchase and sale of real property, was employed by Kock to sell a certain plantation on the Bayou Lafourche, known as the Letory place, and by his written instructions, the 2d April, 1857, was authorized to sell this plantation above named at $250,000, payable one fifth cash, and the remainder in four equal instalments, bearing eight per cent interest.

The petitioner, it is alleged, after visiting the plantation at various times, and with different persons, finally, on the 19th of April, 1857, made an agreement with Jacob Denny, a resident of Louisiana, to purchase the plantation at the price fixed, provided the said Kock would so change the terms of payment as to receive $40.000 in cash, and the remainder in six annual instalments, bearing seven per cent interest.

Kock consented to the terms, and the 29th April he and Denny met at New Orleans to complete the contract. Kock insisted that for the first year's credit a good acceptance for $30,000 should be given, and agreeing, if this were done, the $5,000 remaining on the first term should be equally divided among the other five terms, so that the first year's payment should be $30,000, and the other five credit terms should be $36,000 each. And he agreed to take as satisfactory the acceptance of Messrs. Fellows & Co., or Messrs. Lavoe & McColl, commission merchants of New Orleans. Messrs. Fellows *& [*73 Co. agreed to accept for the $30,000, and Denny offered to advance the $40,000, and in every other respect to carry out and complete the proposed contract. But Kock refused to comply with his agreement, capriciously, as it would seem, as he assigned no reason for his refusal, except that he was going to Europe on a visit with his family, and had no time to execute the title papers. Denny proposed to provide for the payments, and receive the title on his return, but he refused to sell the plantation.

The petitioner alleged that the contract was fully executed on his part, and on the part of Denny; and he claims a recompense for the service in which he was engaged, at the rate of two per cent on $250,000, making the sum of $5,000, said per centage being the usual established rate of broker's commission on the sales of plantations.

The defendant denies the allegations of the bill in the circuit court.

A judgment was entered in the circuit court for the sum claimed by the petitioner; from which judgment the defendant has appealed to this court.

In his statement of facts, the district judge says: "It is established by the proof that the price of the plantation was two hundred and fifty thousand dollars, and the rate of commissions of brokers on sales of plantations was two per cent." This is the ordinary mode of bringing before this court a writ of error on a statement of facts in Louisiana by the district judge. *McGavock* v. *Woodlief*, 20 How. 225.

There would seem to be no doubt on the merits of this case. The terms of the contract as to the sale were specific and unmistakable, and everything was done that could be done by the purchaser to carry out the contract; but the vendor, without any reason, refused to complete it.

The broad ground is assumed, that no contract of this character can be specifically enforced, unless it has been fully executed.

In the case of *McGavock*, above cited, the court says: "The terms of the sale, as given by the vendor to the plaintiff, the *broker, [*74 were simple and specific, etc., and Long, the purchaser, agreed to these terms, as averred in the petition, and not questioned in the case; and if he had offered, and was in a condition to consummate the agreement according to its terms, no doubt the commission would have been earned, and the recovery below, right. But a change was proposed by Long, which prevented the arrangement.

Civil Code, 2035, declares: "The condition is considered as fulfilled, when the fulfilment of it has been prevented by the party bound to perform it." In addition to this, the following authorities have been cited: *Rightor* v. *Aleman*, 4 Rob. 45; *Walls* v. *Smith*, 3 La. 501; *Levistones* v. *Landreaux*, 6 La. Ann. 26; *Lestrade* v. *Perrara*, 6 La. Ann. 398.

It is not perceived why a contract to sell property, real or personal, on commission, should not be governed by the same rules as other sales. If a usage has been established in Louisiana, as seems to be the case, for the sales of plantations,

such usage being reasonable, should govern in the absence of a special agreement.

Nothing is more common in our large cities than to charge brokerage for procuring the loan of money. This varies as the money market rises or falls. One per cent and sometimes two, is charged for this service. The same rule applies as to the sale of property. Where the contract is fair, it is not perceived why such compensation should not be paid, as agreed by the parties, or by an established usage.

Where the vendor is satisfied with the terms, made by himself, through the broker, to the purchaser, and no solid objection can be stated, in any form, to the contract, it would seem to be clear that the commission of the agent was due, and ought to be paid. It would be a novel principle if the vendor might capriciously defeat his own contract with his agent by refusing to pay him when he had done all that he was bound to do. The agent might well undertake to procure the purchaser; but this being done, his labor and expense could not avail him, as he could not coerce a willingness to pay the commission which the vendor had agreed to pay. Such a state of things could only arise from an 75*] express *understanding that the vendor was to pay nothing, unless he should choose to make the sale.

The judgment of the Circuit Court is affirmed.

Dissenting, Messrs. Justices **Grier and Catron.**

BRYAN ROACH and Dennis Long, Composing the Firm of Roach & Long, *Libts. and Appts.*,

v.

WILLIAM CHAPMAN *et al.*, Claimants of the Steamer Capitol, and Daniel Edwards and Joseph Maillot, Sureties.

(See S. C. 22 How. 129-132.)

Contract for building ship or supplying her materials, is not a maritime contract—local laws cannot confer jurisdiction.

A contract for building a ship or supplying engines, timber, or other materials for her construction is, clearly, not a maritime contract.

People's Ferry Co. v. Beers, 61 U. S. (in b. 15) affirmed.

Although the law of Kentucky may create a lien in favor of the libelants, yet the local laws can never confer jurisdiction on the courts of the United States.

Submitted Jan. 18, 1860. Decided Jan. 30, 1860.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The libel in this case was filed in the district court of the United States for the eastern district of Louisiana, by the appellants, who claimed a lien under the general admiralty law, and the law of the state of Kentucky, for $2,947.48, part of the price of the engines and boilers of the steamer Capitol, built for and furnished said steamer at Louisville, Kentucky.

The said court entered a decree in favor of the libelants. The circuit court, on appeal, reversed this decree, and dismissed the libel; whereupon the libelants took an appeal to this court.

A further statement of the case appears in the opinion of the court:

Mr. **J. P. Benjamin,** for appellants:

1. As to the existence of a lien in favor of the builder under the general maritime law, the adverse opinion of the circuit court will not be called in question, as the decision of this court in the case of *The People's Ferry Co. of Boston* v. *Beers*, 61 U. S. 393, 15 L. ed. 961, must be considered as conclusive on this point.

2. But a lien in this case was given, both by the law of the state of Kentucky, where the boat was built, and by that of the state of Louisiana where she was intended to be employed, and where the libel was filed.

Rev. Stat. of Ky. 143, § 2; La. Civ. Code, 3204

This lien under the law of Kentucky, when the contract for the work was made, was available for one year only from the time the cause of action accrued, as against a purchaser without actual notice.

The cause of action accrued on January 5 1855, and the libel was filed within the year *viz.*, on December 15, 1855.

3. The district court had jurisdiction to enforce this lien.

Read v. *The Hull of a New Brig*, 1 Story, 244; *Davis* v. *A New Brig*, Gilp. 473, 536; *The Young Mechanic*, 2 Curt. 404; *The Richard Busteed*, 21 Law Rep. 601; 1 Pars. Mar. Law, 501, 499 note; 2 Pars. Mar. Law, 504, 505, 639 *et seq.*, *The Superior*, 1 Newb. 176; *The Chas. Mears*, 1 Newb. 197.

4. The lien thus created, was not devested by the departure of the vessel from the port of Louisville, nor by any subsequent change of ownership, nor by virtue of any provision of the law of Louisiana.

Liens of materialmen follow the vessel into whatever hands it passes.

1 Pars. Mar. Law, 500, note; *Sheppard* v. *Taylor*, 5 Pet. 675; *The Sloop Canton*, 21 Law Rep. 473; *The Chusan*, 2 Story, 456.

But in the present case there has been no bona fide change of ownership.

5. The taking of drafts for the unpaid balance for the price of the engines was no waiver of the lien. The drafts were offered to be surrendered at the hearing of the district court.

The Nestor, 1 Sumn. 73; *The Chusan*, 2 Story, 455; *Leland* v. *The Ship Medora*, 2 Wood. & M. 92; *Raymond* v. *The Ellen Stewart*, 5 McLean 269; *Sutton* v. *The Albatross*, 2 Wall. Jr. 327; *Ramsay* v. *Allegre*, 12 Wheat. 611.

No counsel appeared for appellees.

Mr. Justice **Grier** delivered the opinion of the court:

The libelants claim to have a lien on the stemboat Capitol, for a balance due them for machinery furnished in her construction. The boat was built at Louisville, Kentucky, and the libelants furnished the boilers and engines. Payments were made as the work progressed,

NOTE.—*Ship-building contracts are not maritime contracts*—see note, 18 C. C. A. 359.

and bills of exchange taken for the balance due after the vessel was completed. These were not paid. The boat left the port and the state, 132*] *and was afterwards sold, and became the property of the claimants.

Among other things, the claimants pleaded to the jurisdiction of the court. This plea was sustained by the circuit court.

A contract for building a ship or supplying engines, timber, or other materials for her construction, is clearly not a maritime contract.

Any former *dicta* or decisions which seemed to favor a contrary doctrine were overruled by this court, in the case of *The People's Ferry Co.* v. *Beers*, 20 How. 400.

It is said here, that the law of Kentucky creates a lien in favor of the libelants; and that, as this case originated before the adoption of our rule, which took effect on the 1st of May, 1859, it may, upon the principles recognized by this court in *Peyroux* v. *Howard*, 7 Pet. 343, be enforced in the admiralty. But (to quote the language of the court in *Orleans* v. *Phœbus*, 11 Pet. 184), "that decision does not authorize any such conclusion. In that case, the repairs of the vessel for which the state laws created a lien, were made at New Orleans, on tidewaters. The contract was treated as a maritime contract, and the lien under the state laws was enforced in admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States."

It is clear, therefore, that the judgment of the Circuit Court, dismissing the libel for want of jurisdiction, must be affirmed, without noticing other questions raised by the pleadings.

THE CITY OF NEW ORLEANS, *Plff. in Err.*,
v.
MYRA CLARK GAINES.

(See S. C. 22 How. 141-144.)

Where record shows nothing but regular judgment, it will be affirmed.

Where a cause, as presented to this court, simply shows a judgment in favor of defendant in error, with regular pleadings to warrant it, and beyond this, contains nothing that this court can notice, as a court of error, the judgment below will be affirmed.

Argued Jan. 10, 1860. Decided Jan. 30, 1860.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **J. P. Benjamin**, for plaintiff in error:

1. The judgment in the suit of Durell in the state court, formed *res judicata* against Mrs. Gaines.

C. C. 2265; *Plicque* v. *Perrett*. 19 La. 318.

When cited by the city to contest the claim of Durell, the judgment by default taken against her was equivalent to a joinder of issue with him as to the right in question.

C. P. 360.

And upon the issue thus joined there was final judgment against her.

Even if the proceedings and judgment in said suit be not technically *res judicata*, they form a valid estoppel.

Mrs. Gaines was cited and personally informed by the city that Durell claimed payment of a sum which was supposed by the city to be due to her. The court ordered her to become a party and defend her rights, if any. She chose to remain silent; to waive objection to any payment to Durell; to permit the city to pay him; and is thereby estopped from now pretending that the payment should be made to her, and that Durell had no right to receive it.

Levistones v. *Claiborne*, 5 Rob. La. 196; *Ducros* v. *Fortin*, 8 Rob. La. 165.

Messrs. **F. Perin** and **P. Phillips**, for defendant in error:

It is doubtful whether any record ever came up from the circuits so perfectly barren of questions upon which a court of errors could base the authority or propriety of its revision, as the one now presented. There is nothing in the record to show anything that was done upon the trial. The final decree merely recites that "this cause having been argued and submitted on a former day, and the court having considered the same, doth now order, adjudge and decree," etc. There was no note of evidence, no objections made or reserved, no bill of exceptions taken, and no facts even returned by the court. The facts in the opinion of the judge justified his decision, whatever they were; but what they were can never be ascertained by this record.

Mr. Justice **Catron** delivered the opinion of the court:

The city of New Orleans instituted proceedings by suit in a city court, pursuant to a statute of Louisiana, for opening two streets in the city, and appropriating the private property requisite for that purpose; and on the tableau of assessment certain squares of ground were put down as belonging to Mrs. Gaines, and the damages done to owner fixed at $2,363.

The assessment was decreed to Mrs. Gaines by the court where the proceeding was had; and she brought suit on this judgment against the city, in the United States circuit court.

The defendant (the city), by its answer, admitted the proceeding, and the damages assessed on the property described in the petition; but, in avoidance of the demand, averred that a suit had been brought by one Durell against the city, claiming that he was the true owner of the property through which the streets run, and which the commissioners of assessment had supposed to be owned by Mrs. Gaines, and demanding payment to him of the damages claimed by her; that in the suit so brought by Durell Mrs. Gaines had been personally cited as a party, at the instance of the city, for the purpose of having the question decided between her and Durell, as to the ownership of the property, and as to their respective claims on the city for the sum

awarded; and that in said suit judgment was rendered, determining the question in favor of Durell; and this judgment is pleaded in bar of the present suit.

Various documents were exhibited with the answer, and filed in the circuit court, on behalf of the city, including a record of the suit by Du-
144*] rell against the city, and the recovery *of the damages for extending the streets; but nothing appears in the record showing that these documents were given in evidence on the trial; nor did the judge before whom the cause was heard make any statement of the facts found by him, as the usual practice is, where the circuit court in Louisiana tries issues of fact without the intervention of a jury.

The cause, as presented to us, simply shows a judgment in Mrs. Gaines' favor, with regular pleadings to warrant it; and beyond this, contains nothing that this court can notice, as a court of error.

It is ordered that the judgment below, be affirmed.

WILLIAM H. ASPINWALL, Joseph W. Alsop, Henry Chauncey, Charles Gould, and Samuel L. M. Barbour, *Plffs.*,

v.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF DAVIESS.

(See S. C. 22 How. 364-380.)

County subscription to railroad, when subject to Indiana Constitution of 1851.

By the act of incorporation of the Ohio and Mississippi Railroad Company of the 14th February, 1848, and the amendment thereto of January 15th, 1849, no such rights to county subscriptions vested in said company as excluded the operation of the new Constitution of Indiana, which took effect on the 1st day of November, 1851.

By virtue of the said acts, and of the election in favor of subscription to the stock, the said company acquired no such right to the subscription of the defendants as would be protected by the Constitution of the United States against the said new Constitution of Indiana.

Argued Jan. 16, 1860. Decided Feb. 6, 1860.

ON a certificate of division of opinion between the Judges of the Circuit Court of the United States for the District of Indiana.

The case is fully stated by the court.

Messrs. **Samuel Judah, S. F. Vinton,** and **J. P. Benjamin,** for plaintiffs:

On the first Monday in March, 1849, an election was held in the county of Daviess, to determine whether the said county should subscribe for stock in the O. & Miss. R. Co.

At such election a majority decided in favor of subscription.

By virtue of this election, it became the duty of the county commissioners to subscribe for $30,000 of the stock, and it became the right of the company to have such subscription.

On September 10, 1852, the defendants subscribed for the stock, and afterwards issued the bonds with the coupons which are the subject of this suit.

The new Constitution of Indiana took effect after the election and before subscription, November 1, 1851.

The only question is, Does it operate in this case? It forbade such a subscription unless on cash payment. The O. & Miss. R. Company was incorporated by an act of Indiana, approved February 14, 1848. The power of the company as to stock is very ample. By § 2, five millions of capital is authorized, with power to the directory to add shares without limit by subscriptions or by sale. By § 6, all persons of lawful age, and all corporations of the United States, may subscribe for stock, and the company may, at any time or place, sell stock to any amount on such terms as shall be thought proper. Sec. 12 is as follows:

"It shall be lawful for the county commissioners of any county in the state through which said railroad passes, for and in behalf of said county to authorize by order on their records so much of said stock to be taken in said railroad as they may deem proper, at any time within five years after the opening of the books of subscription to said stock. To this provision there is this further: "That it shall be the duty of said county commissioners in any county, so to subscribe for and on behalf of said county, if a majority of the qualified voters of said county, at any annual election within five years, etc., shall vote for the same."

The commissioners did not subscribe, the people did not vote at any annual election; so an amendment to the act of incorporation was enacted January 15, 1849. By this act, special provision was made for a special election on the first Monday of March, 1849, and it was provided "that if a majority of the votes given be in favor of subscription, the commissioners shall subscribe for Daviess county not less than $30,000;" and in the last section of these acts, it is declared that each shall be considered a public act and shall receive a liberal construction.

There is another remark to be noticed. The acts are *in pari materia,* and to be construed together.

The first question on which the judges differed, relates to the nature of the right granted by the act of incorporation, and by the amendment to that act to the Railroad Company, to receive county subscriptions. In other words: Was it a vested right, beyond the reach of a law or Constitution made afterwards?

There is no provision in the new Constitution of Indiana as to existing rights, either personal or corporate, except the ordinary declarations: "no man's property shall be taken by law without just compensation" (art. 1, § 21), and, "no law impairing the obligation of contracts shall ever be passed."

Art. 1. § 24.

We assume that the property of private corporations is protected by § 21.

By the act of incorporation, a capital of five millions is contemplated; but the company is allowed to organize on the subscription of $200,000, and a payment at the time of subscription is required. By the 12th section, counties are authorized to subscribe for stock, as by the 6th section all persons of lawful age, and all cor-

NOTE.—*What laws are void as impairing obligation of contracts; repeal or modification of statute; vested rights*—see note Fletcher v. Peck. 3 L. ed. U. S. 162. *Constitutionality of law altering charter as impairing contract*—see note to Dart. Coll. v. Woodward, 4 L. ed. U. S. 629.

porations of the United States may subscribe. Does the power exist anywhere to restrain these rights against the will of the company? If the company may be deprived of one of these classes of subscribers, it may be deprived of all, and thus its entire capacity may be destroyed, and itself in effect annihilated.

But it is argued that counties are municipal corporations; that municipal corporations are under the control of state legislation; and that those who contract with them, contract subject to this control. And we answer: it is true that municipal corporations are subject to the control of the legislature. If the legislature creates a municipal corporation and endows it with other powers; with powers "to contract and be contracted with;" with powers of a private, and not of a political nature; with powers including the rights and duties and obligations of private corporations and individuals; does it not create an exception as to such rights, duties and obligations? In such case the legislature may control, may dissolve the corporation; but the rights, the duties and obligations will remain chargeable on its property.

Mumma v. *Potomac Co.* 8 Pet. 281; *Curran* v. *State of Arkansas*, 15 How. 310.

The second question covers more ground than the first.

The question is whether by virtue of the act of incorporation, and the amendment, and the election, the railroad company acquired such right to the subscription as would be protected by the Constitution of the United States.

This only differs from the first question, in being, if anything, stronger than the first in favor of the plaintiffs. In the first, a mere right dependent on a certain discretion is claimed; in this, a right is claimed so perfected that nothing remained but the discharge of a ministerial duty.

The law is plain: "And if a majority of the votes given shall be in favor of subscription, the county board of said county shall subscribe."

§ 2, art Jan. 15, 1849.

There is no discretion. There is only a duty; and this, by the law of Indiana, may be enforced by mandamus.

Sec. 739; § 745, 2 Rev. Stat. pp. 197, 198.

Hence, when the new Constitution took effect, there was an absolute vested right in the company to $30,000 subscription from the county of Daviess, to be paid in bonds of a certain description; and we submit, that this right is a matter of contract, secured by the Constitution of the United States.

Planters' Bank v. *Sharp*, 6 How. 301; *Slack* v. *Lex. & Maysville R. Co.* 13 B. Mon. 1; 12 B. Mon. 150.

Messrs. **McDonald & Porter**, for defendants:

By the statutes of Indiana, county commissioners are bodies "corporate or politic."

1 R. S. of 1852, p. 225.

Touching the matter in controversy, the first act which they performed—that of subscribing the stock—they performed as a corporation on September 10, 1852. And the question is: Did the Constitution of 1850 prohibit that act? We say it did. And in support of this view, we suggest the following considerations:

I. The constitutional prohibition is, that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription." The spirit and intent of this clause seem very plain. Certainly the design was to prohibit counties from involving their people in debt for corporation stocks. And it is equally certain that any subscription by which such a debt is created, is within the prohibition. Nor is it less clear that the prohibition applies to all such debts, whether created directly or indirectly, for such stocks. The mischief intended to be guarded against, was the burdening of the people with taxes to pay debts contracted for corporation stocks. And the power to impose that burden in any manner, is the thing prohibited.

II. Was the stock paid for at the time of the subscription?

The existence of this suit is an answer to the question.

The phrase "paid for at the time" in the Constitution certainly means more than the making of a promise or obligation to pay.

Payment is a technical term, and in strictness implies the discharge of a debt by the delivery of money. Thus in pleading, if the defense is that we have done what we engaged to do, we allege in cases of engagement to do something besides paying money, performance, and in cases of money debts, we plead payment. The supreme court of Indiana has held, that a plea of payment in anything else than money is a bad plea.

Sinard v. *Patterson*, 3 Blackf. 353.

The two words "debt" and "payment," always refer to money.

The constitutional provision in question requires that the stock subscribed "be paid for at the time of such subscription." Payment must be simultaneous with the subscription. If in this we were wrong, still it does not appear that the payment alleged in the declaration was made "at the time" of the subscription. The averment is that "afterwards, to wit: on the day and year aforesaid, in payment for said stock," the bonds were issued.

The declaration says that, "in conformity with said acts, the defendants subscribed for 600 shares," etc., "of the value of $30,000." The subscription, then was "in conformity with the acts." These acts give the form of the subscription. It is found in the 5th section of the charter of 1848 thus:

"We whose names are subscribed hereto do promise to pay to the president and directors of the Ohio & Mississippi Railroad Company the sum of fifty dollars for every share of stock set opposite to our names respectively, in such manner, proportions, and times as shall be determined by said company, in pursuance of the charter thereof."

This is the only form of subscription given in the two acts. Section 5 of the charter requires this form to be pursued. Both by the declaration and the charter, it must be supposed to have been pursued in the subscription under consideration.

Now, as the engagement was to pay in money, the delivery of something else—bonds, for example—could not in any event amount to payment, unless accepted by the company as payment.

Mace v. *Miller*, 1 Wash. C. C. 328.

The supreme court of Indiana has given a construction to the prohibitory clause in the Indiana Constitution. They say: "This section by implication concedes the power to counties to take stock, at all events by permission of the legislature, in companies chartered to construct works of internal improvements, under the new Constitution, by making cash payment at the time."

The City of Aurora v. *West*, 9 Ind. 78.

Cash payment is the meaning of the section.

Even if the stock was paid for at the time, still the transaction was clearly in violation of that part of the Indiana Constitution which declares that no county shall "loan its credit to any incorporated company."

Undoubtedly the issuance of the bonds in question was lending the credit of the county to this railroad company. This was the prime object of the transaction. The bonds were drawn in the usual form to be put into the market. They were put into the market or the plaintiffs would never have got them; and putting them into the market was using the credit of the county, which it had loaned to the company.

III. It is said by the plaintiffs that the vote to take stock given by the people of Daviess county, before the Constitution of 1850 took effect, amounts to a contract, the obligation of which is protected by the Federal Constitution against the prohibition in the Constitution of Indiana.

The plaintiffs claim, first, that the vote amounted to a "contract" within the 10th section of the 1st article of the Federal Constitution; and second, that the prohibition in the Indiana Constitution is in violation of the company's charter, which permits "the county commissioners of any county through which the railroad passes" to subscribe stock. Let us examine each of those points:

1. Did the vote of the people amount to a "contract" which the Federal Constitution protects? We say, no; for that vote was not a contract at all. "A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing." "An agreement" is the binding assent of both parties. This *aggregatio mentium* in indispensable to every contract. In this sense the people of the county could not by vote enter into an "agreement," for they are not a body politic; and they cannot be sued. It is the board of commissioners that can agree, not the voters. This contract is not alleged to have been made with the voters, but with the commissioners. Not the voters, but the commissioners, are sued. If the vote amounted to a contract, it was the contract of the voters; and it will be time enough when these voters are sued, to inquire whether they contracted. It is for the present enough to know that the present defendants, the board of commissioners, never contracted till after the Constitution of 1850 took effect.

And if the voters had power to make a contract by a vote to take stock, still their vote could not amount to a contract, till the company also agreed. To a contract there must of course be the assent of both parties. Now, it does not appear by the record that the railroad company ever assented to this supposed contract, till the time of the subscription on which, as we have seen, was long after the constitutional prohibition took effect. As, then, there was no assent by both parties till after the first day of November, 1851, there could have been no contract till after that day. And as the making of the contract after that day was prohibited by the Indiana Constitution, there could not have been in the case any contract protected by the Federal Constitution.

Balt. and Sus. R. R. v. *Nesbit*, 10 How. 396.

2. Is the prohibition in the Indiana Constitution in violation of the company's charter, which provided that county subscriptions of stock might be taken? In other words, since a charter is in some respects and in some sense a contract, is the provision in the charter of the Ohio & Mississippi Railroad Company, allowing counties to subscribe for stock therein, such a contract as is contemplated by the Federal Constitution?

The provisions of the charter give no vested right of property to the company; they merely bestow on counties the power to subscribe for stock—a power which, by the general laws of Indiana, did not before exist. They merely operate as enabling acts—as acts removing disabilities.

"That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, is admitted; and it has never been so construed."

Story, Const. § 1392.

Undoubtedly the Indiana legislature might at any time repeal all laws incorporating counties and county boards, and thus disable them from subscribing for any stock or making any contract. Nor is it to be for a moment tolerated, that the legislature of Indiana, by granting a charter to a railroad company, could have intended to abandon any portion of its legislative power over the counties of the state.

As every charter stands, all natural persons not laboring under disabilities, may take stock. But who ever thought that the legislature may not, after the grant of the charter by law, impose liabilities on some of these natural persons? Suppose that at the time of the passage of a charter, married women were by law capable of contracting by subscribing for stock, can it be said that the legislature cannot afterwards by law impose on them the usual disability of *femes covert?* So we think it clear that the Constitution of Indiana might impose on the counties the disabilities in question.

In the case of *Richmond, etc. R. Co.* v. *The Louisa R. Co.* 13 How. 71, where the legislature of Virginia, in a charter, gave a pledge not to allow any other railroad to be constructed near the one chartered, and afterwards another railroad was chartered contrary to that pledge, it was held that the first charter was not violated within the meaning of the United States Constitution touching the obligation of contracts. That was certainly a much stronger case than the one now under discussion; and as long as it stands for law, surely the defendant in this case is safe.

The case of *Cov. and Lex. R. Co.* v. *Kenton Co. Court*, 12 B. Mon. 144, is in point on this

question. There the charter of the company had authorized the county court, under a certain vote of the people, to subscribe stock. The people had voted for it, but the county court refused to subscribe, and in the meantime the legislature repealed the provision of the charter authorizing county subscriptions. This repeal was held no violation of a contract, because "until an actual subscription of the stock was made no right to it vested in the company."

Upon the whole, we submit that it is perfectly clear that the question propounded in this case for the decision of the court, ought to be decided in the affirmative.

The following direct answers to the questions certified to this court are from the order of the court made in this cause:

"It is the opinion of this court:

1st. That by the act of incorporation of the Ohio & Mississippi Railroad Company, of February 14, 1848, and the amendment thereto of January 15, 1849, no such right to county subscriptions vested in said company as excluded the operation of the new Constitution of Indiana which took effect on November 1, 1851.

2d. That by virtue of the said acts, and of the said election in the declaration set forth, the Ohio & Mississippi Railroad Company acquired no such right to the subscription of the defendants as would be protected by the Constitution of the United States against the new Constitution of Indiana, which took effect on November 1, 1851."

Mr. Justice **Nelson** delivered the opinion of the court:

The case comes up from the circuit court of the United States for the district of Indiana.

This suit was brought by the plaintiffs against the board of commissioners of the county of Daviess, to recover two instalments of interest accruing upon certain bonds issued by the board for stock subscribed to the Ohio & Mississippi Railroad Company; and on the hearing the following questions arose, upon which the judges of the court divided in opinion:

1. Whether, by the said act of incorporation of the said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the 375*] new Constitution *of Indiana, which took effect on the 1st day of November, 1851.

2. Whether by virtue of the said acts, and of the said election in the declaration set forth, the Ohio & Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the Constitution of the United States against the new Constitution of Indiana, which took effect on the 1st day of November, 1851.

The charter of the railroad company, passed February 14, 1848, provides that it should be lawful for the county commissioners through which the road passed to subscribe for stock on behalf of the county, at any time within five years after the opening of the books of subscription, if a majority of the qualified voters of said county, at an annual election, shall vote for the same.

The amended act of January 15, 1849, made the holding of the election in the county peremptory on the first Monday of March (then) next, to determine the question of subscription or not to the stock.

The election was held in pursuance of this law, and a majority of the votes of the county cast in favor of the subscription. This was on the first Monday of March, 1849; and on the 10th September, 1852, the board of commissioners, in pursuance of the acts and of election aforesaid, subscribed for six hundred shares of the stock of the railroad company, of the value of $50 per share, in the whole amounting to $30,000, and in payment of said stock issued thirty bonds, of $1,000 each, duly signed and sealed by the president of the board of commissioners, and attested by the auditor of the county, and delivered the same to the president and directors of the railroad company. By the terms of the obligations, they were made payable at the North River Bank in the city of New York, twenty-five years from date, to the railroad company or bearer, with interest at the rate of six per cent per annum, payable annually on the 1st March, at the bank aforesaid, upon the presentation and delivery of the proper coupons attached, signed by the auditor of the said county. The plaintiffs are the holders and owners of sixty of these coupons.

*The new Constitution of the state of [*376 Indiana contains the following provision:

"No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company."

Sec. 6, art. 10, Constitution of Indiana.

This Constitution took effect on the 1st November, 1851. The subscription was not made nor bonds issued by the board of commissioners of the county, as we have seen, until the 10th September, 1852. The question therefore arises, whether the subscription and bonds, thus made and issued after the Constitution went into effect, were not forbidden by the 6th section of the 10th article above cited and, therefore, null and void.

The precise question first presented by the court below, upon which the judges divided, is as follows:

Whether, by the said act of incorporation of said railroad company, and the amendment thereto of January 15, 1849, any such right to county subscriptions vested in said company as would exclude the operation of the new Constitution of Indiana, which took effect on the 1st November, 1851.

The question admits, at least by implication, that this 6th section of the Constitution applies to the acts of the board of commissioners, in making the subscription and issuing the bonds; but presents the question, whether, at the time it went into effect, there was not such a right to the subscription and bonds vested in the railroad company as could be upheld, notwithstanding the constitutional prohibition?

This view is sought to be sustained by force of the 10th section of the 1st article of the Constitution of the United States, which provides that no state shall pass any law "impairing the obligation of contracts."

The argument is, that the provisions in the railroad charter and amendment, conferring power upon the board of commissioners of the

county, and making it their duty to subscribe for stock, and issue bonds therefor if a majority 377*] of the qualified *voters of the county should determine at an election in favor of the same, import a contract with the railroad company on behalf of the state, which is protected by the clause referred to in the Constitution of the United States; and hence the state constitutional prohibition is inoperative to annul the subscription or the bonds. That this right to the subscription and bonds, resting upon a contract in the charter, is unaffected by any subsequent statute or organic law of the state.

Without stopping to inquire whether or not the power conferred upon the board of commissioners in the charter and amendments of the railroad company, in the form and with the conditions therein mentioned, constitutes a contract, the court is of opinion that, in view of the body upon which the power is conferred, and of the nature of the power itself, no such contract existed, if any, as is contemplated by this clause of the Federal Constitution. The power or authority contained in the charter, and out of which the right in question is claimed to arise, is conferred upon the county, a public corporation or civil institution of government, and upon public officers employed in administering laws; and the power or authority itself concerns this body in its public political capacity.

Chief Justice Marshall observed, in *Dartmouth College* v. *Woodward*, 4 Wheat. 627, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens; would extend offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. But, he observes, the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed (p. 629). And Mr. Justice Washington observed, in the same case (p. 663), in respect to public corporations, which exist only for public purposes, such as towns, cities, etc., the legislature may, under proper limitations, 378*] *change, modify, enlarge, or restrain them; securing, however, the property for the use of those for whom, and at whose expense, it was purchased. See, also, pages 693, 694.

It would be difficult to mention a subject of legislation of more public concern, or in a greater degree affecting the good government of the county, than that involved in the present inquiry. The power conferred upon the board of commissioners by the provisions in the charter, among other things, embraced the power of taxation, this being the ultimate resort of paying both the principal and interest of the debt to be incurred in the subscription and issuing of the bonds.

The second question presented, upon which the judges differed, is as follows:

Whether, by virtue of said acts, and of the said election in the declaration set forth, the Ohio & Mississippi Railroad Company acquired any such right to the subscription of the defendants as would be protected by the Constitution of the United States against the new Constitution of Indiana, which took effect the 1st November, 1851.

The acts of 1848 and 1849, already referred to, made it the duty of the board of commissioners to subscribe for the stock, if a majority of the qualified voters at an election determined in favor of the subscription.

The election took place on the first Monday of March, 1849, when a majority of the votes was cast for the subscription. The Constitution of Indiana took effect 1st November, 1851. But the subscription was not made till the 10th September, 1852, and the bonds were issued after this date. It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties; and which, if true, it is agreed the contract would be protected within the Constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in this view. It holds, that a subscription was necessary to create a contract binding upon the county, on one side, to take the *stock and pay in the bonds; and upon [*379 the other, to transfer the stock, and receive the bonds for the same. Until the subscription is made, the contract is unexecuted, and obligatory upon neither party.

We have arrived at the conclusion that both of the questions presented to us by the court below must be answered in the negative with some reluctance, as, for aught that appears in the case, the subscription to the stock by the board of commissioners was made and the bonds issued in good faith to the Railroad Company, and also sold by it, and purchased by the plaintiff in confidence of their validity; but, after the best consideration the court has been able to give the case, it has been compelled to hold, for the reasons above stated, that the subscription was made, and the bonds issued, in violation of the Constitution of Indiana and, therefore, without authority, and void.

We have not been able to find that the courts of Indiana have passed upon this clause of their Constitution, and have, therefore, been obliged to expound it with the best lights before us. We should have felt very much relieved, if a construction had been given to it by the judicial authorities of the state, and have readily followed it.

Whereupon it is now here ordered and adjudged by this court that it be so certified to the said circuit court.

JOSEPH S. CUCULLU, *Plff. in Err.*,

v.

LOUIS EMMERLING.

(See S. C. 22 How. 83-87.)

Objection not made below will not be heard here —where judge finds facts, evidence not reviewed.

The objection, that a contract cannot be proved

by one witness, according to the law of Louisiana, should have been made to the court below.

Where the case stated, made by the judge to whom the cause was submitted, finds facts, and not evidence of facts, this court cannot inquire, unless upon some bill of exceptions properly taken, whether the evidence was sufficient to justify the finding of the court.

Argued Jan. 23, 1860. Decided Feb. 13, 1860.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This case arose upon a petition filed in the court below, by the defendant in error, to recover commissions alleged to be due him as a broker.

The cause having been submitted to the court, a judgment was entered in favor of the plaintiff for $2,700, with interest and costs; whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **Miles Taylor**, for plaintiff in error:

The agreement or contract under which Emmerling pretends to claim the payment by Cucullu of $2,700, as his commissions, cannot be proved in the state of Louisiana by one witness, and the judgment of the court below must be reversed for want of sufficient evidence to sustain it, as disclosed by the statement of facts in the case.

Cormier v. *Le Blanc*, 8 Mart. N. S. 458; 3 La Ann. 214; *Gasquet* v. *Kokernot*, 5 La. 268; *Lallande* v. *McMaster*, 16 La. 352; *Gillispie* v. *Day*, 19 La. 263; *Brent* v. *Slack*, 10 Rob. La. 371.

Mr. **J. P. Benjamin**, for defendant in error:

Louis Emmerling recovered a judgment in the circuit court against J. S. Cucullu, for $2,700, for brokerage on the sale of a plantation. The statement of fact shows that the commissions were earned by Emmerling, and the writ of error seems to have been prosecuted solely to vex and delay the defendant in error, who prays the court to allow him damages under the 23d rule.

Mr. Justice **Grier** delivered the opinion of the court:

The declaration charges that the plaintiff below was employed by Cucullu, as a broker, to sell a plantation; that he effected a sale on terms satisfactory to Cusullu; that the sale was consummated by delivery of the property and receipt of the purchase money; and that for these services the plaintiff was entitled to a brokerage of two per cent, which Cucullu refused to pay.

The facts of the case are stated by the court below in the nature of a special verdict, finding the allegations of the declaration to be supported by the evidence.

It has been objected here, that such a contract cannot be proved by one witness, according to the law of Louisiana. That objection should have been made to the court below, if it is worth anything. But the case stated, made by the judge to whom the cause was submitted, finds facts, and not evidence of facts; consequently, this court cannot inquire, unless upon some bill of exceptions properly taken, whether the evidence was sufficient to justify the finding of the court. It would be granting a new trial, because the verdict is not *sup- [*87 ported by the evidence, without any bill of exceptions to the admission of testimony or to the charge of the court.

The judgment of the court below is, therefore, affirmed.

WILLIAM BREWSTER, *Appt.*, *v.* WILLIAM WAKEFIELD.

(See S. C. 22 How. 118-129.)

Interest on notes after due—appeal, when proper—laws of territory cannot regulate process of this court—what parties need not join in appeal—defendant with separate interest.

By the construction of a statute of the territory of Minnesota, after the day specified for the payment of notes, the interest is to be calculated at the rates therein mentioned or according to the rate established by law, when there is no written contract on the subject between the parties.

The contract being entirely silent as to interest after due, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract.

In a proceeding in the nature of a bill in equity to foreclose a mortgage, an appeal, and not a writ of error, is the appropriate mode of bringing the case before this court.

The laws or practice of a territory cannot regulate the process by which this court exercises its appellate power.

It is not necessary that parties who acquired liens on the mortgaged premises subsequent to the mortgage in question, should join in the appeal.

A defendant in equity, whose interest is separate from that of the other defendants, may appeal without them.

Argued Dec. 8, 1859. Decided Feb. 20, 1860.

APPEAL from the Supreme Court of the Territory of Minnesota.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. B. Brisbin, H. L. Stevens** and **H. W. Merrill**, for appellant:

1. It is submitted that the court below erred in allowing the plaintiff interest, at the rate specified in the notes, after their maturity.

Our statutes (*vide* Rev. Stat. of Minn. p. 155, ch. 35) fix the legal rate of interest at seven per cent per annum, in all cases where no other rate is agreed upon by the parties in writing.

The appellant agreed in writing to pay a certain sum at a certain time, with interest thereon at a certain rate, or a certain other sum at interest at the same time. His contract to pay interest, did not extend beyond the time at which he agreed to pay it. The plaintiff, therefore, although entitled to interest upon his demand until the same is satisfied, is not so entitled by virtue of the defendant's contract to pay it, but by virtue of the law which allows interest upon all liquidated demands, from the time they become due until they are paid.

Bander v. *Bander*, 7 Barb. 560, and cases there cited.

NOTE.—*Interest, when recoverable as damages or on money*—see note to Sneed v. Wistar, 5 L. ed. U. S. 717.

Rate of interest after maturity—see note to Town of Ohio v. Frank, 26 L. ed. U. S. 531.

2. Authorities directly in point upon the question raised in this case, are not numerous.

In *Macomber* v. *Dunham*, 8 Wend. 550, it was held that a loan company, which was authorized by its charter to charge interest for a full month where a loan was for a period over fifteen days and less than one month, was not entitled, where a loan made for twenty days remained unpaid, to demand interest at the same rate for any subsequent time.

In *U. S. Bank* v. *Chapin*, 9 Wend. 471, it is held that a bank, which by law is limited to six per cent interest upon all discounts, is entitled to recover at the rate of seven per cent from the time the debt becomes due.

The case of *Ludwick* v. *Huntzinger*, 5 Watts & S. 51, 60, it seems to us is directly in point. In that case it was held, that "a note payable at a future day with three per cent interest from the date, carries that interest till the day of payment, and after that, carries lawful interest."

This case is cited in a note to Chit. Bills (11 American, from 9th London ed.), 682, marginal paging.

There are several cases in the reports of the state of Alabama.

Clay v. *Drake*, Minor, 164; *Henry* v. *Thompson*, Minor, 209; see, also, *Kitchen* v. *Br. Bank of Mobile*, 14 Ala. 233.

"The policy of all usury laws of modern times is to protect necessity against avarice, and to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and national wealth." Per Ch. J. Best, in the House of Lords (3 Bing. 193).

Messrs. **Joseph H. Bradley** and **M. E. Ames**, for appellee:

The appeal from the decree of the supreme court taken by William Brewster alone.

It is manifest that the other defendants, if they claimed under Brewster, were equally interested with him in receiving the demand of Wakefield, and the judgment or decree is against all, foreclosing them from any equity of redemption.

Two preliminary questions arise on the face of this record:

First. Can the case be brought to this court on appeal?

Second. Can Brewster alone take the appeal, and without making the other defendants parties?

As to the first: this is a final judgment in a civil action other than a case in equity or of admiralty and maritime jurisdiction and as such, is, by statute, the subject of a writ of error.

Act 24th Sept. 1789, § 22 (1 Stat. 83); 3d March, 1803, § 2 (2 Stat. 244).

Courts of equity are distinct in their forms and modes of proceeding, as well as their jurisdiction, from courts of common law, and they are peculiarly placed under the direct control of this court; with this limitation they are understood to be governed by the principal usages and rules of the English court of chancery at the time of the Revolution.

See 1 Stat. 276; 4 Stat. 278; 5 Stat. 499; *Vattier* v. *Hinde*, 7 Pet. 274.

Their jurisdiction, rules of decision and remedies, are the same in all the states.

Boyle v. *Zacharie*, 6 Pet. 658; *Neves* v. *Scott*, 13 How. 268.

From any other court except a court of equity or admiralty jurisdiction, a case can be brought to this court by writ of error only.

The San Pedro, 2 Wheat. 132; *McCollum* v. *Eager*, 2 How. 61; *Parish* v. *Ellis*, 16 Pet. 451.

As to the second question: it is a case in which there are several defendants claiming in the same right immediately or derivatively, against whom the same joint decree was passed, finally settling their rights, and the appeal is prayed by one only.

An appeal will not lie in such a case by one.

Owings v. *Kincannon*, 7 Pet. 399; *Todd* v. *Daniels*, 16 Pet. 521.

It is submitted that the case ought to be dismissed.

If the case is properly before this court, the points following will be relied on by the defendant in error upon its merits:

First. The rate of interest having been agreed on by the parties and reduced to writing, the contract is authorized by the statute.

Rev. Stat. Minn. p. 155. ch. 35.

Second. The contract being in writing, it is the province of the court to interpret and carry it into effect, according to the intentions of the parties.

See cases and authorities in defendant's brief in the record, to wit, Story, Cont. p. 556, §§ 633, 634; 7 Barb. S. C. 560; Chit. Cont. 74, 7 Am. ed.

Third. If the terms are ambiguous or the intention is doubtful, they are to be taken most strongly against the promisor.

The maxim "*verba chartarum fortius accipiuntur contra proferentem*" (Co. Litt. 36, *a*) is as applicable to contracts not under seal, as to those of greater solemnity.

Mayer v. *Isaac*, 6 Mees. & W. 612; *Hargreave* v. *Smee*, 6 Bing. 248; *Stevens* v. *Pell*, 2 Cromp. & M. 710; *Edis* v. *Bury*, 6 B. & C. 433.

Fourth. This is an express contract for the use of money. The terms import a continuance of the same rate for its detention.

1. It uses the word "interest;" "interest from date."

These words have a definite signification. They show that it was made with reference to an understood compensation, the right to which would continue until payment of the principal sum with all the accumulated interest, or until judgment recovered. Nor could the promisor have paid the debts of either of them, before the appointed time, so as to stop the interest; for the time is a part of the contract and of the consideration on which the money was lent, and was made so for the benefit of the creditor.

Ellis v. *Craig*, 7 Johns. Ch. 7.

2. The interest is to run from the date of the note in one case, at the rate of twenty per cent per annum; in the other, at the rate of two per cent per month. Language could with difficulty be found more clearly to import that the parties contemplated the possibility of the non-payment of the debts at their maturity, and intended, at that event, to fix the rate of interest to be allowed and paid for its detention.

Fifth. It is to be construed as every other contract, to make compensation for the use of another man's property. The hire of labor, the rent of a house or machinery, stand on the same principle. If there is no contract, the

owner is entitled to recover whatever the jury may find he should reasonably receive. But if there is a contract for a definite period at a certain rate, the relation of the parties continues unchanged—the rate of compensation likewise continues. So here, the hire of this money and the rate of compensation being fixed by agreement, the rate must continue so long as the money is detained in the use or employment of the borrower. The statute does not come to the relief of the party who has made his own law.

It is therefore submitted, that there is no error in the decree of the court below.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case comes before the court upon appeal from the judgment of the supreme court of the territory of Minnesota, before its admission into the Union as a state.

It appears that a suit was instituted in the district court, in the county of Ramsey, by Wakefield, the appellee, against the appellant and others, in order to foreclose a mortgage made by the said Brewster and his wife, of certain lands, to secure the payment of three promissory notes mentioned in the proceedings. The notes are not set out in full in the transcript, but are stated by the complainant in his petition, or bill of complaint, to have been all given by Brewster on the 11th of July, 1854, whereby, in one of them, he promised to pay, twelve months after the date thereof, to the **126***] order of *Wakefield, the appellee, the sum of $5,583.25, with interest thereon at the rate of twenty per cent per annum from the date thereof, for value received; and in another, promised to pay to the order of the said Wakefield the further sum of $2,000, twelve months after the date thereof, with interest thereon at the rate of two per cent per month from the date; and by a third one, promised to pay to the order of the said Wakefield, six months after date, the further sum of $1,000, with interest at the rate of two per cent per month. This last-mentioned note is admitted to have been paid, and these proceedings were instituted to recover the principal and interest due on the first two.

No defense appears to have been made by the appellant, and the notes were admitted to be due. But when the court was about to pass its decree for the sale of the mortgaged premises, and ascertain and determine the sum due, the appellant, by his counsel, appeared and objected to the allowance of more than the legal rate of interest (seven per cent) after the notes became due and payable. Wakefield, on the contrary, claimed that interest should be allowed at the rate mentioned in the notes, up to the time of judgment or decree for the sale. And of this opinion was the court, and by its decree, dated June 20th, 1855, adjudged that the sum of $10,670.77 was then due and owing for principal and interest on the said two notes, and ordered the mortgaged premises, or so much thereof as might be necessary, to be sold to raise that sum.

This decree or judgment was carried by writ of error, according to the practice in the territory before the supreme territorial court; and was there, on the 29th of January, 1857, affirmed, with ten per cent damages, and also legal interest on the sum awarded by the district court, amounting altogether to the sum of $12,538.09. For the payment of that amount, with costs, the mortgaged premises were ordered to be sold.

From this last-mentioned decision an appeal was taken to this court.

*There is no question as to the validi- [*127 ty of the notes or mortgage; and it is admitted that no part of the debt has been paid. The question in controversy between the parties, is whether, after the day specified for the payment of the notes, the interest is to be calculated at the rates therein mentioned, or according to the rate established by law, when there is no written contract on the subject between the parties. The question depends upon the construction of a statute of the territory, which is in the following words:

"Sec. 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

Sec. 2. When no rate of interest is agreed upon or specified in a note or other contract, seven per cent per annum shall be the legal rate."

Now, the notes which formed the written contracts between the parties, as we have already said, are not set out in full in the record. We must take them, therefore, as they are described by the complainant, as his description is not disputed by the appellant; and according to that statement, the written stipulation as to interest, is interest from the date to the day specified for the payment. There is no stipulation in relation to interest, after the notes become due, in case the debtor should fail to pay them; and if the right to interest depended altogether on contract, and was not given by law in a case of this kind, the appellee would be entitled to no interest whatever after the day of payment.

The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And, in this view of the subject, we think the territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law, where there was no contract to regulate it. The cases of *Macomber* v. *Dunham*, 8 Wend. 550; *United States Bank* v. *Chapin*, 9 Wend. 471; and *Ludwick* v. *Huntzinger*, 5 Watts & S. 51, 60, were decided upon this principle, and, in the opinion of this court, correctly decided.

*Nor is there anything in the char- [*128 acter of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact, from the necessities of a borrower, more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms:

for, with such a claim, he must stand upon his bond.

A question has been raised by the appellee, as to the jurisdiction of this court. The laws of the territory have abolished the distinction between cases at law and cases in equity, and both are blended in the same proceeding, without any regard to the forms and rules of proceeding, either at law or in equity, and a case cannot be removed from an inferior to an appellate territorial court, except by writ of error. And it is urged that this case, under the laws of Minnesota, ought to be regarded as a case at law, and removable to this court by writ of error only, and not by appeal.

But the case presented by the record is not a case at law, according to the meaning of those words, in courts which recognize the distinction between law and equity. On the contrary, it is a proceeding in the nature of a bill in equity to foreclose a mortgage, in which the facts as well as the law are to be decided by the court; and an appeal, and not a writ of error, was the appropriate mode of bringing the case before this court. The laws or practice of the territory cannot regulate the process by which this court exercises its appellate power. Nor, indeed, can there be any such thing as a suit at law, as contradistinguished from a suit in equity, in the courts of the territory, where legal rights and equitable rights must be blended together and prosecuted in the same suit, without any regard to the rules and practice of courts of common law or courts of equity.

Nor was it necessary that the parties who acquired liens on the mortgaged premises subse-
129*] quent to the mortgage in question *should join in the appeal. They were not necessary parties in a proceeding in equity to foreclose the mortgage, and none of them have appeared to the suit to contest the claim of Wakefield. And if it had been otherwise, yet the question in controversy here is the amount of the debt due from the appellant; and in the case of *Forgay* v. *Conrad*, 6 How. 201, and 26 How. 653, this court decided that a defendant in equity, whose interest is separate from that of the other defendants, may appeal without them.

We have no doubt of the jurisdiction of the court upon this appeal; and the judgment and decree of the supreme court of the territory must be reversed, for the error above mentioned.

Ex parte IN THE MATTER OF THE UNITED STATES, on the Relation of Richard R. Crawford,

v.

HENRY ADDISON,

(S. C. 22 How. 174–185.)

Supreme court has power to issue writs of mandamus—power of circuit courts to issue—will not issue, to control discretion of judge, but will, to require him to act—when writ of error operates as a supersedeas—when will lie upon judgment of circuit court awarding mandamus—that writ of error will be ineffectual, is not cause for mandamus.

Crawford was elected mayor of Georgetown; and Addison, the opposing candidate, defendant, took possession of the office. The circuit court rendered judgment of ouster against said defendant; he sued out writ of error which operated as a supersedeas to the said judgment. Crawford, alleging that this court has no jurisdiction of the writ of error, applied for a mandamus commanding the circuit court to issue process for the execution of the judgment aforesaid. Held, that under the 13th section of the judiciary act of 1789, the Supreme Court has "power to issue writs of mandamus, to any courts appointed or persons holding office under the United States."

The power of the circuit courts to issue the writ of mandamus, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.

This court will not, by mandamus, direct a judge as to the exercise of his discretion; but it will require him to act.

The writ of error, to operate as a supersedeas, must be issued within ten days after the rendition of the judgment, and on security being given for a sum exceeding the amount of the judgment.

A writ of error will lie from this court upon judgments of the circuit courts awarding a peremptory mandamus, if the matter in controversy is of sufficient value.

The salary of the mayor of Georgetown is $1,000 per annum; and if this be a matter of controversy, it settles the jurisdiction.

That the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable, may be a defect in the law; but we must administer the law as we find it.

The writ of error is the legal mode of revising the judgment of the circuit court in this case; and security having been given on the judgment, as the law requires, it is superseded.

Argued Jan. 6, 1860. Decided Feb. 20, 1860.

ON THE petition of Richard R. Crawford for a peremptory mandamus, or for a rule to show cause.

Upon the filing of the petition, and the transcript of the record therewith exhibited, a motion is submitted by Mr. Brent and Mr. Carlisle of counsel for the petitioner, that a peremptory mandamus be issued, directed to the judges of the circuit court of the District of Columbia, commanding them to execute, by due process of law, the judgment of ouster, and for costs, which appears by the said record to have been rendered by the said court, in the matter of the United States, on the relation of the said *Richard R. Crawford* v. *Henry Addison*.

Or, in the alternative that a rule be granted to show cause, at a short day to be named therein, why a mandamus shall not issue as prayed.

The case is very fully stated by the court, the petition being there set out.

Messrs. **R. J. Brent** and **J. M. Carlisle** for petitioner.

Messrs. **J. H. Bradley** and **H. W. Davis** for respondent.

Mr. Justice **McLean** delivered the opinion of the court:

This a writ of error to the circuit court of the United States for the District of Columbia.

Richard R. Crawford, of the city of Georgetown, in the District of Columbia, states that on the fourth Monday of February, 1857, in pursuance of an act of Congress to amend the charter of Georgetown, approved the 31st May, 1830, and an act to amend the same charter, approved the 11th August, 1856, by ballot, to elect some fit and proper person, having the qualifications required by law, to be mayor of the corporation of Georgetown, to continue in

NOTE.—*Mandamus, when will issue*—see note to 4 L. ed. U. S. 263, and note to 39 L. ed. U. S. 160.
Mandamus to control inferior courts—see note to 29 L. ed. U. S. 135, and note to 51 L. R. A. 33.

office two years, and until a successor shall be duly elected, said Crawford, being duly qualified, received the greatest number of legal votes, and was elected mayor of the said corporation, and took the oath as mayor, and continued to discharge the duties for two years.

On the fourth Monday of February, 1859, another election was held for mayor, at which he received the greatest number of legal votes, and was by the judges declared to be duly elected; on which he presented himself in the presence of the two boards of the common council of the said corporation, and claimed that the oath should be administered; but the said two boards, alleging there was a mistake in the returns, and that there was in fact a majority of one vote in favor of Henry Addison, who was the opposing candidate, and to whom the oath of office was administered, and who took possession of the office, and continues to exercise the duties of the same.

And your petitioner represents that at the 182*] ensuing term of *the circuit court of the District of Columbia, being the court then and still having jurisdiction in the premises, an information, in nature of quo warranto, upon the relation of your petitioner, was filed in the said court by Robert Ould, Esq., the attorney of the United States for the District of Columbia, on which due process was issued against the said Henry Addison, requiring him to answer before the said court by what warrant he claimed to exercise the said office of mayor of the corporation of Georgetown.

And the said Addison having pleaded to the said information, and certain replications having been made to said plea by the said attorney of the United States, certain issues were joined thereon at the October term, 1859, of the said court, and amongst others the issue to try whether the said Henry Addison had, as alleged by him in his plea, received the greatest number of legal votes for mayor at the said last-mentioned election; and upon the issue it was found by the jury, duly impaneled and sworn to try the same, that the said Henry Addison did not receive the greatest number of legal votes for mayor at the said election; and thereupon the said court rendered judgment of ouster against the said defendant. and for the costs of your petitioner, as relator in the said proceeding, to wit, on the —— day of December instant.

Whereupon, due process for the execution of the said judgment, to remove the defendant and for the recovery of the costs aforesaid was duly prayed of the said court; but the said Henry Addison, pretending that the proceedings upon the said information in matter of law may be reviewed by this honorable court upon writ of error, sued out such writ of error, filed a bond, and caused a citation to be issued and served upon your petitioner, to appear and answer to the said writ of error on the return thereof, to wit, at the December term, 1860. And thereupon the said circuit court, for the express and sole reason that such writ of error and bond operated as a supersedeas (which is expressed in their order in that behalf), refused to execute the said judgment, or to issue any process to remove the said defendant or for the recovery of the costs aforesaid.

*Your petitioner is advised, and humbly submits, that this honorable court hath no jurisdiction of the matter of the said writ of error, and that the same must be dismissed on the return thereof. But, as hereinbefore stated, the said writ is not returnable until December term, 1860, and the term of office for which your petitioner was elected as aforesaid will then be about to expire. [*183

Your petitioner is advised that his only adequate and proper remedy is by a mandamus from this honorable court, directed to the judges of the said circuit court of the District of Columbia, commanding them to issue process for the execution of the judgment aforesaid. And for that the transcript of record herewith filed plainly expresses on its face the sole cause for the refusal of such process, so as distinctly to present the whole matter of law for the consideration of the court, he prays that a peremptory mandamus may issue, or, in the alternative, that such interlocutory order may be passed to that end, as this court may direct.

Under the 13th section of the judiciary act of 1789 (1 Stat. at L. 72), the Supreme Court has "power to issue writs of mandamus, in case warranted by the principles and usages of law, to any courts appointed of persons holding office under the United States." The power of the circuit courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. *Kendall* v. *United States*, 37 U. S. (12 Pet.) 524.

On a mandamus, a superior court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but they will, in a proper case, require the inferior court to decide. *Life Insurance Co.* v. *Wilson*, 8 Pet. 294. It has repeatedly been declared by this court that it will not, by mandamus, direct a judge as to the exercise of his discretion; but it will require him to act. 38 U. S. (13 Pet.) 279.

A mandamus is a remedy where there is no other appropriate relief, and it is only resorted to on extraordinary occasions.

The writ of error is a common law writ, and is almost as old as the common law itself. This writ, to operate as a *supersedeas, [*184 must be issued within ten days after the rendition of the judgment, and on security being given for a sum exceeding the amount of the judgment. Where no supersedeas is required, security for the costs of the Supreme Court must be entered. So that, in these respects, the writ of error is said to be a writ of right, though regulated by statute.

The condition on the supersedeas bond is: "that the said Henry Addison shall prosecute the said writ of error to effect, and answer all damages and costs if he shall fail to make his plea good; then the above obligation to be void, otherwise to be and remain in full force and virtue."

In the *Columbian Insurance Company* v. *Wheelright*, 7 Wheat. 534, it was held that a writ of error will lie from this court upon the judgments of the circuit courts awarding a

peremptory mandamus, if the matter in controversy is of sufficient value. But in that case, it did appear that the office of director of the insurance company, which was the matter in controversy, was of less value than $1,000 and that its value was to be ascertained by the salary paid; the court held it had no jurisdiction.

The weight of this authority is not lessened by the fact on which the question of jurisdiction turned. The salary of the mayor of Georgetown was established by law at $1,000 per annum; and if this be the matter of controversy, it settles the jurisdiction.

But it is contended that a year's salary cannot be regarded as the amount in controversy, as the salary is paid monthly or quarterly, as may be most convenient to the mayor. The law regulates the pay of all salaried officers by the year, and the estimates are so appropriated in the reported bills. Any departure from this annual allowance would derange, more or less, the fiscal of a government or corporation.

But it is said that the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable. This may be a defect in the law, which the legislative power only can remove. A writ of error returnable 185*] *instanter* would give *more speedy relief, and might be more satisfactory, but we must administer the law as we find it.

The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute, with effect, his writ of error.

We can entertain no doubt that the writ of error is the legal mode of revising the judgment of the circuit court in this case; and that security having been given on the judgment, as the law requires, it is superseded.

Dissenting, Mr. Justice **Wayne** and Mr. Justice **Grier**.

ROBINSON LYTLE and Lydia L., his Wife, Nathan H. Cloyes *et al.*, *Plffs. in Err.*,
v.
THE STATE OF ARKANSAS, Charles B. Bertrand, *et al.*

(See S. C. 22 How. 193-214.)

State judgment as to title, when examinable—entry procured by fraud may be reviewed—decision as to statute of limitations not reviewable—where evidence contradictory, verdict conclusive.

Under the 25th section of the judiciary act, it is not material whether the invalidity of a title was decreed in the state court upon a question of fact or of law.

The fact that the title was rejected in that court, authorizes this court to re-examine the decree.

The adjudication of the register and receiver, which authorized the entry of land, is subject to revision in the courts, on showing that the entry was obtained by fraud and false testimony as to settlement and cultivation.

The act of limitations of the state is a defense having no connection with the title, and this court cannot revise the decree below in this respect, under the 25th section of the judiciary act.

Where the evidence is contradictory on the question of fraud and imposition on the officers, this court will not overrule the finding of fact by the courts below.

Argued Jan. 18, 1860. Decided Feb. 20, 1860.

IN ERROR to the Supreme Court of the State of Arkansas.

The history of the case, and a sufficient statement of the facts, appear in the opinion of the court.

See, also, *Lytle* v. *Arkansas*, 9 How. 314; *Lytle* v. *Arkansas*, 17 Ark. 610, from which the present writ of error is prosecuted.

Of the elaborate arguments presented in this court, but little can be here given, except on the question of jurisdiction.

Messrs. **J. H. Bradley, A. Fowler,** and **J. Stillwell,** for plaintiff in error:

It may be insisted that this court has no jurisdiction of the case.

The right set up by the plaintiffs in error arises under an act of Congress, and the decision of the supreme court of Arkansas was against that right, consequently this court has jurisdiction of the case, without regard to the particular ground upon which the decree of the state court is based.

Cunningham v. *Ashley*, 14 How. 389; *Mobile* v. *Emanuel*, 1 How. 95; 14 How. 98.

The right grows out of an act of Congress, and is sanctioned against all laws and judicial decisions of the states.

Owings v. *Norwood*, 5 Cranch, 344; *Fisher* v. *Cockerell*, 5 Pet. 257; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 322, 352.

The evidence for the defense was admitted for the purpose of impeaching the right claimed under the act of Congress, and granted to them by the land officers acting under it; consequently the decision of the state court upon the effect of such evidence may be fully considered here, and the decree reversed or affirmed.

Mackay v. *Dillon*, 4 How. 447.

The power to revise and reverse a decision of a state court, depriving a party of his right to transfer his case from the state court to the circuit court of the United States for trial, has been exercised.

Gordon v. *Longest*, 16 Pet. 103.

In *Neilson* v. *Lagow*, 7 How. 775, the plaintiff claimed the land under an authority exercised by the secretary of the treasury in behalf of the United States, and the decision was against the validity of the authority thus exercised, and on motion to dismiss, Chief Justice Taney said: "We think it is evidently one of the cases prescribed for in the 25th section of the act of 1789."

In this case the decision was against the authority exercised by the register and receiver, subordinates of the secretary of the treasury, but under the same authority.

The jurisdiction exists wherever the laws of Congress and the acts of officers executing them in perfecting titles to public lands, have been drawn in question and construed by the supreme court of a state, and the decision is

against the title set up under the laws of Congress and the authority exercised under them.

Cousin v. *Blanc's Ex'r*, 19 How. 207; *McDonogh* v. *Millaudon*, 3 How. 704.

The plaintiffs in this case claim under the authority exercised under a statute of the United States, and a right set up under it, and the decision was against them. *Garland* v. *Wynn*, 20 How. 7, was similar to this in every respect, and the question was passed over without notice.

In order to give jurisdiction, it is sufficient if the record shows that it is clear, from the facts stated by just and necessary inference, that the question was made, and that the state court must, in order to have arrived at the judgment pronounced by it, have decided that question as indispensable to that judgment.

Crowell v. *Randell*, 10 Pet. 392; *Wilson* v. *The Black Bird C. M. Co.* 2 Pet. 250; *Martin* v. *Hunter's Lessee*, 1 Wheat. 355; *Miller* v. *Nichols*, 4 Wheat. 311; *Williams* v. *Norris*, 12 Wheat. 117.

The jurisdiction must be determined by reference to the record. And in doing so, the court will refer to the opinion of the state court, where it is made a part of the record by the laws of the state.

Cousin v. *Blanc's Exrs.* 19 How. 207.

In this case there is no necessity in the first instance of looking behind the decree of the supreme court of Arkansas, to determine the ground of the decision; but if need be, we may look back to the decision of the Chancellor, whose decree was affirmed by the supreme court of Arkansas, and shall find that he overruled all the defenses set up, except the invalidity of the pre-emption claim of Cloyes.

The decision being against the right, the Supreme Court has jurisdiction to re-examine the case and determine, not whether the decision was right upon the particular ground, but whether the right was properly denied. The decree of the state court would not have been what it is, if there had not been a decision against the right set up by the plaintiffs; and this is all sufficient.

Williams v. *Oliver*, 12 How. 124; 3 Pet. 292, 302.

And the decision of the state court need not be confined exclusively and especially to the construction of the treaty, act of Congress, etc., in order to give jurisdiction.

Williams v. *Oliver*, 12 How. 124.

Points may arise growing out of and connected with the general question, and so blended with it as not to be separated, and therefore falling equally within the decision contemplated by the 25th section. The case of *Smith* v. *The State of Maryland*, 6 Cranch, 281; and *Martin* v. *Hunter's Lessee*, 1 Wheat. 305, 355, afford illustrations of this principle.

Here the record shows affirmatively that the decision was against the right set up and the authority of the land officers, excluding the idea that the decision was made upon the other defense set up by the defendants, such as purchasers for a valuable consideration without notice, statutes of limitation, lapse of time, etc. And it follows, as a matter of course, that if the decision of the state court upon that point was wrong, the decree must be reversed.

The effect of the decision of that court reversing the decree of the supreme court of Arkansas; the right of the defendants to question the validity of the pre-emption claim of Cloyes, and whether, if they have the right, they have done so by proper pleading, are the next questions presented. There are other questions which will be discussed, though it is not supposed the court will, under the circumstances, feel called upon to decide them.

The idea seemingly entertained by some of the counsel for the defense in this case, and also by the Chancellor, that the former decree in this case by the Supreme Court of the United States is not "the law of the case"—to govern it absolutely, as far as that decree went—because amendments and not parties were subsequently made, is at least a novel one.

The issue is substantially the same now as presented before; and such changes as have been made only present the complainant's rights much more clearly and strongly, and render the former adjudication much more emphatically "the law of the case," and more conclusive now than it could possibly have been without such change.

And the law in all cases is well settled and without any exception, that an adjudication of the Supreme Court of the United States is conclusive down to the very point decided, and becomes unchangeably "the law of the case," and nothing behind that point can ever be opened or revived afterwards.

See *Nelson* v. *Hubbard*, 13 Ark. 256; *Ex parte Story*, 12 Pet. 339; *Fortenberry* v. *Frazier*, 5 Ark. 202; *Sibbald* v. *The U. S.* 12 Pet. 492; *West* v. *Brashear*, 14 Pet. 54; *Porter* v. *Hanley*, 10 Ark. 191; *Boyce* v. *Grundy*, 9 Pet. 290; *Walker* v. *Walker*, 7 Ark. 556; *Pulaski Co.* v. *Lincoln*, 13 Ark. 104; *Rector* v. *Danley*, 14 Ark. 307; *Story* v. *Livingston*, 13 Pet. 367.

In this case, then, what can be inquired into under that former decision, but the question of fraud and purchase bona fide without notice? And by the well-understood principles of equity, we think both of these must be determined against the defense.

As a general principle of law, it is well settled, that where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and where no appeal is allowed or revising power given by law, such adjudication is final and conclusive upon all the other courts and persons, until successfully impeached upon the ground of fraud.

Lessee of Rhoades v. *Selin*, 4 Wash. C. C. 721; *Wilcox* v. *Jackson*, 13 Pet. 511; *Gelston* v. *Hoyt*, 1 Johns. Ch. 546; *Voorhees* v. *U. S. Bank*, 10 Pet. 478; *U. S.* v. *Arredondo*, 6 Pet. 729; *Blount* v. *Darrach*, 4 Wash. C. C. 650; *Foley* v. *Harrison*, 15 How. 448; *Borden* v. *The State*, 11 Ark. 547.

And embraced within this general principle are the adjudications of the register and receiver of the land offices, as to the facts of possession, cultivation and other acts essential to the validity of the pre-emptor's right—questions directly submitted to them and adjudicated upon and within their exclusive jurisdiction.

See *Wilcox* v. *Jackson*, 13 Pet. 511; *Nick's Heirs* v. *Rector*, 4 Ark. 284; 2 Laws, Instructions and Opinions (ed. of 1838), p. 85, No. 57;

Gaines v. *Hale*, 16 Ark. 25; *McGhee* v. *Wright*, 16 Ill. 557; *Mitchell* v. *Cobb*, 13 Ala. 139; *Lytle* v. *The State*, 9 How. 333; *Lewis* v. *Lewis*, 9 Mo. 186; *Perry* v. *O'Hanlon*, 11 Mo. 591; 12 Ark. 21, *et seq.*

And is binding on a court of chancery, as well as other courts.

16 Ill. 557.

Even a surveyor appointed by act of Congress to make a partition of lands, becomes in that matter virtually a judge; and his act is final and conclusive in the absence of fraud.

See *Haydel* v. *Dufresne*, 17 How. 30.

Such judgments or any other final judgments, may be impeached in equity for fraud; but never on account of irregularity.

See *Shottenkirk* v. *Wheeler*, 3 Johns. Ch. 275.

And however grossly ignorant such a court or officer may be of the duties confided, or regardless of the right of parties, yet this cannot affect the jurisdiction or impair the judgment, in the absence of fraud.

See *Woodruff* v. *Cook*, 2 Edw. Ch. 261.

We insist, as to the attempted imputation of fraud made by wholesale in many of the answers—that none of them occupy a position to give them the right in law or equity, to avail themselves of the charge even were it as true as it is untrue.

None of them had any interest in the land or any claim to it, of any sort at the time that the grant of the pre-emption was obtained; and even were it done by fraud, what right had any of them to complain? Was any one of them injured by it? It was a question between Cloyes and the United States, alone.

Fraud must be accompanied by injury in order to entitle a party to redress. The party seeking relief must be damaged by the alleged act.

See *Halls* v. *Thompson*, 1 Sm. & M. 489; *Irons* v. *Reyburn*, 11 Ark. 389; *Cunningham* v. *Ashley*, 12 Ark. 303, 320; 1 Story, Eq. Jur. § 203; Co. Litt. 357, *b.*; *Young* v. *Bumpass*, Freem. Ch. (Miss.) 250; *Juzan* v. *Toulmin*, 9 Ala. N. S. 684; *Conard* v. *Nicoll*, 4 Pet. 296, 310; *U. S.* v. *Arredondo*, 6 Pet. 716; *Meux* v. *Anthony*, 11 Ark. 418; *Clarke* v. *White*, 12 Pet. 196; *Edmunds* v. *Hildreth*, 6 Ill. 215; 2 Tenn. 153.

Messrs. **S. H. Hempstead, A. Pike,** and **Geo. C. Watkins,** for defendants in error:

In *Miller* v. *Kerr*, 7 Wheat. 1, the court held that where an equitable title was asserted, against a patent, the equitable title was first open to examination, and the complainant failed because his supposed prior equity was founded upon a mistake. So in this case when before the court in 9 How., it was held that the alleged equity acting on the offensive, might be impeached on the ground of fraud or unfairness. In Garland v. Wynn, 20 How. 1, where the equitable claimant assailed a title which had ripened into a patent, it was announced as the settled doctrine of the court, and which a fortiori would apply as against the alleged equity of a complainant asserting an imperfect title, "that where several parties set up conflicting claims to property with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims." That was a writ of error from a state court, and those are the ordinary courts of justice referred to.

The distinct question was presented, whether the court below had authority or jurisdiction to set aside or correct the decision of a register and receiver, on the ground that the witnesses were induced to swear ignorantly, and what was untrue as to the locality of the cultivation, and upon which depended the existence and validity of the pre-emption claimed, and which the land officers, acting upon that false testimony, had adjudicated and allowed.

The supreme court of Arkansas, in their decision in *Lytle* v. *Arkansas*, 17 Ark. 610 (from which the present writ of error is prosecuted), yielded implicit obedience to the opinion of this court in 9 How., as the law of the case.

The rights of a bona fide pre-emptor are fully recognized, but in the new aspect of the case, that court was called upon to decide whether the pre-emption claim was bona fide. The testimony was again reviewed and carefully considered.

The judgment in the Supreme Court was "that the pre-emption claim set up in the bil was and is fraudulent in fact and in law, an there is no error in the proceedings and decre of said chancery court in this cause."

The proposition contended for is, that on writ of error from a state court, where no que tion of law is presented, it is not the provin or duty of this court to review the decision an issue of fact merely, made by the court bel with its superior facilities for determining t fact, according to the weight or credibility testimony.

By the judiciary act of 1789 appeals w only allowed from the district to the circ courts. There was no mode of bringing up any case to this court, except by writ of error.

Blaine v. *Ship Carter*, 4 Dall. 22.

The terms "appeal" and "writ of error," though used by the act, were not confounded. An appeal is a civil law proceeding which removes the cause entirely, and is a rehearing on the facts as well as the law.

Wiscart v. *Dauchy*, 3 Dall. 321.

The great object of the judiciary act of 1789, was to confine the appellate jurisdiction of this court to the examination and decision of questions of law, on errors assigned and made to appear upon the record. By § 19, the circuit courts in equity were required to cause the facts upon which they founded their decree to appear upon the record, either by a statement of such facts by the parties, or by the court where they could not agree, being analogous to a special verdict or case stated in trials at law. This regulation appears to have been regarded with some jealousy, according to the report of the case as cited, *Wiscart* v. *Dauchy*, as conferring a power on the circuit courts in chancery which might be abused by the determination of facts contrary to or not warranted by the evidence. That feeling probably led to the passage of the act of March 3, 1803, providing for an appeal in chancery causes from the circuit court to this court, and that on such appeal the transcript should contain all the pleadings, depositions and documentary evidence in the cause.

The policy of the act of 1803, as appears from its history, was to enable this court

view and correct any gross error of the circuit courts, in determining questions of fact against or without evidence. The principle pervading the exercise of appellate jurisdiction by this court, is only partially innovated upon. We apprehend that no appeal in chancery was ever decided by this court without deference to the opinion of the circuit court which tried the cause upon the facts which the evidence conduced to establish; while on the other hand, their errors or misconstructions of law are freely examined.

In all the cases, from *Parsons* v. *Bedford*, 3 Pet. 444, to *Minor* v. *Tillotson*, 2 How. 392, and *Fenn* v. *Holme*, 21 How. 481, this court has perseveringly resisted all efforts to engraft upon the Federal judiciary the civil law practice, or the mongrel systems of Texas and other new states.

But in any view of it, the act of 1803 does not apply to writs of error from the state court, under the 25th section of the judiciary act. And according to the construction repeatedly given by this court, touching the distinction between an appeal and a writ of error, where those terms are used in acts of Congress, nothing is examinable on a writ of error by this court, as one of appellate jurisdiction, except questions of error in law. When this cause was tried in 9 Howard, the facts confessed by the demurrer lay in a nut shell. The decision is interesting and important as an affirmance of the doctrine that an inchoate right of preemption vested under law is not defeated by a subsequent act of Congress granting the land. But on this record, suppose the court were to enter upon a re-examination of facts, and after a patient and laborious collation of the testimony, and without, indeed, those aids attendant upon the court which tried the cause, and breathing the atmosphere of the witnesses, could instinctively appreciate their worthy credibility, should arrive at the conclusion that the claim of Cloyes was unfounded in fact, and fraudulent; the decision, settling no question of law, would not be worthy of a place in the reports. We take it that amid all changes and fluctuations in the jurisprudence of the states, the principle governing the appellate jurisdiction of this court should remain unchanged; so that, whatever more of trial may be provided in the local tribunals, and to which the parties have resorted, the ascertainment of a fact according to the mode provided, is to be regarded as final and conclusive of the fact.

We venture to submit that it is only according to a technical view of the judiciary act that this court has any jurisdiction in the premises. It is true that because the plaintiffs in error claim under a law of Congress, and the decision is against the right claimed, they come literally within the terms of the 25th section, so that the court, according to its practice, might refuse to entertain a motion to dismiss for want of jurisdiction, and out of abundant caution, reserve the question until the final judgment. Doubtless, if the plaintiffs in error can put their finger on any error or misconstruction of law by the Chancellor in the determination of the fact, or in other words can show that he regarded those acts of the claimant as fraudulent, which, in the opinion of this court and according to its construction of the law, were not so, then the decision of the court below would be examined for that error. But apart from the consideration of all other elements of *mala fides*, one essential fact ascertained and decided by the court below, is that Cloyes did not cultivate in 1829. While that determination stands, there never was any right, and consequently there is no jurisdiction.

Mr. Justice **Catron** delivered the opinion of the court:

The first question presented on the record, is whether this court has jurisdiction to examine and revise the decision of the supreme court of Arkansas by writ of error, under the 25th section of the judiciary act. The question arises on the following facts:

Nathan Cloyes, ancestor of the principal complainants, entered as an occupant, at a land office in Arkansas, a fractional quarter section of land, in 1834, under the pre-emption acts of 1830 (4 Stat. at L. 420) and 1832 (4 Stat. at L. 603). The fraction adjoined the village of Little Rock on its eastern side, and was for twenty-nine acres. The same land had been patented in 1833 by the United States to John Pope, governor of the territory of Arkansas, to be appropriated to the erection of public buildings for said territory. The heirs of Cloyes claimed to have an earlier equity, by force of their pre-emption right, than that of the governor of Arkansas.

They filed their bill in equity in the proper state court, to enforce this equity. That bill contained appropriate allegations to exhibit an equitable title in the plaintiffs, and the opposing right of the patentee, and thus to enable the courts to compare them. Some of the defendants demurred to the bill; others answered, denying the facts of the settlement and cultivation, and pleading the bona fides of their purchase and the statute of limitations.

The courts of Arkansas dismissed the bill on the demurrer; which judgment was reversed in this court, and the cause remanded for further proceedings. *Lytle* v. *Arkansas*, 9 How. 314. It was prepared for hearing a second time, and the courts of Arkansas have again dismissed the bill, and the cause is a second time before us.

The cause was fully heard on its merits below; and the claim of Cloyes rejected, on the ground that he obtained his entry by fraud in fact and fraud in law; and the question is, can we take jurisdiction, and reform this general decree. It *rejected the title of Cloyes; [*203 and in our opinion, it is not material whether the invalidity of the title was decreed in the supreme court of Arkansas upon a question of fact or of law. The fact that the title was rejected in the court authorizes this court to re-examine the decree. 14 Pet. 360.

The decision in the supreme court of Arkansas drew in question an authority exercised under the United States, to wit, that of admitting Cloyes to make his entry; and the decision was against its validity, and overthrew his title, and is, therefore, subject to be re-examined, and reversed or affirmed in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering

the sale of the public lands on the part of the United States.

In the case of *Martin* v. *Hunter*, 1 Wheat. 352, the foregoing construction of the 25th section of the judiciary act of 1789 was recognized, and has been followed since, in the cases of *Chouteau* v. *Eckhart*, 2 How. 372; *Cunningham* v. *Ashley*, 14 How. 377; *Garland* v. *Wynn*, 20 How. 8, and other cases.

Another preliminary question is presented on this record, namely: whether the adjudication of the register and receiver, which authorized Cloyes' heirs to enter the land, is subject to revision in the courts of justice, on proof showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion. It was so treated in the case of *Cunningham* v. *Ashley*, 14 How. 377; again in *Barnard* v. *Ashley*, 18 How. 43; and conclusively in the case of *Garland* v. *Wynn*, 20 How. 8.

The next question is, how far we can re-examine the proceedings in the state courts.

In their answers, the respondents rely on the act of limitations of the state of Arkansas for protection. As this is a defense having no connection with the title of Cloyes, this court cannot revise the decree below in this respect, under the 25th section of the judiciary act (1 Stat. at L. 72).

204*] *Many of the defendants also relied in their answers on the fact that they were bona fide purchasers of the lots of land they are sued for, and therefore no decree can be made here to oust them of their possessions. The state courts found that a number of the respondents were purchasers without notice of Cloyes' claim, and entitled to protection as bona fide purchasers, according to the rules acted on by courts of equity. With this portion of the decree we have no power to interfere, as the defense set up is within the restriction found in the concluding part of the 25th section, which declares "that no other error shall be assigned or regarded by this court as a ground of reversal, than such as immediately respects the before-mentioned questions of validity or construction of the Constitution, treaties, statutes, commissions, or authorities in dispute." Mr. Justice Story comments on the foregoing restraining clause, in the case of *Martin* v. *Hunter*, 1 Wheat. 358, which construction we need not repeat.

Whether Cloyes imposed on the register and receiver by false affidavits, when he made proof of cultivation in 1829, and residence on the land in dispute on the 29th of May, 1830, is the remaining question to be examined. He made oath (23d April, 1831) that he did live on said tract of land in the year 1829, and had done so since the year 1826. Being interrogated by the register, he stated: I had a vegetable garden, perhaps to the extent of an acre, and raised vegetables of different kinds, and corn for roasting ears; and I lived in a comfortable dwelling, east of the Quapaw line on the before mentioned fraction. Being asked, did you continue to reside, and cultivate your garden aforesaid, on the before named fraction, until the 29th of May, 1830? he answers: "I did; and have continued to do so until this time."

John Saylor deposed on behalf of Cloyes in effect to the same facts, but in general terms. Nathan W. Maynor and Elliott Bursey swore that the affidavit of Saylor was true. On the truth or falsehood of these depositions the cause depends.

In opposition to these affidavits, it is proved, beyond dispute, that Cloyes and his family resided at a house, for a part of the *year [*205 1828, occupied afterwards by Doctor Liser. In the latter part of 1828, they removed from that place to some log cabins, situate on the lots afterwards occupied by John Hutt, and where the governor of Arkansas resided in 1851, when the witnesses deposed. Both places were west of the Quapaw line—the cabins standing probably one hundred yards west of the line, and which line was the western boundary of the fractional quarter section in dispute. Cloyes resided at these cabins when he swore, at Batesville, before the register; and continued to reside there till the time of his death, which occurred shortly after his return from Batesville, say in May or June, 1831, and his widow and children continued to reside at the same cabins for several years after his death.

Cloyes was by trade a tinner, and in December, 1826, rented of William Russell a small house, constructed of slabs set upright, in which he carried on his business of a tin-plate worker. He covenanted to keep and retain possession for Russell of this shop against all persons, and not to leave the house unoccupied, and to pay Russell $2 per month rent, and surrender the house to Russell or his authorized agent at any time required by the lessor.

Under this lease, Cloyes occupied the house until the 19th day of June, 1828, when he took a lease from Chester Ashley for the same, and also for a garden. He covenanted to pay Ashley $1 per month rent; to put and keep the building in repair; to keep and retain possession of the same, until delivered back to said Ashley by mutual consent, either party having a right to terminate the lease on one month's notice. The house and garden were rented by the month.

Under this lease, Cloyes occupied the house as a tin-shop to the time of his death. Both the leases state that the shop was east of the Quapaw line, and on the public lands.

This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock, he sold it to Dr. Matthew Cunningham; it passed through several hands, till it was finally owned by Col. Ashley. Buildings and cultivated portions of the public lands were protected by the local laws of the Arkansas territory; either ejectment or trespass could have *been [*206 maintained by Ashley against Cloyes to recover the premises, nor could an objection be raised by anyone, except the United States, to these transfers of possession—neither could Cloyes be heard to disavow his landlord's title. He held possession for Ashley, and was subject to be turned out on a month's notice to quit.

Cunningham and other witnesses depose that the shop rented to Cloyes stood west of the Quapaw line. It however appears from actual survey, that it was on the section line, which ran through the house, taking its southeast corner on the east side, but leaving the greater part of the shop west of the line.

Another pertinent circumstance is, that when

Cloyes heard the pre-emption law of 1830 (4 Stat. at L. 420) was about to pass, or had passed (it is uncertain which, from the evidence), he removed his wife and children, with some articles of necessary furniture, to the tinner's shop, from his residence at the Hutt place, and kept his family at the shop for a few months, and then they returned to their established home. This contrivance was probably resorted to at the instance of Benjamin Desha, who had agreed with Cloyes to pay into the land office the purchase money, and all incidental expenses, to obtain a title from the government for an interest of one half of the land. These evasions were mere attempts to defraud the law, and to furnish some foundation of the necessary affidavits to support his pre-emption claim at the land office.

On this aspect of the case, the question arises whether Cloyes' possession as lessee and tenant of Ashley, occupying a shop as a mechanic, the corner of which accidentally obtruded over the section line, upon the public land, and who was subject to removal by his landlord each month, was "a settlement" on the public lands, within the true intent and meaning of the act of May 29th, 1830 (4 Stat. at L. 420).

That Cloyes never contemplated seeking a home on the public lands as a cultivator of the soil, is manifest from the proof; he worked at his trade, when he worked at all (say the witnesses), and followed no other avocation. Our opinion is, that the affidavits, on which the 207*] occupant entry was founded, *were untrue in fact, and a fraud on the register and receiver; and that Cloyes had no bona fide possession as tenant of the tinner's shop, within the true meaning of the act of 1830.

We are also of opinion, that the affidavits are disproved, as respects the fact of cultivation in 1829. There was no garden cultivated in that year, adjoining or near to the shop. To say the least, it is quite doubtful whether there was such cultivation east of the Quapaw line; and the state courts having found that there was none, it is our duty to abide by their finding, unless we could ascertain from the proof that they were mistaken, which we cannot do, our impressions being to the contrary.

The question of cultivation in May, 1830, depended on parol evidence of witnesses. The judges below knew them; they decided on the spot, with all the localities before them; and as the evidence is contradictory, it would be contrary to precedent for this court to overrule the finding of a mere fact by the courts below.

On the several grounds stated, we order that the decree of the Supreme Court of Arkansas be affirmed, with costs.

Dissenting, Mr. Justice **McLean** and Mr. Justice **Clifford**.

Mr. Justice **McLean**, dissenting.

I dissent from the opinion of the court, as now expressed, and shall refer to the former opinion, to show the nature of the case:

"After the refusal of the receiver to receive payment for the land claimed, an act was passed, 14th July, 1832 (4 Stat. at L. 603), continuing the act of the 29th May, 1830 (4 Stat. at L. 420), and which specially provided that those who had not been enabled to enter the land, the pre-emption right of which they claimed, within the time limited, in consequence of the public surveys not having been made and returned, should have the right to enter such lands, on the same conditions in every respect as prescribed in said act, within one year after the surveys shall be made and *re- [*208 turned. And this act was in full force before Governor Pope selected said lands. That the public surveys of the above fractional sections were made and perfected on or about the 1st of December, 1833, and returned to the land office the beginning of the year 1834. On the 5th of March, 1834, the complainant paid into the land office the sum of $135.76¼, in full for the above-named quarter section."

That a certificate was granted for the same, "on which the receiver indorsed that the north-west fractional quarter section two was a part of the location made by Governor Pope in selecting 1,000 acres, adjoining the town of Little Rock, granted by Congress to raise a fund for building a courthouse and jail for the territory; and that the indorsement was made by direction of the Commissioner of the General Land Office." "That the register of the land office would not permit the said fractional quarter sections to be entered."

It appeared that "the patentees in both of said patents, at the time of their application to enter the lands, had both constructive and actual notice of the right of Cloyes, and that the present owners of any part of these lands had also notice of the right of the complainants."

In his dissenting opinion, Judge Catron says: "The proof of occupancy and cultivation was made in April, 1831, under the act of 1830, pursuant to an instruction from the Commissioner of the General Land Office having reference to that act. The act itself, the instruction under its authority, and the proofs taken according to the instruction, expired and came to an end on the 29th May, 1831. After that time, the matter stood as if neither had ever existed; nor had Cloyes more claim to enter from May 29, 1831, to July, 1832, than any other villager in Little Rock."

Now, although it may be true that, until the act of 1832 had passed, the act of 1830 having expired, the pre-emptive right of Cloyes could not be perfected, yet the policy of the law was, where vested rights had accrued, which, by reason of delays in the completion of surveys, could not be carried out, the government gave relief by extending the law. And the inchoate right was secured by the policy of the government. It *is, therefore, not strictly ac- [*209 curate to say, the party entering a pre-emption has no right. He has a right, recognized by the government, by which he is enabled to perfect his right; and under such circumstances, no new entry could interfere with a prior one, though imperfect.

This court says, the proof of the pre-emption right of Cloyes being entirely satisfactory to the land officers, under the act of 1830, there was no necessity of opening and receiving additional proof under any of the subsequent laws. The act of 1830 having expired, all rights under it were saved by the subsequent acts. No

steps which had been taken were required again to be taken.

"Did the location of Governor Pope, under the act of Congress, affect the claim of Cloyes? On the 15th of June, 1832, one thousand acres of land were granted, adjoining the town of Little Rock, to the territory of Arkansas, to be located by the governor. This selection was not made until the 30th of January, 1833. Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only accrued, under the provisions of the act of 1830, but he had proved his right, under the law, to the satisfaction of the register and receiver of the land office. He had, in fact, done everything he could do to perfect this right. No fault or negligence can be charged to him."

"By the grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

From the citations above made in the original opinion in this case, the following facts and principles of law are too clear to admit of doubt by anyone:

1. That Cloyes' pre-emption to fractional quarter section No. 2 was clearly established, by the judgment of the land officers and of this court.

2. That the location of Governor Pope, being subsequent to the right of Cloyes, could not affect, under the circumstances, that right, and that the conveyance was subject to it. This appears by the certificate of the land office, by the 210*] uniform *action of the government in all such cases, and the good faith which has characterized the action of government, in protecting pre-emption rights, by giving time to protect such right, where the government officers had failed in doing their duty. And in addition to these considerations, in the solemn declaration of this court, "that Congress could not have intended to impair vested rights." And the court says: "The grants of the thousand acres and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

This court says: "The supreme court of the state, in sustaining the demurrers and dismissing the bill, decided against the pre-emption right claimed by the representatives of Cloyes; and as we consider that a valid right as to the fractional quarter on which his improvement was made, the judgment of the state court was reversed."

"Now, the defendants demurred to the original bill, which they had a right to do, and rest the case on the demurrer's appearing on the face of the bill. But this court held Cloyes' right valid, and consequently reversed, on this head, the judgment of the state court. And the cause is transmitted to the state court for further proceeding before it, or as it shall direct on the defense set up in the answers of the defendants, that they are bona fide purchasers of the whole or parts of the fractional section in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits may be fully presented and proved, as equity shall require."

Now, it is perfectly clear that nothing was transmitted under the direction of this court to the state court, except the latter part of the sentence beginning, "and the cause is transmitted to that court," etc. And that part relates wholly to the inquiry whether the defendants were bona fide purchasers of the whole or parts of the fractional section in controversy. And for this purpose, leave was given to amend the pleadings.

If there is anything in this bill which afforded any pretense to the state court to open the pleadings, and examine any matters in the bill, except those specified in its close, it has escaped my notice.

*It is said in the bill, "the register and [*211 receiver were constituted, by the act, a tribunal to determine the right of those who claimed pre-emptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, the decision cannot be impeached on the ground of fraud or unfairness; it must be considered final."

The court here was speaking of its own powers of jurisdiction and investigation, and not the powers of any other tribunal. It was supposed that no superior court would willingly permit its judicial powers to be subverted, new parties made, new subjects introduced, and the whole proceedings reversed, at the will of an inferior jurisdiction, without the exercise of a controlling power.

This state record of Arkansas seems to have been a prolific source of controversy, as its proportions have grown to about a thousand pages, not including briefs and statements of facts. It certainly must require some skill in legislation, to draw into the state court so large an amount of business under the laws of Congress. And it may become a matter of public concern, when such a mass of judicial action is not only thrown into the state court, but new rules and principles of action are liable to be sanctioned, in disregard of the laws of the United States.

Without any authority, it does appear that the judgment of the Supreme Court has been reversed by the Arkansas court, its proceedings modified in disregard of its own judgments and opinions clearly expressed, and new rules of proceedings instituted and carried out; and this under an authority given to the Arkansas court to ascertain whether certain purchases had been made bona fide.

Cloyes, in his lifetime, by his own affidavit, and the affidavits of others, made proof of his settlement on, and improvement of, the above fractional quarter, according to the provisions of the act, to the satisfaction of the register and receiver of said land district, agreeably to the rules prescribed by the Commissioner of the General Land Office; on the 20th May, 1831, Hartwell Boswell, the register, and John Redman, the *receiver, decided that the said [*212 Cloyes was entitled to the pre-emption right claimed. "On the same day, he applied to the register to enter the northwest fractional quarter of section two, containing thirty acres and eighty-eight hundredths of an acre." But the register very properly decided that Cloyes could only be permitted to enter the fraction on which his improvement was made.

The Commissioner of the General Land Office, and the register and receiver, declare they were

satisfied with the proof made in the case; but the supreme court of Arkansas decided against the pre-emption right claimed by the representatives of Cloyes; and the Supreme Court of the United States says: "As we consider that a valid right as to the fractional quarter on which the improvement was made, the judgment of the state court is reversed."

How does this case now stand? It stands reversed upon our own records by the supreme court of Arkansas, and by no other power. A majority of this bench entered the judgment, as it now stands, in 1849. But, through the reforming process, of a record of a thousand pages, not including notes and statements of facts, it has become a formidable pile, enough to fill with despair the first claimant of the pre-emption right.

It is true, the cause was sent down for a special purpose, every word of which I now copy:

"And the cause is transmitted to that court (the supreme court of Arkansas) for further proceedings before it, or as it shall direct, on the defense set up in the answers of the defendants, that they are bona fide purchasers of the whole or parts of the fractional sections in controversy, without notice, and that that court give leave to amend the pleadings on both sides, if requested, that the merits of the case may be fully presented and proved, as equity shall require."

Several of the defendants alleged they were bona fide purchasers of a part or the whole of the fraction, without notice; and the object in sending the case down was to enable persons to show they were purchasers of this character. This did not necessarily involve fraud. And this embraces the whole subject of inquiry.

213*] *It would have been inconsistent for this court to say, we consider the pre-emption claim by the representatives of Cloyes as a valid right, as to the fractional quarter on which his improvement was made, and on that ground to reverse the judgment of the state court, and at the same time send the case down, open to the charge of fraud and every conceivable enormity. The object was to know who were purchasers without notice. That this was the intention of the Supreme Court is palpable from the language of the entry.

The majority of the Supreme Court had full confidence in the validity of Cloyes' claim, and consequently they reversed the judgment of the state court, leaving the question open, whether the defendants were purchasers without notice. It may be that this entry would have protected all the purchasers.

From the nature of pre-emption rights, it is presumed, a person desirous of such a right is the first applicant. And the proof of such a right, if sustained by the register and receiver and the Commissioner of the Land Office, the proof required, is deemed satisfactory. It is only where a fortunate selection appears to be made, by the prospect of a city, or some great local advantage is anticipated, that a contest arises as to such a claim.

The officers of the Land Department, whose peculiar duty it was to protect the public rights seemed to have discharged their duty to the satisfaction of the government. This was also entirely satisfactory to a majority of the judges of this court, with the single exception, that, from the answers, it was probable that there may have been purchasers of this right without notice. And from the evidence introduced, it would seem to have been considered that anyone who at any time desired to purchase, considered himself as having a right to complain, although he had no means to make the purchase, or had no desire to make it.

If I mistake not, evidence was heard from witnesses from twenty to twenty-five years after the pre-emption right was sanctioned by the government. Such a course tends greatly to embarrass land titles under the general land law. Every one knows that a man who endeavors to obtain a pre-emption, *must, in [*214 the nature of things, be a man of limited means, and incapable of maintaining an expensive suit at law; and it has always appeared to me the true policy to limit those questions to the Land Department of the government. At all events, they should be limited to the Federal tribunals, where, it may be presumed, the Land Department will have an uniform administration.

As this case now stands, I think the judgment of the Arkansas supreme court must be reversed on two grounds:

1. Because it has reversed the judgment of this court, entered by a majority of the members at December term, 1849, in these words: "The supreme court of the state, in sustaining the demurrers and dismissing the bill, decided against the pre-emption claimed by the representatives of Cloyes; and as we consider that a valid right, as to the fractional quarter on which his improvement was made, the judgment of the state court is reversed."

This is the judgment of this court as it now stands upon our docket. And,

2d. The judgment of the state court must be reversed, because it wholly disregarded the directions of this court in trying the issues transmitted to it.

JOSEPH KIMBRO, *Plff. in Err.*,

v.

CUTHBERT BULLITT, Thomas D. Miller, and Lloyd D. Addison, Partners in Trade, under the Name and Style of Bullitt, Miller, & Co.

(See S. C. 22 How. 256-269.)

One partner may draw bills in firm name—each partner has general authority—restrictions thereto, by private agreement between partners, do not affect the public—farming partnerships—what is a trading firm—firm, bound as drawers of bill, although the money is applied by one partner to unlawful purpose.

One of several partners composing a trading firm, has power to draw bills of exchange in the name of the firm, unless restricted from so doing by the terms of the copartnership agreement.

NOTE.—*Liability of partners on bills and notes. Power of partner, as agent, to bind the firm as party to negotiable instruments, and otherwise*—see note to Le Roy v. Johnson, 7 L. ed. U. S. 391. *How far partners are liable for each other's acts*—see note to Nelson v. Hill, 12 L. ed. U. S. 81.

Who are partners as to third persons—see note to 36 L. ed. U. S. 836.

Each partner of a trading firm is presumed to be intrusted by his copartners with a general authority in all the partnership affairs.

A restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one partner possesses, as a general agent for the other, is operative only between the partners themselves.

It does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restriction has been made.

Farming partnerships, when strictly confined to that purpose, are held to be within the exception to the above stated general rule.

Where farming was not sole business of the partners composing the firm, but they were also engaged in running a steam saw-mill, for manufacturing purposes; held, they were a trading firm.

Where bills were drawn by the firm, and were duly accepted and paid by the plaintiffs at maturity, on account of the firm, their right to recover the amount cannot be affected by the fact that one of the drawers applied the money to an unlawful purpose.

Submitted Feb. 8, 1860. Decided Feb. 20, 1860.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

The case is stated by the court.

See, also, the opening statement in the abstract here given of Mr. Benjamin's argument.

No counsel appeared for plaintiff in error.

Mr. **J. P. Benjamin**, for defendants in error:

This is an action instituted in the circuit court for the middle district of Tennessee, for the recovery of the amount of three bills of exchange drawn by Morgan McAffee and Dement, Kimbro, & Sons, to the order of, and indorsed by, Morgan McAffee, and alleged to have been accepted and paid by Bullitt, Miller, & Co., the drawees, for the accommodation of the drawers.

The action was brought against Joseph Kimbro alone, the partner of the firm of Dement, Kimbro, & Sons, and the grounds of defense as shown by the pleadings and bill of exceptions were two, *viz.:*

1. That Dement, the principal acting partner of the firm of Dement, Kimbro, & Sons, had no power to draw the bills sued on.

2. That the bills of exchange were drawn and accepted for the purpose of raising money to be laid out in the purchase of slaves, to be imported from some other state or territory of the United States, for sale, into the state of Mississippi, which slaves were afterwards purchased with said money and imported as aforesaid into the state of Mississippi, and there sold according to the original intent, contrary to the form of the statute of Mississippi, in that behalf made and provided.

On the trial the judge charged the jury in the following words:

"The court charge the jury that Dement, the principal acting partner of the firm of Dement, Kimbro, & Sons, had power to draw the bills given in evidence according to the proof adduced to them, if true; that if the bills were accepted and paid at maturity by the plaintiffs for said firm, the defendant Joseph Kimbro, was responsible; and it mattered nothing to the plaintiffs how the proceeds of the bills were disposed of, as this was a fact the plaintiffs could not know, and were not bound to prove."

The case comes before this court on exceptions taken to the above charge.

I. The charge that Dement had power to draw bills was correctly given, and is sustained by the proof.

From the foregoing testimony it is plain, that even *inter se* there was such a trading partnership as authorized the drawing of bills by one partner in the name of the firm; although the farming business might not authorize the exercise of such a power, running a saw-mill for two years necessarily required the purchase of the requisite stock of wood, and its resale as boards, planks, scantling, etc.

In mining partnerships and farming partnerships, it has been held that such powers are not vested in the partners, and the reason is, that their business is simply to sell the produce of the real estate, to make profits out of the soil by gathering its fruits; but wherever the business imports in its nature the necessity of buying and selling, the partnership is in its essence a trading partnership.

The general doctrine is admirably summed up in the opinion of Ch. J. Marshall, in the case of a manufacturing partnership.

Winship v. *Bank of the U. S.* 5 Pet. 529.

So it was held that one partner could bind the firm by a promissory note, where the partnership was for carrying on the business of farming and coopering.

McGregor v. *Cleveland*, 5 Wend. 475.

And although there be no partnership in real estate, the parties being tenants in common, yet if they are common tenants of timber land and do a lumber business, they are trading partners in the timber cut from the land.

Baker v. *Wheeler*, 8 Wend. 505; *Coles* v. *Coles*, 15 Johns. 160.

Partners in a steam saw-mill are bound by the note of the partnership given by some of the partners for partnership purposes.

Johnson v. *Dutton*, 27 Ala. 245.

And even where the partnership is limited, a note by one of the partners, in the name of the firm, is prima facie for the firm's account.

Holmes v. *Porter*, 39 Me. 157.

See, also, Story Part. § 102.

And it makes no difference as to the power of a partner to bind the firm, that the trade was a particular and limited trade.

Chit. Bills, 10th Am. ed. p. 44.

II. But independently of the question as to the powers of the partners in controversies *inter se* as regards the present case, where the holders of the bills are third persons ignorant of the special partnership agreement, the partnership is bound, because it was actually engaged in general trading, and Dement, who signed the bills, was the ostensible and principal business partner. It was in the light of a general trading partnership that this firm exhibited itself to the public. It was quite immaterial whether or not there existed a secret contract limiting his powers.

Sto. Part. § III. 126, 130; Coll. Part. § 386; Gow. Part. pp. 52–55; 3 Kent, Com. 40–45; *Winship* v. *Bank of U. S.* 5 Pet. 529; *Cargill* v. *Corby*, 15 Mo. 425; *Nichols* v. *Chearis*, 4 Sneed (Tenn.) 229; *Frost* v. *Hanford*, 1 E. D. Smith, 546.

And in the above case of *Cargill* v. *Corby*, the test of the power to draw bills and notes in the name of the firm is stated to be, whether the business was to "buy and sell." It is plain

that the business of a steam saw-mill cannot be conducted without buying and selling.

III. Independently of the legal presumption that the bills drawn in the partnership name were for partnership account, the partnership articles show that negroes were necessary for their business, and that the parties promised to furnish them for carrying it on. p. 12.

The only remaining point to be considered, is the legality of the second charge of the judge —"that if the bills were accepted and paid at maturity by the plaintiffs for said firm, the defendant Joseph Kimbro, was responsible, and it mattered nothing to the plaintiffs how the proceeds of the bills were disposed of, as this was a fact the plaintiffs could not know, and were not bound to prove."

In point of law the instruction was clearly right.

The idea that money loaned or advanced cannot be recovered, because the borrower applies it to an unlawful purpose, was never countenanced by any jurist.

It is true that *ex turpi causa non oritur actio*. But what is the contract now before the court? A contract for advancing money. There is nothing illegal in that. If the money was to be applied to an unlawful purpose the illegality was in the application, not in the borrowing. The contract for purchasing the slaves might be in contravention of law; and if so, would not be enforced in a court of justice; but on the ground now assumed by plaintiffs in error, it would be incumbent on the court to refuse to maintain an action for the price of goods sold, if the purchaser could prove that the vendor intended to raise money by the sale, to be applied to an unlawful purpose. The proposition will not bear an instant's examination. The whole doctrine on the subject was scrutinized, and the true principles governing it settled by this court in 1826, and the law is now too well established to require any further citation of authorities.

See *Armstrong* v. *Toler*, 11 Wheat. 258.

Mr. Justice **Clifford**, delivered the opinion of the court:

This case comes before the court upon a writ of error to the circuit court of the United States for the middle district of Tennessee. It was an action of assumpsit brought by the present defendants against the plaintiff in error, to recover the amount of three several bills of exchange, particularly described in the declaration. As exhibited in the transcript, the several bills of exchange bear date at Lexington, in the state of Mississippi, on the 2d day of April, 1853, and purport respectively to have been drawn and addressed to the original plaintiffs by one Morgan McAffee, and by Dement, Kimbro, & Sons. They were each for the sum of $2,000, and were severally made payable to the order of the first-named drawer, by whom also they were duly indorsed. Two of them 263*] *were likewise indorsed with the firm name of the other drawers. At the time the bills of exchange were executed, the original defendant was a member of the firm of Dement, Kimbro, & Sons; and it was conceded in the pleadings and at the trial, that the bills of exchange were drawn and negotiated by the senior partner of that firm. All the members of that partnership, except the defendant, were citizens of the state of Mississippi at the time the suit was commenced, and were residing out of the jurisdiction of the court; and for that reason, as alleged in the declaration, the other partners were not sued in this action. In the court below, the plaintiffs claimed to recover against the defendant, upon the ground that the firm, of which he was a member, were the drawers of the bills of exchange, and that they, the plaintiffs, had paid the amount, or the principal portion of the same, out of their own funds, as exceptors, for the accommodation of the drawers. Without attempting to give any very definite analysis of the several pleas filed by the defendant, it will be sufficient for the purposes of this investigation to state that he set up two distinct grounds of defense in answer to the claim of the plaintiffs:

1. To the merits of the claim he pleaded the general issue, and denied specially that he ever drew the bills of exchange described in the declaration, or that he ever authorized anyone to draw them in his name, or in the name of his firm.

2. For a further defense, he also alleged, in his fourth plea to the amended declaration, that the bills of exchange were drawn and indorsed by Dement, and accepted by the plaintiffs, for the purpose of raising money to be laid out in the purchase of slaves, to be imported from some other state or territory of the United States, for sale, into the state of Mississippi, which slaves he alleged to be afterwards purchased with the money and imported into the state, and there sold, according to the original intent, contrary to the form of the statute of that state in such case made and provided. To that plea the plaintiffs replied, traversing the allegations of fact, and tendering an issue, which was duly joined. Some of the pleas resulted in issues of law, all of which were ruled in favor of the *plaintiffs, and the de- [*264 fendants acquiesced in the rulings of the court.

Evidence was then introduced on both sides upon the issues involving the merits of the claim, and the court instructed the jury that Dement, the principal acting partner of the firm, had power to draw the bills given in evidence according to the proof adduced to them, if true; that if the bills were accepted and paid at maturity by the plaintiffs for the firm, the defendant was responsible, and it mattered nothing to the plaintiffs how the proceeds of the bills were disposed of, as that was a fact the plaintiffs could not know, and were not bound to prove.

Under the charge of the court, the jury returned their verdict in favor of the plaintiffs for the amount claimed, deducting certain admitted credits, according to the account exhibited in the transcript, and the defendant excepted to the instructions of the court. It is obvious, on the first reading of the instruction, that it contains two distinct propositions, and no doubt is entertained that both were intended to be controverted by the exceptions. In the first place, it affirms that the evidence adduced, if found to be true, was sufficient to show that the acting partner of the firm, of which the defendant was a member, had power to draw the bills of

exchange described in the declaration. According to the proofs introduced by the plaintiffs, the firm commenced business at Lexington, in the state of Mississippi, in January, 1853, and the partnership was continued, without interruption, until the third day of October, of the same year, when it was terminated by the death of the senior partner. They also proved, by two witnesses, that the firm was engaged during that period in farming, carrying on a steam saw-mill, and in general trading. Both of these witnesses testified that the senior partner, who drew the bills of exchange in question, was the active business partner of the firm; and one of them added, that he did the principal trading, and borrowed money, and paid it back in the name of the firm.

Their partnership agreement was introduced by the defendant. It bears date on the 5th day 265*] of January, 1853; and the *partnership was formed, as recited in the instrument, to continue for the term of two years, for the purpose of farming and of carrying on a steam saw-mill. By its terms, one third of the capital stock was to be furnished by the senior partner, one third by the defendant, and the remainder by his two sons. Those five persons constituted the firm, under the name and style before mentioned. And it was further stipulated that negroes or hands, stock, provisions, and all necessary utensils, should be furnished by the respective parties, according to their interest in the capital stock, and that they should defray the expenses of the copartnership and share its profits in the same proportions. They also designated the farm to be carried on, and stipulated that the steam saw-mill should be located at such place as a majority of the partners in interest should determine.

After the partnership agreement was executed by the parties, it was deposited with a third person; and it appeared from his deposition, taken by the defendant, that it remained in his possession from that period to the time of his examination. In the same deposition, the witness testified that the firm, so far as he knew, had never been held out by the defendant as having any more extensive powers than those conferred by the partnership agreement.

Some attempt was made by the defendant to prove that it was the usage, in partnerships of this description, when money was wanted to carry on the business, and the several partners could not be consulted, for the managing partner to raise it on his own credit, and charge it to the partnership; but the proof was not sufficient to show any such general usage.

Such was the substance of the evidence on which the charge of the court was based, and we think it was of a character to justify that part of the instruction under consideration. Our reasons for that conclusion will now be briefly stated.

That one of several partners composing a trading firm has power to draw bills of exchange unless restricted from so doing by the terms of the copartnership agreement, is a proposition which, it is presumed, no one will dispute. Whenever there are written articles of agree- 266*] ment between the partners, *their power and authority, *inter se*, are to be ascertained and regulated by the terms and conditions of the written stipulations. But, independently of any such stipulations, each partner possesses an equal and general power and authority, in behalf of the firm, to transact any business within the scope and objects of the partnership, and in the course of its trade and business.

Acts performed by one of the partners, in respect to the partnership concerns, and in the usual course of its business, differ in nothing, so far as their legal consequences are concerned, from those transactions in which they all concur; and for the reason, that, by the commercial law, each partner of a trading firm is presumed to be intrusted by his copartners with a general authority in all the partnership affairs. Accordingly, it was held, in *Hawken* v. *Bourne*, 3 Mees. & W. 710, that one partner, by virtue of the relation he bears to the firm, is constituted a general agent for another, as to all matters within the scope of the partnership dealings, and has conferred upon him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised in the business in which they are engaged. Any restriction which, by agreement among the partners, is attempted to be imposed upon the authority which one partner possesses, as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, unless they know that such restrictions have been made.

Contracts made by one of several partners, in respect to matters not falling within the ordinary business, objects, and scope of the partnership, are not binding on the other partners, and create no liability to third persons, who have no knowledge that the partner making the contract is acting in violation of his duties and obligations to the firm of which he is a member. But whenever credit is given to the firm, within the scope and objects of the partnership, and in the course of its trade and business, whether the partnership be of a general or limited nature, it will bind all the partners, notwithstanding any secret stipulations or reservations between themselves, *which [*267 are unknown to those who give the credit. *Harrison* v. *Jackson*, 7 T. R. 207; *Pinkney* v. *Hall*, 1 Salk. 126; *Lane* v. *Williams*, 2 Vern. 277; *Swan* v. *Steele*, 7 East. 210; Byles, Bills, p. 31; 3 Kent's Com. p. 40; Story, Part. § 105; Collyer, Part. § 401.

Apply these principles to the facts disclosed in evidence, and it is clear that the power of the acting partner was ample to authorize him to draw the bills of exchange in the name of the firm, unless it can be shown that the firm of which he was a member was not one falling within the general rules of law defining and regulating the rights and obligations of partners engaged in the transactions and business of trade.

All partnerships, says Chancellor Kent, are more or less limited; and there is none that embraces, at the same time, every branch of business. Such limitations are generally to be found in the terms and stipulations of the articles of copartnership; but they may arise from general usage, or, to a certain extent, from the character of the business, and the nature of the objects to be accomplished.

Partnerships are sometimes formed by those

who are interested in real estate, for the mere purpose of farming; and in respect to that class of business arrangements, it has been held, that one of the several partners does not possess, by virtue of that relation merely, the right, without the consent of his associates, to draw or accept bills of exchange, for the reason that such a practice is not usual, nor is it necessary for carrying on the farming business. Collyer on Part. (ed. 1848), § 402; *Greenslade* v. *Dower*, 7 Barn. & C. p. 635; *Dickinson* v. *Valpy*, 10 Barn. & C. p. 138, per Littledale, J.

In the case last named, it was held that a certain mining company fell within the same exception; and, on the facts disclosed, no doubt the question was well decided. But the mere circumstance that the business consists in making profits out of real estate, as in working a stone quarry, will not necessarily take the case out of the operation of the general rule. *Thicknesse* v. *Bromilow*, 2 Crompt. & J. 425.

268*] *Farming partnerships, when strictly confined to that purpose, are held to be within the exceptions to the general rule, upon the ground, as assumed by the counsel for the plaintiffs, that their principal object is to make profits out of the soil, by gathering its fruits, and that the partners are in no proper sense engaged in trade; but wherever the business, according to the usual mode of conducting it, imports, in its nature, the necessity of buying and selling. the firm is then properly regarded as a trading partnership, and is invested with all the powers and subject to all the obligations incident to that relation. *McGregor* v. *Cleveland*, 5 Wend. 475; *Winship* v. *Bank of the United States*, 5 Pet. 529; *Baker* v. *Wheeler*, 8 Wend. 505; *Coles* v. *Coles*, 15 Johns. 160; *Johnston* v. *Dutton*, 27 Ala. R. 245; *Hedley* v. *Bainbridge*, 3 Q. B. 321.

Another answer, however, may be given to the objection to this part of the instruction, which is entirely conclusive against it. According to the evidence, farming was not the sole business of the partners composing this firm. They were also engaged in running a steam saw-mill, for manufacturing purposes; and common observation will warrant the remark, that those who engage in that business always want capital to carry it on, and frequently find it necessary to ask for credit. Like those engaged in other branches of manufactures, they buy and sell, and have occasion to remit money and collect it from distant places.

Two witnesses also testified at the trial that this firm was engaged in general trading; and there was no evidence introduced by the defendant to contradict their statements. Whether the witnesses were entitled to credit, and whether, in point of fact, this firm was a trading firm. were questions which were properly submitted to the jury. By the verdict, both questions were found in favor of the plaintiff, and the finding of the jury is conclusive.

2. One other point only remains to be considered, which arises out of the second proposition contained in the charge of the court. It was to the effect, that if the bills of exchange were accepted and paid at maturity by the 269*] plaintiffs for the *firm, then the defendant was responsible, and it mattered nothing to the plaintiffs how the proceeds were disposed of.

No evidence was offered by the defendant in support of the issue raised by his fourth plea to the amended declaration, and there was none in the case tending to show that the proceeds had been applied to any illegal object, or in any manner misappropriated. Such being the fact, it is obvious that this part of the instruction became entirely immaterial; which, of itself, is a sufficient answer to the objection.

But another answer may be given to the objection, which perhaps will be more satisfactory; and that is, we think it was clearly correct. It will be observed that this part of the charge was based upon the theory that the bills of exchange were drawn by the firm of which the defendant was a member; and properly so, for the reason that the question of authority to draw them had been disposed of in the preceding part of the charge.

In considering this objection, then, it must be assumed that the bills were drawn by the firm, and that they were duly accepted and paid by the plaintiffs at maturity, on account of the firm; and if so, it is not perceived how their right to recover the amount can be affected by the fact that one of the drawers applied the money to an unlawful purpose. Where a contract grows immediately out of and is connected with the illegal or immoral act of the party claiming the benefit of it, courts of justice will not lend their aid to enforce it. *Armstrong* v. *Toler*, 11 Wheat. 258.

But the illegal act, if any, in this case, was performed by one of the drawers of the bills, and not by the acceptors. Suppose one of a firm should borrow money of a third person, in the name of the partnership, and apply it to an unlawful purpose, it surely could not defeat the right of the lender to recover on the contract.

Regarding this point as too clear to be the subject of dispute, we forbear to pursue the discussion.

After a careful examination of the exceptions, we think they cannot be sustained.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

THE UNITED STATES, *Appts.*,
v.
THE WIDOW AND HEIRS of MARCUS WEST, Deceased.

(See S. C. 22 How. 315–318.)

Rights of wife and children of grantee, not affected by fraudulent alteration of grant.

Where fraudulent attempts were made to enlarge the quantity intended to be granted in a Mexican grant, by erasures and interlineations, after California had been ceded to the United States, though the proof of it is undeniable, and was an attempt to defraud the United States, that cannot take away from the wife and children of the grantee their claim to the original grant, which was made before California had been transferred by treaty.

Argued Feb. 14, 1860. Decided Feb. 27, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition to the board of land commissioners in California, by the appellees, for the confirmation of a claim to a tract called San Miguel.

The board of commissioners rejected the entire claim; but, on appeal, the district court allowed it to the extent of one league and a half, and entered a decree accordingly; whereupon the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **J. S. Black,** *Atty. Gen.*, and *Mr.* **Stanton** for appellants.

Messrs. **C. Benham** and **F. Marbury,** for appellees:

The claimants derive title by succession. The grant of November 2d is admitted to be genuine. It must be confirmed to the extent of one league and a half. Its alteration did not devest the rights which vested under it. It is immaterial who made the alteration, although as a matter of fact it was not made by the claimants, or with their knowledge or consent.

There is another grant in the archives, which vested the land (the league and a half) in West.

Lewis v. *Payn*, 8 Cow. 75, 76; *Jackson* v. *Gould*, 7 Wend. 364; *Hatch* v. *Hatch*, 9 Mass. top pages 297, 298, 307; *Doe* v. *Hirst*, 3 Stark. 60; *Herrick* v. *Malin*, 22 Wend. 391; 3 Prest. Abs. 103; 2 H. Bl. 263; Bull. N. P. 267.

The position of the Attorney General that the alteration of the grant is an abandonment of title which will prevent confirmation by this court, is not tenable. It cannot be held there was any abandonment when the claimants continued, as they have always done, to occupy the land.

All the conditions imposed by the Jimeno grant were complied with.

The second grant is not forgery, and should be confirmed.

The evidence of genuineness of the second grant is both direct and circumstantial.

That of forgery is negative and inconclusive.

Mr. Justice **Wayne** delivered the opinion of the court:

All of the documents upon which the defendants rely for a confirmation of their right to the land in dispute, are to be found on file in the archives among the *expedientes* of the first class. Concerning the genuineness of those which show that a grant for a league and a half was originally made to Marcus West, there can be no denial. They were admitted by the Attorney General to be genuine; but he resists the confirmation of that title, upon the ground that fraudulent attempts were subsequently made to enlarge the quantity intended to be granted, by erasures and interlineations.

West first petitioned for the land, without stating the quantity. In a few days afterwards, General Vallejo certified that the land asked for was vacant, and that it was not within twenty leagues of the boundary of California, nor within ten leagues of the sea shore. On the 30th of October, 1840, a report was made to the governor, that the petitioner had the qualifications for receiving a grant, and that the land might be granted.

Jimeno was then acting as governor *ad interim*. He declared West to be entitled to the land, to the extent of a league and a half, describing particularly its boundaries; and he made an entry of his executive action in the case, in what is termed Jimeno's Index.

We do not regard that catalogue of grants as authoritative proof of grants enumerated in it, or as a conclusive exclusion of grants not so registered by Jimeno, which may be alleged to have been made whilst California was a part of the Mexican Republic, though they may bear date within the time to which that index relates. But in this case, it may be referred to as an auxiliary memorandum made by Jimeno himself of his action upon the petition of West. *West died before the claim was acted [*318 upon by the United States commissioners.

We have only to observe, that the fraudulent attempts to enlarge the grant were made after California had been ceded to the United States; and though the proof of it is undeniable, and was an attempt to defraud the United States, that cannot take away from the wife and children of West their claim to the grant, which was made to him before California had been transferred by treaty.

We affirm the decree of the court below, confirming the grant to West for a league and a half.

PIERRE BERTHOLD *et al.*,
v.
JAMES McDONALD and Mary McRee.

(See S. C. 22 How. 334-341.)

Jurisdiction to review state decision as to United States title—parol proof admissible, to show which of two equities or titles is the better.

Where the title to land, under confirmation by United States commissioners, was directly drawn in question and the decision below rejected the title, this court has authority to re-examine the decision of the state court.

Where titles in controversy are equities only, no patent having issued to either claimant on the certificates granted by the board, as to the priority between these equities, the state courts properly received parol evidence reaching behind the confirmation.

The rule laid down by this court in the case of Garland v. Wynn, "that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice, and litigate the conflicting claims," followed.

Where each party has a good title as against the United States, in a contention between double concessions which balanced each other, proof can be heard, and must of necessity be heard, to determine the better right between the contending parties.

Landes v. Brant, 10 How. 370, approved.

Argued Jan. 10, 1860. Decided Feb. 27, 1860.

IN ERROR to the Supreme Court of the State of Missouri.

This case arose upon a petition in the nature of an action of ejectment at law, filed in the St. Louis land court, by the plaintiffs in error, to recover the possession of a tract of land near St. Louis, containing eighty arpents, equiva-

NOTE.—*Jurisdiction of United States Supreme Court where a Federal question arises, or where is drawn in question, statute, treaty, or Constitution of United States*—see note to Matthews v. Zane, 2 L. ed. U. S. 654; note to Martin v. Hunter, 4 L. ed. U. S. 97; and note to Williams v. Norris, 6 L. ed. U. S. 571.

lent to sixty-eight acres. The trial resulted in verdict and judgment for the defendants.

This judgment having been affirmed, on appeal, by the supreme court of Missouri, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **E. B. Washburne,** for plaintiffs in error:

1. The confirmation to Charles Gratiot on November 19, 1811, was final and conclusive, so that neither the United States nor any person deriving title from the United States subsequently to that date, could rightfully claim the land against such confirmation.

Act of Congress, March 3, 1807, § 41; 12 Sto. St. § 1060; *Strother* v. *Lucas*, 12 Pet. 458; *Chouteau* v. *Eckhart*, 2 How. 344; *Les Bois* v. *Bramell*, 4 How. 449; *Landes* v. *Brant*, 10 How. 370.

The supreme court of Missouri, without denying the general proposition as stated above, attempts to evade its force by distinguishing this case from the cases heretofore decided in this court.

They say that both confirmations were made under one and the same act of Congress. This is a fallacious statement of the case. Neither of the acts of 1805, 1806, 1807, which created the board of commissioners and regulate its proceedings, confirms by its own force, any Spanish title. The whole subject was referred, by the law, to the commissioners; their act worked the confirmation, and it was their decision that the law declared to be final. In the next place, the supreme court of Missouri objects to the title of the plaintiffs, that the commissioners were not authorized to grant a confirmation under the 2d section of the act of 1807, when there was, as in the present case, an adverse claimant of the land.

The answer to this is two-fold:

First. The claim of Gratiot is not confined to any particular section of the law. Granting that the commissioners ought not to have given a confirmation under the 2d section of the act of 1807, still the party has obtained no more than his just rights.

Second. The 2d section of the act of 1807, is merely directory to the commissioners.

Burgess v. *Gray*, 15 Mo. 220; 16 How. 48.

That section imposed no limitation on the jurisdiction of the commissioners to be enforced by any other tribunal, but simply furnished a rule of action. There is no court that can correct their errors, if any.

Landes v. *Brant*, 10 How. 370; *Morehouse* v. *Phelps*, 21 How. 294.

The doctrine of relation does not apply to this case. That doctrine, founded in mere fiction for the advancement of justice, is applied only to effectuate acts and consequences between the parties, and is never to be used to destroy estates, or to work a prejudice to strangers.

Butler v. *Baker*, 3 Co. 29; *Thompson* v. *Leach*, 3 Lev. 284; *Jackson* v. *Bard*, 4 Johns. 230.

2. The claim and confirmation in the name of Jeannette, who was dead at the time, are nullities, and cannot, even if otherwise valid, stand in the way of the confirmation to Gratiot. The court below disposed of this point by a simple reference to a prior decision of the same court, in *Mercier* v. *Letcher*, 22 Mo. 66. The case referred to will be found to be this: Charles Mercier was proprietor of a tract of land, under an imperfect Spanish title. Mercier died in Spanish times, and Courtois married his widow.

Courtois claimed the land in his own name, as representative of Mercier, and filed with the commissioners the evidences of Mercier's title. The commissioners confirmed the land "to Charles Mercier." The court decided that Courtois, who made the claim, took nothing by this confirmation; and that the heirs of Mercier, who made no claim, and who, by the force of the act of Congress, were barred of all right in the land two years before the confirmation, took title from it. Both branches of this decision seem to be very questionable.

With the former branch, denying the title of Courtois, we have here no concern.

The counsel then reviewed this case at considerable length, criticising and pointing out differences between it and the case at bar.

3. There are no equities appearing in the case that can defeat a recovery by the plaintiffs in the present action, or deprive them of the right to hold the land under the confirmation to their ancestor.

The state of the pleading was such that under the established rule of practice in Missouri, a title merely equitable could not be considered at all.

In *Burgess* v. *Gray*, 16 How. 48, this court inaccurately stated the present practice in the state of Missouri.

See *Maguire* v. *Vice*, 20 Mo. 429; *Conran* v. *Sellew*, 28 Mo. 320; Rev. Stat. Mo. 1825, 1835, 1845.

Messrs. **M. Blair** and **H. R. Gamble,** for defendants in error:

The defendants insist that the following positions are sustained by the evidence and law of the case:

1. The objection to the confirmation in the name of Jeannette, on the ground that she was dead when the claim was filed, is not sustained by the evidence, and if it had been, is not a valid objection in law.

Mercier v. *Letcher*, 22 Mo. 66.

In this case, the dispute is between the parties holding equitable titles with the legal title outstanding in the United States, and is to be determined in favor of the party having the superior equity.

Bagnell v. *Broderick*, 13 Pet. 449; *Wilcox* v. *Jackson*, 13 Pet. 516.

3. The facts in evidence show that if the two confirmations cover the same land, the superior equity is in the defendants.

4. The reliance of the plaintiffs on the fact that their confirmation is one day older than that of the defendants, is not warranted by any decision of this court, or by any principle of law, and arises from a mere misapprehension of the language found in the opinion in *Landes* v. *Brant*, 10 How. 372. No such case as the present, has ever been before this court.

Strother v. *Lucas*, 6 Pet. 763; *Strother* v. *Lucas*, 12 Pet. 410; *Chouteau* v. *Eckhart*, 2 How. 345; *Les Bois* v. *Bramell*, 4 How. 449; *Bissell* v. *Penrose*, 8 How. 330. None of these

decisions apply to this case, where there are two confirmations by the same board on consecutive days.

5. If the two confirmations are equal as recognitions of the two original titles, then they are to be laid out of consideration, and the parties are to litigate upon their original titles.

Carmichael v. *Brisler*, 8 Mart. 727; *Sanchez* v. *Gonzales*, 11 Mart. 212. In such litigation the defendants must succeed.

6. The doctrine of relation as explained and applied in *Landes* v. *Brant*, refers each of the confirmations to the time of filing the notice and in this case, the notice in the name of Jeannette was filed first, and the confirmation in her name becomes the elder by relation.

7. The confirmation for Gratiot, if it in fact covers the land confirmed in the name of Jeannette, is void for want of jurisdiction in the commissioners, because the land was claimed and possessed by Jeannette, under the Spanish government.

2 Stat. U. S. 440, § 2.

Certainly it was void, as against her and her representatives claiming the land, according to law.

8. The confirmation, when located, does not cover the land in controversy.

Until surveyed, it attaches to no land.

West v. *Cochran*, 17 How. 416.

The judgment of the supreme court of Missouri should be affirmed, because,

1st. If the confirmations are valid, the title of Jeannette is the elder title by relation to her claim.

Landes v. *Brant*, 10 How. 373; *Crowley* v. *Wallace*, 12 Mo. 145.

2d. Whether the confirmations are valid or not, and whether Jeannette's is the elder title or not, it is the equitable title, and must prevail against Gratiot's representatives who have not the legal title.

West v. *Cochran*, 58 U. S. (17 How.) 403.

3d. The confirmation to Gratiot is void, the board having authority only to confirm titles of claimants to "lands not claimed by any other persons."

2d §, act of 1807, 2 Stat. 440.

4th. Jeannette's representatives have a complete title under the act of June 13, 1812.

Guitard v. *Stoddard*, 16 How. 494.

338*] *Mr. Justice **Catron** delivered the opinion of the court:

The board of commissioners, sitting at St. Louis to examine claims to lands, according to the act of March 3d, 1807 (2 Stat. at L. 440), confirmed to Chas. Gratiot, assignee of Jeannette Flore, two arpents in front, by forty back, lying in the Prairie des Noyers, near to St. Louis. This common field lot had been designated by survey, and was well known. The confirmation was made November 19th, 1811.

On the next day (November 20th, 1811) the board also confirmed the same land to Jeannette, a free negro woman. Patent certificates issued to Gratiot and Jeannette, respectively, dated the same day, 20th November, 1811. Jeannette died about 1803, leaving as her heir a child named Susan Jeannette, who died about 1840.

Gratiot got a deed for the land from a different person, named Florence Flore, who conveyed in the name of *Jeannette* Flore. This deed was made in 1805, and filed by Gratiot with the recorder, and on which deed his confirmation by the board was founded. Jeannette had occupied the land for many years before her death. Florence Flore had never occupied it; had no claim to it, at any time; and conveyed in ignorance of what land her deed covered, in all probability. Gratiot died in 1817, leaving a widow and children. Neither he nor his heirs pretended to have any claim to the premises until recently, before this suit was brought by the heirs.

McDonald and Mary McRee, the defendants, claim under Jeannette, who got the second confirmation. This suit was instituted in the land court at St. Louis by petition, in 1854, under the new code of procedure of Missouri, which confounds all distinction between law and equity, and combines both remedies in the same action. The petition was answered, and a trial had on the merits, before the court and a jury.

The court, on motion of the defendants, instructed the jury as follows:

"If the jury find, from the evidence, that the tract of land confirmed to Jeannette by the board of commissioners includes the land in controversy, and is the same land which was surveyed for Jeannette by the authority of the Spanish government; *that said Jean- [*339 nette, and those acting for or under her, were the only persons who inhabited, cultivated or possessed the said tract, prior to the 20th of December, 1803; that the person who executed the deed in the name of Jeannette Flore, and filed by Charles Gratiot with the recorder of land titles as one of the evidences of his claim, is not the person for whom the survey of said tract of land was so made, but another and a different person, and that she cultivated and possessed, prior to the 20th of December, 1803, another and different tract in the same common field, surveyed for her, by authority of the Spanish government, in the year 1788, embracing no part of the land in controversy, the jury ought to find for the defendants."

This instruction was excepted to, and a verdict was found for the defendants.

The cause was brought to the supreme court of Missouri by writ of error, where the judgment of the land court was affirmed; and, to revise this judgment, a writ of error was prosecuted out of this court, under the 25th section of the judiciary act.

As the title of Gratiot's heirs was directly drawn in question by the foregoing instruction, and as the decision below giving the instruction, rejected the title, no doubt can exist in regard to the authority of this court to re-examine the decision of the state courts.

It was so determined in the case of *Lytle et al.* v. *Arkansas*, 22 How. 193, decided here at this term.

The titles in controversy are equities only, no patent having issued to either claimant on the certificates granted by the board. 10 How. 274. With these equities, the courts of Missouri were dealing on parol evidence, reaching behind the confirmation; and the question is, had they the power to do so.

The rule laid down by this court in the case of *Garland* v. *Wynn*, 20 How. 8, is, "that where several parties set up conflicting claims

to property, with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter 340*] may come into the ordinary *courts of justice, and litigate the conflicting claims." The board of commissioners was a special tribunal, within the rule.

The principle was applied in the case of *Lytle* v. *Arkansas*, cited above.

In these cases, and in several others, the contest was between claimants under occupant laws, giving a preference of entry to actual settlers; and where an applicant obtained the preference, and was allowed to enter the land on producing false affidavits, by which he imposed on the register and receiver, to the prejudice of another's right.

In this instance before us, each of the parties claimed as occupants for ten consecutive years before the 20th of December, 1803. Gratiot and Jeannette both proved that the latter had occupied as required, but Gratiot imposed on the board by his false deed of assignment for the lot obtained by him from Florence Flore, whose name was untruly signed *Jeannette* Flore; and by reason of this imposition, he obtained confirmation and a patent certificate, which his heirs make the foundation of their suit.

Each party here has a good title, as against the United States, the act of 1807 (2 Stat. at L. 440), declaring that a confirmation of the board shall be conclusive against the government.

As both claims were filed in proper time, and the confirmations were had in due time, the equities are equal, and balance each other, so far as they depend on the confirmations alone; and the question is, can the ordinary courts of justice go behind the right established by the record confirming Gratiot's claim. To do this, proof must be heard impeaching his prima facie title, and which proof existed when the claim was filed with the recorder and acted on by the board. In other words, could the state courts go behind Gratiot's confirmation, and on evidence, compare his equity with that of Jeannette and adjudge who the true owner was.

In the case of *Barbarie* v. *Eslava*, 9 How. 421, this court came to the conclusion (although it is not distinctly expressed), that in a contention between double concessions, which balanced each other, proof could be heard, and must of neces- 341*] sity *be heard, to determine the better right between the contending parties.

In the cases of *Chouteau* v. *Eckhart*, 2 How. 345, and *Les Bois* v. *Bramell*, 4 How. 449, it was held that the grant made by the act of 1812, of the village commons of St. Charles and St. Louis, and of village lots, to possessors, gave a title in fee; and that a claimant, under a Spanish concession subsequently confirmed, could not go behind the act of Congress, and overthrow the legal title it conferred; and this, for the plain reason that neither Chouteau nor Les Bois had any title, when the act of 1812 (2 Stat. at L. 728) was passed, that could be asserted in a court of justice; and as the political power from which they alone could take title had cut them off, to that power they must look for redress of the injury, if any existed.

To conflicts of title of the foregoing description, the principles asserted in the case of *Landes* v. *Brant*, 10 How. 370, apply.

We have no doubt of the correctness of the decision of the Supreme Court of Missouri in this cause, and order its judgment to be affirmed.

THE UNITED STATES, *Appts.*,
v.
JAMES D. GALBRAITH, John Sine, David T. Bagley, and Richard H. Stanton.

(See S. C. 22 How. 89-96.)

Mexican grant—want of merits.

Where the doubtful character of the claim under a Mexican grant, and entire want of any merits upon the testimony appears, the decree of the court below will be reversed, and the case remitted for further evidence and examination.

Argued Feb. 20, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **Black**, *Atty. Gen.*, and *Messrs.* **Stanton** and **Gillet**, for appellants:

The brief filed by the Attorney General after reviewing the circumstances of the case, stated following objections to the grant:

1. That the genuineness of the original *espediente* is extremely doubtful. The probabilities are, as ten to one, that the papers of which it consists were placed among the archives, after the conquest of the country.

2. That the grant is, beyond all doubt, a forgery.

3. That the certificate of approval is also a forgery. It must be observed that Moreno, attesting secretary, was in full life, and within the reach of process, but was not called to prove either the execution of the grant or the signature of Pico to certificate. A witness was called to prove his handwriting, and that witness, of all men in the world, was Covarrubias. If Covarrubias had been a subscribing witness, he would no doubt have kept out of sight, while Moreno testified to his handwriting.

The evidence of the possession is overwhelmingly contradicted.

The following is an abstract of *Mr. Gillet's* argument:

1. Where a witness is proved to have knowingly sworn false in a cause, his whole evidence must be rejected as unworthy of belief.

2. Where a party alters a written instrument with the intention of changing its character and effect, he destroys it, so that it can have no legal effect.

The effect of alterations of deeds has been settled in the following cases:

In *Henman* v. *Dickinson*, 5 Bing. 183, it was held: "Where a party sues an instrument which, on the face of it, appears to have been altered, it is for him to show that the alteration has not been improperly made."

This the claimants did not attempt to show in the case at bar.

See, also, *Lewis* v. *Payn*, 8 Cow. 71; *Jackson* v. *Malin*, 15 Johns. 293, 297; *Prevost* v. *Gratz*, 1 Pet. C. C. 364; *Jackson* v. *Osborn*, 2 Wend. 555, 559.

The grant in this case is void, and cannot lay the foundation of a recovery.

3. When a party knowingly, on a trial, introduces false evidence, it taints his whole case, and every presumption is against him.

4. Where a written instrument has become void upon alteration, other evidence to supply its place cannot be admitted.

In the present case, the original grant being excluded, all evidence tending to establish it must be rejected. The claim cannot stand upon the petition and order to report, and the report itself.

See *Sutter's, Nye's*, and *Bassitt's Cases* in 21 How.

5. Official acts, in granting land and furnishing evidence of title on Sunday, are void.

See *Story* v. *Elliot*, 8 Cow. 27.

6. When the facts upon which the claim rests are inconsistent with one another, and out of the ordinary course of events, the claim must be rejected.

Mr. **H. P. Hepburn** and **Robert J. Brent**, for the defendants in error:

After reviewing the evidence in the case, the counsel said: defendants endeavored to discredit the title by arguing that Padilla was not procuring a grant at Monterey and Los Angeles in May and June, 1846, because he was pursued for killing Americans on the 21st of June of the same year, in Sonoma.

There are several answers to this:

1. Padilla was not found by Ford and his men on the 21st of June, at Sonoma.

2. The petition of Beadly is the only paper in the record which in any way fixes the whereabouts of Padilla, and this is dated May 14, 1846, and between this and the 21st of June, he could have been several times between Monterey and Sonoma.

3. It is a mistake as alleged on the other side, that the Bear War broke out in May, 1846. It is further objected that Pico, on the 20th of May, made an order of reference to the prefect for a report, when the certificate of Castro, which accompanied the petition, showed that the land was vacant, and that the report was, therefore, unnecessary. These irregularities are to be found in nearly all the *espedientes*. They were drawn up by the secretaries, who followed a certain routine, without regard to the facts. It is not the business of the claimants to show that the archives are consistent. It is the business of the government to show that they are fraudulent.

It is also objected that the date of the grant has been altered from June 12, 1846, to February 12, 1846.

The motive of this is not easy to understand. The Californians are a simple, ignorant people. The supreme court of the state told them that their titles would not support an action, either for the possession or the property; the squatters, who knew Spanish, kindly interpreted the judgment of the court; it merely took the land from the Californians and gave it to them, the squatters.

The rule on the subject of alterations, is this: where an estate which may exist without deed (as a fee simple in land) is conveyed by deed, then the alteration, even though material and fraudulent, destroys the deed, but not the estate.

There are many cases to this effect, but a very strong one is the case of *Lewis* v. *Payn*, 8 Cow. 71.

See, also, *Jackson* v. *Gould*, 7 Wend. 364; *Hatch* v. *Hatch*, 9 Mass. 307.

Herrick v. *Malin*, 22 Wend. 391 decides that no subsequent alteration of a deed by the grantee, in a material or immaterial point, will avoid the deed, where the controversy relates to a title to land, and the title once vested under the deed in the grantee. In other words, the title once vested will not revert by the alteration, cancelation, or destruction of the muniment of title, whatever may be the law of defense against the recovery on a personal contract.

See Prest. Abs. 103; 2 H. Bl. 263; Bull. N. P. 267.

Applying this principle to the facts of this case, it will be seen that the alteration of the month of the grant, from June to February, 1846, must have been made in the original grant after it was recorded by the Mexican authorities, because there is no such alteration in the copy certified from the surveyor general's office.

The original grant, then, has this manifest alteration. If done for a fraudulent purpose, it is clearly immaterial in a point of law, and the fraud could be easily detected, by reference to the record of the grant, and the date of the petition and antecedent documents.

There is no evidence to show by whom or when the date was altered.

As to the charge that this grant is suspicious because made shortly before the change of flags, see Executive Documents, 1846-1847, vol. III., doc. 19, pages 99 and 106. These documents show when the war did break out; that Frémont did not come over with a hostile force or hostile intention; that Castro undertook to cut him off, because he was afraid of just such a revolution, got up by foreigners, as had placed himself in power.

The Californian government had not a hint of war with the United States, or of the prospect of it, until they received notice of the occupation of Monterey.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from the district court of the United States for the northern district of California.

The appellees, who derived their title from Juan N. Padilla, the original grantee, presented their claim before the board of land commissioners in 1852, for five square leagues of land known by the name of *Bolsa de Tomales*, situate in the county of Sonoma, California. The board, after hearing the proofs, decreed in favor of the claim, which, on appeal to the district judge, was affirmed.

The documentary evidence of the title includes a petition to the governor for the track, dated at Monterey, May 14th, 1846, accompanied with a certificate of Manuel Castro, prefect, that *the land was vacant and grantable, dated [*95 same place, 10th same month; a marginal reference for information, by the Governor, Pio Pico, dated Los Angeles, 20th May, 1846; a note of concession, dated same place, 12th June, 1846; and a formal title, dated same time and

place, both signed by the governor, and J. M. Moreno, Secretary *ad interim*.

Proof was given of the signatures of the governor and secretary, and that these papers were found among the Mexican archives, which had been transferred to the custody of the surveyor-general of the United States for California.

The original grant of the formal title to the grantee was given in evidence by the claimants, dated Los Angeles, 12th February, 1846; also, a certificate of the governor and secretary, of the approval on the 12th June by the departmental assembly, dated 14th June, 1846.

Some attempt was made to prove possession and occupation by Padilla before and since the date of the grant, which were denied by the government. The clear weight of the proof in the case is against any possession or occupation. The two witnesses in support of it, aside from Padilla, clearly confounded the possession of the ranch of Padilla, called the *Roblar de la Miseria*, with that of the *Bolsade Tomales*, both of which are in the same section of country. Padilla states that he had possession of the land in 1844; built on it in that year; that he cultivated the land, and had cattle on it from that time until he sold it to Molena and Berreyesa, in the latter part of the year 1848, or beginning of the year 1849. In this he is expressly contradicted by some half a dozen witnesses, some of whom cannot be mistaken as to the facts. It appears, from the evidence, that Padilla, at the breaking out of the disturbances in the early part of 1846, adhered to the Mexican government, and was charged with having been concerned in killing some Americans in the fore part of that year; was pursued by an American force, and fled from that part of the country, and did not return until after the war. See, also, the testimony of Padilla in the case of the claim of Josefa de Haro and others, No. 101, before the board of commissioners; and see his grant of *Roblar de la Miseria*, 25th November, 1845.

96*] *It is admitted that the original grant of the title in form, which was in the hands of the claimants, has been altered so as to bear date the 12th February, instead of the 12th June. 1846. No explanation was given of the alteration. though it was apparent on the face of the paper.

The genuineness of the signature of the govenor, Pio Pico, to the certificate of the approval of the departmental assembly, was doubted by the board of commissioners.

The board say, after alluding to the alteration of the date of the grant, "there are many things connected with the claim which, under the conclusion at which the commission has arrived, were not altogether satisfactory. The time when the grant was made, only a few days before the Americans took possession of the country; the evident and palpable attempt to alter the date so as to make it appear several months anterior to the time when it was issued; and the manifest want of similarity in the signatures of Pio Pico to the papers of approval, with the usual mode of signing his name, are circumstances which greatly detract from the good faith of the claim. The evidence, however, they say, makes out a prima facie case, which, in the absence of any rebutting testimony, entitles the petitioners to a decree of confirmation." 22 How.

The court is of opinion that, in consideration of the doubtful character of the claim, and entire want of any merits upon the testimony, *the decree of the court below should be reversed, and the case remitted for further evidence and examination.*

THE BANK OF PITTSBURGH, *Plff. in Err.*, *v.* JOHN S. NEAL and Reuben E. Neal.

(See S. C. 22 How. 96-111.)

Agent, holding blank bill or note, may fill up blanks—bona fide holder may recover on bill or note, invalid between original parties—"second of exchange"—either set may be presented—where both sets are accepted, both may be recovered on—which of two innocent parties must suffer.

Where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument.

A bona fide holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it before the same becomes due, holds the title unaffected by these facts and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity.

The effect of the words, "second of exchange, first unpaid," which appear on the face of the bills is a question of law and not of fact, for the jury.

Either of two sets of bills of exchange may be presented for acceptance, and if not accepted, a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the set being presented.

If either of the set be presented, and is accepted, the indorsee may properly negotiate the bill, and a bona fide holder for value, without notice, may acquire a good title.

When two bills were perfected, filled up, and negotiated, by the correspondent of the defendants, to whom the blank acceptances had been intrusted as a single bill of exchange; for the acts of their correspondent, in that behalf, the defendants are responsible to a bona fide holder for value, without notice that the acts were performed without authority.

If the defendant himself had improvidently accepted two bills for the same debt, he is liable to pay both, in the hands of innocent holders for value.

Where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit.

Argued Mar. 1, 1860. Decided May 12, 1860.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit brought in the court below, by the plaintiff in error, against the defendants in error, as acceptors of two bills of exchange, one for $1,350, dated at Pittsburgh, August 1, 1857, payable four months

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NOTE.—*Alteration of note as affecting bona fide holders*—see note, 35 L. R. A. 464.

Negotiable paper executed in blank. Blanks filled in negotiable paper. Rights of bona fide holder.

The case of Russell v. Langstaffe, Doug. 514, Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'Trust Galley to any amount and I

after date; the other for $2,168, dated at Pittsburgh August 18, 1857, payable four months after date.

Both bills were drawn by L. O. Reynolds & Son, were payable to the order of L. O. Reynolds, and were indorsed and negotiated by him to the plaintiff in error.

The court below entered judgment, on demurrer, in favor of the defendants, whereupon the plaintiff sued out this writ of error.

A very full statement appears in the opinion of the court.

Messrs. **E. M. Stanton** and **Charles E. Walker,** for plaintiff in error:

The acceptance of the bills held by the bank for value, binds the acceptors. Whether the bills held by the bank were seconds or any other number in any real or imaginary series of bills, they were accepted, and the acceptors bound themselves thereby to pay the holder the sum therein specified. If the acceptor meant to be bound only on one of the set, he should have accepted that one. The holder was not bound to make any inquiry, or take any notice of the others.

16 Pet. 205; Chit. Bills, 155; *Holdsworth* v. *Hunter,* 10 B. & C. 444; Story, B. § 226; Byles, Bills, 293, 294.

II. The words "second of exchange, first unpaid" were directions given by the drawer to the acceptors, to notify them of the series and put the acceptors on their guard as to the extent of acceptance. But their own acceptance constitutes the contract of the acceptors, and by it they bound themselves to pay the holder of that identical paper the sum specified therein.

Wells v. *Whitehead,* 15 Wend. 527; *Downes* v. *Church,* 13 Pet. 205.

"The bona fide holder of any one of the set, if accepted, might recover the amount of the acceptor."

Sto. Bills, sec. 226; Byles, Bills, 310; Chit. Bills, 155; *Holdsworth* v. *Hunter,* 10 B. & C. 444.

III. There were no firsts of the bills held by the Bank of Pittsburgh. The agent to whom they were delivered in blank made a distinct bill of each blank; and each being accepted, the acceptors are chargeable to any bona fide holder into whose possession they might come.

See Chit. Bills, 11th Amer. from 9th London ed., marg. pp. 155, 156; Byles, Bills, marg. pp. 310, 311; Story, Bills, § 226; see, also, *Holdsworth* v. *Hunter,* 10 B. & C. 444; *Wells* v. *Whitehead,* 15 Wend. 527; *Downes & Co.* v. *Church,* 13 Pet. 205.

If the defendants accepted the bills as filled up not to correspond, and delivered them to the payee so accepted, to be put in circulation, and he circulated, the different parts to different persons, for value, before due, 'tis the same as if the defendants themselves had circulated them. They are to be taken to have accepted the bills after the filling up, and are not permitted to show the contrary, as against bona fide holders.

I refer to *Montague* v. *Perkins,* 22 Eng. L. & Eq. 516; *Hallifax* v. *Lyle,* 3 Exch. 446; *Schultz* v. *Atsley,* 2 Bing. N. C. 544; Reported 29 Eng. Com. Law, 414; *Russell* v. *Langstaffe,* 2 Doug. 514; *Violett* v. *Patton,* 5 Cranch, 142; *Putnam* v. *Sullivan,* 4 Mass. 45; Byles, Bills, marg. p. 103; Chit. Bills, same edition as above, pp. 29 and 214; Sto. Prom. N. § 122; and *Holdsworth* v. *Hunter,* above cited; 1 Greenl. Ev. § 207; *Trevivian* v. *Laurence,* 6 Mod. 256.

But it is alleged that the plaintiff was guilty of negligence in not making inquiry for the first parts of said bill, and that such inquiry would have elicited the facts in the case; but mere negligence is not sufficient to defeat the title of the holder of commercial paper.

See Chit. Bills, edition as above, p. 256; 1 Smith, L. C. pp. 512-524; *Goodman* v. *Harvey,* 4 Ad. & E. 870; 31 Eng. Com. Law, 212; *Uther* v. *Rich,* 10 Ad. & E. 784; 2 Greenl. Ev. § 639.

If, however, the bills sued on are the defendants' separate acceptances, there can be no question of negligence arising in the case; and they are the defendants' acceptances or

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will be his security.' It does not lie in his mouth, to say the indorsements were not regular."

In this case the defendant had indorsed his name on the back of five copperplate checks, made in form of promissory notes, but blank as to times of payment, sums or dates, and Galley, the holder, had filled them up as his own notes with different sums, dates, and times of payment, and the indorser was held bound to the plaintiff who had discounted them. This seems to be a leading case, and has been quoted and followed as a precedent, applying equally to maker, indorser, acceptor and drawer. Usher v. Dauncey, 4 Camp. 97; Bulkley v. Butler, 2 Barn. & Cress. 425; Powell v. Duff, 3 Camp. 182; Schultz v. Astley, 20 Eng. C. L. 414; Mahone v. Central Bank, 17 Ga. 111; Fullerton v. Sturges, 4 Ohio, N. S. 530; Bank of Commonwealth v. Curry, 2 Dana, 142; Bank of Limestone v. Perrick, 5 T. B. Mon. 25; Jones v. Shelbyville Ins. Co. 1 Met. 58; Mich. Ins. Co. v. Leavenworth, 30 Vt. 11; Androscoggin Bank v. Kimball, 10 Cush. 373; Nichol v. Bate, 10 Yerg. 429; Ives v. Farmers' Bank, 2 Allen, 236.

Where one person intrusts to the custody of another a negotiable instrument, with blanks not filled up such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such person and innocent third parties the person to whom it was so intrusted must be deemed the agent of the party who committed it to his custody. Bank of Pittsburgh v. Neal, *supra;* Davidson v. Lanier, 71 U. S. (4 Wall.) 457.

Where papers indorsed in blank were left with a clerk with authority to use them for certain purposes and they were fraudulently obtained from him and used differently, the indorser is liable. Putnam v. Sullivan, 4 Mass. 45; 1 Parson on N. & B. 114.

Where the agent or person to whom paper is intrusted, which is complete except that the sum is left blank, fills in a sum, the parties who signed, accepted or indorsed the same, would be bound to pay any sum, for which it might be filled up, whether in excess of the sum for which he authorized it to be filled or not to a bona fide holder without notice of any limitation upon the authority of the person having it, and it is immaterial that the holder knew it was signed, accepted or indorsed in blank unless he knew of its being fraudulently filled up. Mich. Bank v. Eldred, 76 U. S. (9 Wall.) 544; Violett v. Patton, 5 Cranch, 142; Orrick v. Colston, 7 Grat. 189; Fullerton v. Sturges, 4 Ohio St. 530; Redlick v. Doll, 54 N. Y. 236; Huntingdon v. Branch Bank, 3 Ala. 186.

If the date is left blank, and an improper date is inserted by a holder, an indorser will be bound to a bona fide holder without notice. Page v. Morrel, 3 Abb. C't of App. Dec. 433.

Where the holder of a note in blank filled it up and negotiated it for a larger amount than was indicated by the marginal figures, it was held this did not vitiate the note, though he also altered the figures. Schryver v. Hawkes, 22 Ohio St. 308.

Where paper was drawn in the form of a blank bill of exchange, and was filled up as a negotiable note, by the party for whom it was drawn, the party who signed the blank was held liable. Luellen v. Hare, 32 Ind. 211.

Where the indorsee inserted a provision in a note

they are entire forgeries. But the defendants do not pretend that their signatures are forgeries, and nothing short of this will be a defense for them as against the bona fide holders. If forgeries, the forgery was committed by Reynolds, to defraud the defendants, not the plaintiffs. because they delivered him a blank paper, but with their genuine signature thereon, as acceptors of bills of exchange, and thereby enabled him to fill up the instruments in a different manner than that which they directed. But in filling up he is their general agent, and the filling up is to be taken to be done by the defendants themselves, when the paper gets into the hands of holders in good faith, for value before due, and they are not permitted to shield themselves from responsibility by saying that the bill is a forgery.

See Byles, Bills, marg. pp. 103, 156, and 266; Chit. Bills, ed. above, marg. pp. 261 and 638; *Morrison* v. *Buchanan*, 6 C. & P. 25 Eng. Com. Law, 258; *Young* v. *Grote*, 4 Bing. 253, above; *Farr* v. *Ward*, 2 Mees. & W. 844; Story, Bills, §§ 113, 441; Edw. Bills, p. 14.

Messrs. **R. W. Thompson** and **W. M. Dunn**, for defendants in error:

We feel confident that the well-established rules of law will in this case charge the plaintiff with constructive notice, and withhold from her the benefit of the estoppel contended for, and as the argument would be substantially the same, whether the act complained of was a forgery as against one holding the notice, or simply a fraud, we will not assume the task of defining the true legal character of the act. The general rule that a party executing a bill or note in blank as to date, amount, or otherwise, is responsible to a bona fide holder without notice for any fraudulent use that may be made of such blank by the person intrusted with the paper, we of course admit. Such responsibility results from a principle of general applicability in cases of agency over which the principal is held responsible to the extent to which he has accredited his agent. The doctrine of estoppel, when applied in such instances, rests upon the same reason, and is in effect the same thing. The party putting out the instrument in blank, is estopped to say that he did not originally execute it in the form in which it finally appears, whenever an innocent person, without any fault of his own, would otherwise suffer.

We think, however, that the facts of this case do bring the plaintiff within the operation or the reason of this principle. The statement of the law laid down by the opposing counsel, as to which of two innocent partners must suffer by the fraud or negligence of a third, is substantially correct; but it keeps too much in the background one constituent principle, that we think excludes the case in question from its operation.

It is this: that the act of the party giving the credit must be such as is reasonably calculated to deceive—that the party claiming the protection of this principle must himself have acted with reasonable circumspection, and must have been subjected to the loss, notwithstanding the use of such reasonable circumspection.

Baker v. *Sterne*, 25 Eng. L. & Eq. 502; *Pickard* v. *Sears*, 6 Ad. & E. 469; S. C. 33 Eng. Com. L. 115.

In 2 Smith, L. C. 4 Am. ed. Hare & Wallace, 571, the editors, in speaking of the fact that an acceptor is estopped to deny the genuineness of the bill as originally drawn, say that this estoppel "is marked by much of the naked severity of circumstance and application which marked estoppels at common law." We cannot, however, see any peculiarity that distinguishes this in principle from other cases of estoppel *in pais*, or why it should be said to be marked with "naked severity." The drawee is reasonably presumed to know the handwriting of the drawer, who is his immediate correspondent. He should not pay the bill without being satisfied that it is genuine. If he does pay and the draft proves a forgery, he is guilty of negli-

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making it payable at a certain bank, in spite of an agreement with the makers that it should not be made payable at bank, it was held that the holder could recover. Spitler v. James, 32 Ind. 203.

A party who makes a blank acceptance or signs his name on a blank paper and delivers it to another person to be overwritten with a note, gives an implied authority to fill up the instrument; and he is liable thereon to the party receiving it honestly and for value, though filled up for a larger amount than was actually authorized and in a different manner. Van Duzer v. Howe, 21 N. Y. 531; Griggs v. Howe, 31 Barb. 100; Young v. Ward, 21 Ill. 223; Goodman v. Simonds, 61 U. S. (b. 15) 934.

The holder may fill in the name of the payee where it is left blank. He may fill in his own name, or where it was delivered to a person who indorsed it in blank, the holder may fill in the name of the indorser in the body and then complete the indorsement by filling it up to himself. Crutchley v. Clarence, 2 Maule & S. 90; Brumel v. Enders, 18 Grat. 905; Crutchley v. Mann, 5 Taunt. 529, 1 Eng. C. L. 179; Nelson v. Cowing, 6 Hill, 336; Pindar v. Barlow, 31 Vt. 539; Elliott v. Chesnut, 30 Md. 562; Hardy v. Morton, 66 Barb. 533; Dinsmore v. Duncan, 57 N. Y. 573; Atwood v. Griffin, 2 Carr. & P. 368.

While the bill or note is blank as to the payee, the holder cannot sue upon it as bearer; he must insert his name as payee. Greenhow v. Boyle, 7 Blackf. 56; Seay v. B'k of Tenn. 3 Sneed, 558; Rees v. Canocochegue Bank, 5 Rand. 326.

The following

$1,585.90. BROOKLIN, September 20, 1858.

———after date ——— promise to pay to the order of ———, Dec. 23, ——— dollars at ———.

Value received. GEO. R. IVES

was delivered to Yale as a memorandum and not to be used as a note. Yale filled it up as a note for $1,585.90 payable to his own order at the Atlantic Bank, New York, and indorsed it to plaintiff who discounted it. It was held that all evidence as to any agreement between the original parties was inadmissible and the holder was entitled to recover. Ives v. Farmers' Bank, 2 Allen, 236.

If a holder exceed his authority in filling up a blank, he can have no benefit from it, even to the extent of his authority, and a holder who knows when he takes such paper that the authority to fill it up has been exceeded or departed from, cannot recover. What charges the transferee with notice, is a matter on which authorities differ. Wagner v. Diedrick, 50 Mo. 484; Van Duzer v. Howe, 21 N. Y. 531; Putnam v. Sullivan, 4 Mass. 45; Davidson v. Lanier, 71 U. S. (4 Wall.) 456; Hatch v. Searles, 2 Sm. & Gif. 147; Johnson v. Blasdale, 1 Sm. & M. 17; Hemphill v. B'k of Ala. 6 Sm. & M. 44; Byles, p. 182; Chitty on Bills, p. 29; Orrick v. Colston, 7 Grat. 189; Story on Bills, § 222; Parsons on N. & B. 109; Edwards on Bills & Notes, 252, 253.

Where a person simply writes his name upon a piece of blank paper, with no intention that a contract should be written over it, as for use in identifying his signature, and a note is written or printed over it by the person into whose hands it comes, and the same is passed into the hands of third parties, it has been held, there can be no recovery. Caulkins v. Whisler, 29 Iowa, 495; Nance v. Lary, 5 Ala. 370.

gence, and for that reason the law will not grant him recovery.

He should not accept without being satisfied that the drawer is competent to draw, and that his signature is genuine. By the act of accepting, he admits these things. Between a casual purchaser in market of the bill and the drawer, there is no privity. They are probably strangers to each other, and in case of a foreign bill, residents of different states. Such purchaser, then, may reasonably act upon the faith of the admission implied in the acceptance; and as against him, the acceptor should not be allowed to say that the draft was forged. But this reason would cease in cases where the holder is privy to the fraud, or affected with notice of it, and in such case there is no estoppel.

Bank of Commerce v. *Union Bank*, 3 N. Y. 230. Such estoppel, then, falls plainly within the ordinary principle of estoppel *in pais*, without resorting to any supposed peculiarity of the commercial law.

We submit, as a clear deduction from the authorities. that if the officers of the Bank of Pittsburgh, in purchasing this paper, failed to use ordinary and reasonable prudence, and if the paper as intrusted by the defendants to Reynolds, was not in such condition or of such kind as to enable Reynolds to practice the fraud, notwithstanding the exercise of ordinary and reasonable prudence by the plaintiff, then the defendants are not concluded by their acceptance.

All the representations made by the defendants, upon which plaintiff claims to have acted and out of which she claims an estoppel arises, are contained in the paper itself. It purports to be one of a set only. Plaintiff claims we are estopped to say it was not a single bill. It refers on its face to another part. Plaintiff says we are estopped to say there was another part. It purports on its face to be payable conditionally. Plaintiff claims we are estopped to say it was not payable absolutely.

The plaintiff's proposition, expressed in mathematical fashion, would just amount to this: that having represented a thing as a part, the defendants are, therefore, estopped to deny that it is a whole.

Holsworth v. *Hunter*, 21 Eng. C. L. 110, is cited but it gives no countenance to the proposition. In that case the bill was drawn at Calcutta, by McKenzie & Co., on James Hunter, Jr., & Co., at London, payable to W. Hunter & Co., in three parts, James Hunter, Jr., was a common member of the two firms, drawees and payees, and therefore empowered to deal with the bill in the double capacity of acceptor and indorser.

It is urged, however, that the drawee should accept but one part of a bill drawn in a set, and that that part, when so accepted, becomes the bill; that any third person seeing it has a right to presume it to be the only accepted part, and is justified in purchasing it without inquiring after the other parts; that by accepting all the parts, the drawee becomes liable as upon so many different bills.

The following authorities are cited, as tending to establish this position: Chit. Bills, 11 Am. from 9th London ed. 155, 156; Byles, Bills, marg. pp. 310, 311; Story, Bills, § 226; *Holdsworth* v. *Hunter*, *supra*; *Wells* v. *Whitehead*, 15 Wend. 527; *Downes* v. *Church*, 13 Pet. 205.

Each of the above text-books contains a *dictum* seeming to favor the proposition, but neither of the three cases cited has any tendency to sustain it. If these *dicta* in the text-books are to be understood as anything stronger than mere recommendation, we submit that they are unsustained by authority, that they are inconsistent with the theory of this species of commercial paper, and at variance with general commercial usage.

Chitty says: "It is laid down that unless the drawee has accepted another payment of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others. But that if one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may, therefore, refuse to pay the bearer of the unaccepted part, and may compel him, if he suggests that he has lost the accepted part, to find caution or sureties against his liability to pay the accepted part."

We know of no authority in this country or in England, sustaining this part of the *dictum* above quoted, and we feel somewhat secure in saying there is none.

Chitty deduces it as an inference from an untenable legal proposition; Story, rejecting the proposition, perpetuates the inference; Byles repeats it on the authority of *Holdsworth* v. *Hunter*—an authority that condemns it; and all of them put it as matter of recommendation and caution, rather than peremptory law.

It seems to have been first advanced on the supposed authority of Pardessus, and to have acquired the support of no additional authority since that time, except it may be unconsidered repetition. Perhaps it may be in accordance with commercial usage in France, or perhaps it results from an error in not carefully adverting to the distinctions recognized in that country, between the rules and usages applicable to bills drawn in sets, and single bills attending copies.

(Counsel then examined the theory and reason of sets of exchange, citing Story on Bills, section 66, and contended that the plaintiff's theory would defeat this purpose.)

Perhaps the most satisfactory argument against the proposition that the drawer is allowed to accept but one part, is that the facts of commerce are against it.

See 4 Bac. Abr. Merchant and Merchandise. M. 685.

If, then, it can be recognized as a general mercantile usage to accept all the parts, the plaintiff in this case cannot say that she had a right to presume that this second part, which she purchased, was the only accepted part, and therefore itself a bill of exchange.

It remains to be inquired, whether enough appeared upon the face of the bill to put her upon notice as to the other part. The early doctrine on this subject in England, seems to have required *mala fides*.

Lawson v. *Weston*, 4 Esp. 56.

But in *Gill* v. *Cubitt*, 3 B. & C. 466, it was held that if the holder took the bill under circumstances that ought to have excited the suspicion of a prudent and careful man, he could

not recover, if the party from whom he received it had no title.

Gill v. *Cubitt* was subsequently overruled in England, but the American authorities adopted its principle. The question has not, so far as we know, been in terms passed upon by this court.

See, however, *Fowler* v. *Brantly*, 14 Pet. 318; *Cummins* v. *Mead*, 6 Am. Law Jour. No. 1; 3 Kent, 81, 82; *Cone* v. *Baldwin*, 12 Pick. 545; *Safford* v. *Wyckoff*, 4 Hill. 444; *Pringle* v. *Phillips*, 5 Sand. 157; *Coffin* v. *Anderson*, 4 Blackf. 408.

The plaintiff, therefore, is chargeable with notice, if her officers neglected to make such inquiries as a reasonable prudence would have suggested.

Counsel then argued that the words "second of exchange, first unpaid," were sufficient to put the plaintiff upon inquiry, citing Byles, Bills, 3 Am. from 6 London ed. p. 439; *Lang* v. *Smyth*, 7 Bing. 284; Story, Bills, §§ 67, 226; Bay Bills, 20 Am. from 5 London ed. pp. 24, 147; *Boyd* v. *Plum*, 7 Wend, 309; *Fowler* v. *Brantly*, 14 Pet. 318.

Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Indiana. All of the questions presented in this case arise upon the pleadings and the facts therein disclosed. It was an action of *assumpsit*, brought by the plaintiff in error as the holder of two certain bills of exchange, against the defendants as the acceptors. An amendment to the declaration was filed after the suit was commenced. As now exhibited in the transcript, it contains four counts. Two of the counts were drawn up on the respective bills of exchange, and are in the usual form of declaring in suits, by the holder of a bill of exchange against the acceptor. Those contained in the amendment are special in form, setting forth the circumstances under which the respective bills of exchange were drawn, accepted, and negotiated, and averring **105*]** that these *acts were subsequently ratified by the defendants. To the merits of the controversy the defendants pleaded the general issue, and filed seven special pleas in bar of the action. Demurrers were filed by the plaintiff to each of the special pleas, which were duly joined by the defendants, and after the hearing, the court overruled all the demurrers. Those filed to the pleas responsive to the first and second counts were overruled, upon the ground that the pleas were sufficient, and constituted a good bar to the action; but those filed to the fifth, sixth, seventh, and eighth pleas were overruled, upon the ground that the third and fourth counts, to which those pleas exclusively applied, were each insufficient in law to maintain the action. Whereupon, the plaintiff abiding his demurrers, the court directed that judgment be entered for the defendants, and the plaintiff sued out a writ of error, and removed the cause into this court. It being very properly admitted, by the counsel of the defendants, that the first and second counts of the declaration are in the usual form, it is not necessary to determine the question as to the sufficiency of the third and fourth, and we are the less inclined to do so, from the fact that the counsel on both sides expressed the wish, at the argument, that the decision of the cause might turn upon the question, whether the plaintiff, on the facts disclosed in the pleadings, was entitled to recover against the defendants. That question is the main one presented by the pleadings; and inasmuch as it might well have been tried under the general issue, we think it quite unnecessary to consider any of the incidental questions which do not touch the merits of the controversy. Special pleading in suits on bills of exchange and promissory notes ought not to be encouraged, except in cases, where, by law, the defense would otherwise be excluded or rendered unavailing. Full and clear statements of the facts as disclosed in the pleadings, were presented to the court, at the argument, by the counsel on both sides. They are substantially as follows: In June, 1857, the defendants, residents of Madison, in the state of Indiana, being desirous of procuring a loan of money, made their certain acceptances in writing of two blank bills of exchange, in sets of two *parts to each bill, and transmitted the [*106 four blanks, thus accepted, to their correspondent, Lot O. Reynolds, then and still residing at Pittsburgh, in the state of Pennsylvania. Both sets of blanks were in the form of printed blanks usually kept by merchants for bills of exchange in double sets, except that each of the four was made payable to order of the correspondent to whom they were sent, and was duly accepted on its face by the defendants, in the name of their firm. They were in blank as to the names of the drawers and the address of the drawees, and as to date, and amount, and time, and place of payment. When the defendants forwarded the acceptances, they instructed their correspondent to perfect them as bills of exchange, by procuring the signatures of the requisite parties, as accommodation drawers and indorsers, and to fill up each with the appropriate date, and with sums not less than $1,500 nor more than $3,000, payable at the longest period practicable, and to sell and negotiate the bills as perfected, for money, and remit the proceeds to the defendants. Afterwards, in the month of July, of the same year, the defendants, at the request of the person to whom those acceptances were sent, made four other similar acceptances, and delivered them to him, to be sold and negotiated as bills of exchange, in double sets for his own use, and with power to retain and use the proceeds thereof for his own benefit. They were in all respects the same, in point of form, as the four acceptances first named, and like those, each of the four parts was made payable to the order of the person at whose request they were given, and was duly accepted by the defendants in the name of their firm. When they delivered the sets last named, they authorized the payee to perfect them as bills of exchange, in two parts, in reasonable amounts, and with reasonable dates. Eight acceptances were thus delivered by the defendants to the same person, corresponding in point of form to four bills of exchange, but with blanks for the names of the drawers and the address of the drawees, and for the respective amounts, dates, and times and places of payment. Four contained, in the printed form of the blanks, the words, "first of exchange, second unpaid;" and the other four contained in *the corre- [*107

sponding form the words, "second of exchange, first unpaid;" but in all other respects they were alike. All of the first class were perfected by the correspondent as bills of exchange of the first part, and were sold and negotiated by him at certain other banks in the city of Pittsburgh. He perfected them by procuring L. O. Reynolds & Son to become the drawers, addressed them to the defendants, indorsed them himself in blank, and procured another individual or firm to become the second indorser. They were filled up by him for sums varying from about $2,000 to $3,000, with dates corresponding to the times when they were negotiated, and were respectively made payable in four months from date. Contrary to his instructions, he retained the proceeds of the one first negotiated, which he had been directed to remit; and he also retained in his possession, but without inquiry or complaint on the part of the defendants, the other four acceptances, constituting the second class. On the 1st day of August, 1857, he perfected and filled up as a separate bill of exchange one of the last named acceptances, and sold and negotiated it to the plaintiff for his own use and benefit. He also perfected and filled up, on the eighteenth day of the same month, another of the same class, in the same manner, and for the same purpose, and on the same day sold and negotiated it to the plaintiff. Both of these last mentioned bills of exchange vary from those of the first class, not only in dates and amounts, but also as to time and place of payment, and are in all respects single bills of exchange. They were each received and discounted by the plaintiff, without any knowledge whatever that either had been perfected and filled up by the payee without any authority, or of the circumstances under which they had been intrusted to his care, unless the words, "second of exchange, first upaid," can be held to have that import.

In all other respects, the bills must be viewed precisely as they would be if they had been perfected and filled up by the defendants, and for two reasons, deducible from the decisions of this court.

First. Because, where a party to a negotiable **108*]** instrument *intrusts it to the custody of another with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or, in other words, it is the act of the principal, and he is bound by it. *Goodman* v. *Simonds*, 20 How. 361; *Violett* v. *Patton*, 5 Cranch, 142.

Second. Because a bona fide holder of a negotiable instrument, for a valuable consideration, without notice of the facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. *Swift* v. *Tyson*, 16 Pet. 15; *Goodman* v. *Simonds*, 20 How. 363.

Applying these principles, it is obvious that the only question that arises on this branch of the case is as to the effect of the words, "second of exchange, first unpaid," which appear on the face of the bills. That question, under the circumstances of this case, is a question of law, and not of fact for the jury. Three decisions of this court sustain that proposition; and in view of that fact, we think it unnecessary to do more than refer to those decisions, without further comment in its support. *Andrews* v. *Pond et al.* 13 Pet. 65; *Fowler* v. *Brantly*, 14 Pet. 318; *Goodman* v. *Simonds*, 20 How. 366.

Another principle, firmly established by this court, and closely allied to the question under consideration, will serve very much to elucidate the present inquiry. In *Downes et al.* v. *Church*, 13 Pet. 207, this court held, that either of the set of bills of exchange may be presented for acceptance, and if not accepted, that a right of action presently arises, upon due notice, against all the antecedent parties to the bill, without any others of the set being presented; for, say the *court, it is by no means [*109 necessary that all the parts should be presented for acceptance before a right of action accrues to the holder.

Now, if either of the set may be presented, and when not accepted a right of action immediately ensues, it is difficult to see any reason why, if upon presentation the bill is accepted, it is not competent for the indorsee to negotiate it in the market; and clearly, if the indorsee may properly negotiate the bill, a bona fide holder for value, without notice, may acquire a good title. In this connection, Mr. Chitty says that "unless the drawee has accepted another part of a bill, he may safely pay any part that is presented to him, and that a payment of that part will annul the effect of the others; but if one of the parts has been accepted, the payment of another unaccepted part will not liberate the acceptor from liability to pay the holder of the accepted part, and such acceptor may, therefore, refuse to pay the bearer of the unaccepted part;" from which he deduces the rule, that a drawee of a bill drawn in sets should only accept one of the set. Chitty on Bills (10 Am. ed. by Barb.) 155.

Mr. Byles says: "The drawee should accept only one part, for if two accepted parts should come into the hands of different holders, and the acceptor should pay one, it is possible that he may be obliged to pay the other part also;" which could not be, unless it was competent for the holder of a second part to negotiate it in the market. Byles on Bills, p. 310.

Where the drawee accepted and indorsed one part to a creditor, as a security, and afterwards accepted and indorsed another part for value to a third person, but subsequently substituted another security for the part first accepted, it was held, in *Holdsworth* v. *Hunter*, 10 Barn. & C. 449, that, under these circumstances, the holder of the part secondly accepted was entitled to recover on the bill; and Lord Tenterden and Baron Parke held that the acceptor would have been liable on the part secondly accepted, even if the first part had been indorsed and circulated unconditionally.

Judge Story says, in his work on bills of exchange, that the *bona fide holder of any [*110

one of the set, if accepted, may recover the amount from the acceptor, who would not be bound to pay any other of the set which was held by another person, although he might be the first holder. Story on Bills, § 226.

No authority is cited, for the defendant, to impair the force of those already referred to; but it is not necessary to express any decided opinion upon the point at the present time. Suffice it to say, that in the absence of any authority to the contrary, we are strongly inclined to think that the correct rule is stated by Mr. Chitty, and that such is the general understanding among mercantile men.

But another answer may be given to the argument for the defendant, which is entirely conclusive against it; and that is, that the bills described in the first and second counts were not parts of sets of bills of exchange. They were perfected, filled up, and negotiated by the correspondent of the defendants, to whom the blank acceptances had been intrusted as single bills of exchange; and for the acts of their correspondent, in that behalf, the defendants are responsible to a bona fide holder for value, without notice that the acts were performed without authority.

When the transaction is thus viewed, as it must be in contemplation of law, it is clearly brought within the operation of the same rule as it would be if the defendant himself had improvidently accepted two bills for the same debt. In such cases, it is held, that the acceptor is liable to pay both, in the hands of innocent holders for value. *Davison* v. *Robertson*, 3 Dow. P. C. 228.

Lord Eldon, said, in that case: "Here were two bills for the same account, and supposed to be for the same sums; they who were to pay them had a right to complain that there were two, and yet they were bound to pay both, in the hands of bona fide holders, if accepted by them or by others for them, having authority to accept."

To suppose, in this case, that the words "second of exchange, first unpaid," import knowledge to the plaintiff that the bills were drawn in sets, would be to give them an effect contrary to the averments of the defendants' pleas, as 111*] well as *contrary to the admitted fact that they were not so drawn; and for those reasons the theory cannot be sustained.

In view of all the facts, as disclosed in the pleadings, we think the case clearly falls within the operation of the rule, generally applicable in cases of agency, that where one of two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit. *Fitzherbert* v. *Mather*, 1 Term. 16, per Buller; *Androscoggin Bank* v. *Kimball*, 10 Cush. 373; *Montague* v. *Perkins*, 22 Eng. L. & Eq. 516.

Business men who place their signatures to blanks, suitable for negotiable bills of exchange or promissory notes, and intrust them to their correspondents, to raise money at their discretion ought to understand the operation and effect of this rule, and not to expect that courts of justice will fail in such cases to give it due application.

According to the views of this court, the demurrers to the several pleas filed to the first and second counts of the declaration should have been sustained. Having come to that conclusion, it is unnecessary to examine the other propositions submitted on behalf of the defendants.

The judgment of the Circuit Court is, therefore, reversed, with costs, and the cause remanded, with directions to enter judgment for the plaintiff, as upon demurrer, on the first and second counts of the declaration.

THE INSURANCE COMPANY OF THE VALLEY OF VIRGINIA, *Plffs. in Err.*, *v.* MOSES C. MORDECAI.

(See S. C. 22 How. 111-118.)

Marine insurance—total loss, what is—question not made in court below, cannot be entertained here.

In suit on a policy of insurance on the freight of a vessel, on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States, held, that the loss of the freight on the return voyage was a total loss, and the plaintiff was entitled to the whole amount underwritten.

A question not made on the trial, or presented to the court below for decision, cannot be entertained here.

The insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation.

Argued Feb. 23, 1860. Decided Mar. 12, 1860.

IN ERROR to the Circuit Court of the United States of the District of South Carolina.

This action was brought in the court below, by the defendant in error, on a policy of insurance for $4,000.

The trial in the court below resulted in a verdict and judgment in favor of the plaintiff for $4,546, including interest and costs, whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court:

Mr. **Con. Robinson,** for plaintiff in error:

The court erred in charging the jury "that upon the case as above stated, the plaintiff was entitled to recover the whole amount underwritten by the defendants;" for,

1. The plaintiff was entitled to recover nothing. The case stated must be looked at with reference to the case alleged; memorandum signed by the agent, must be taken in connection with the blank policy set forth in the declaration, and that policy has this material clause: "it is also agreed that if the abovenamed vessel, upon a regular survey, should be declared unseaworthy by reason of her being

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NOTE.—*Marine insurance; what is a total loss*—see note to Great Western Ins. Co. v. Fogarty, 22 L. ed. U. S. 216.

Insurance; different kinds of policies. Valued policy.

Policies of insurance are divided with reference to the reality of interest into (1) *interest* and (2) *wager* policies.

1. An *interest* policy is where the insured has a real, substantial, assignable interest in the thing insured.

2. A *wager* policy is a pretended insurance,

unsound or rotten, or incapable of her prosecuting her voyage on account of being unsound or rotten, then the assurers should not be responsible on this policy.

See *Dorr* v. *Pacif. Ins. Co.* 7 Wheat. 610; *Janney* v. *Columbian Ins. Co.* 10 Wheat. 418.

Independent of the clause above relied on, the doctrine is well established, that in all voyage policies there is an implied warranty of seaworthiness.

Fawcus v. *Sarsfield*, 6 El. & B. 201; *Hazzard* v. *N. E. Mar. Ins. Co.* 8 Pet. 581; 4 Dow. 276; 1 Dow. 344; 2 Casey, 192.

With respect to insurance upon freight, the rule was laid down by Nelson, J., in 7 How. 604: "If the damage happens to the vessel and that can be repaired at the port of distress, in a reasonable time, and at a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight. In every case, before he can recover of the underwriter, he must show that he was prevented, by one of the perils insured against, from completing the voyage, and for that reason that failed to entitle him to the freight from the shippers." The present is a far stronger case against the surety than the cases where after the commencement of the risk, damage or loss occurs to the vessel, which renders it unseaworthy, and the master, having made a port where such damage might be repaired, neglects to have the same repaired, and the vessel is afterwards lost in consequence of unseaworthiness. In such cases it is held, that the effective cause of the loss is the neglect of the master to make the repairs which would have prevented it.

Cudworth v. *S. C. Ins. Co.* 4 Rich. 420; *Gen. Mut. Ins. Co.* v. *Sherwood*, 14 How. 365; see, also, 1 Kern. 19, 22; 1 Bosw. 68, 76; 6 El. & B. 203, 204.

If the plaintiff was entitled to anything, his judgment is far too much.

The contract of insurance is one of indemnity. *Charleston Ins. & Trust Co.* v. *Corner*, 2 Gill, 427, 428; *Franklin F. Ins. Co.* v. *Hamill*, 6 Gill, 95.

Here the bill of exceptions does not show a case of a valued policy, as in *Davy* v. *Hallett*, 3 Cai. 19, and *Patapsco Ins. Co.* v. *Biscoe*, 7 Gill & J. 294, but an open policy, as in *Maitland* v. *Ins. Co.* 3 Rich. 332. No doubt the policy was for the whole voyage round, as in *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 386, 387. But treating the policy as open, the recovery could only be in respect of 3,800 bags of coffee, at a freight of 79 cents per bag, amounting at most to $3,002.09. And then it might be a question, whether from this there should not be a deduction in respect of the freight earned on the outward voyage from Charleston to Rio de Janeiro.

Robertson v. *Marjoribanks*, 2 Stark. 573. To avoid such deduction, the plaintiff has to insist that the freight insured is to be regarded as not on "one entire voyage" from Charleston to Rio de Janeiro, and thence to a port of discharge in the United States, but upon "separate voyages" out and back, as in *Hugg* v. *Augusta Ins. & Banking Co.* 7 How. 610. This last position the appellants are not disposed to controvert; for, treating the voyage, from Rio de Janeiro to a port of discharge in the United States, as a "separate voyage," then, according to the opinion of Bosworth, J., in *Van Valkenburg* v. *Astor Mut. Ins. Co.* 1 Bosw. 66, the policy is, in effect, a distinct insurance for each separate voyage, and there is an implied warranty of the seaworthiness of the vessel, not only at the time of commencing the voyage from Charleston to Rio de Janeiro, but also at the time of commencing the voyage from Rio de Janeiro to a port of discharge in the United States.

In every aspect, it is submitted that the judgment should be reversed, the verdict set aside, and a new trial ordered, with proper instruction to the jury.

Mr. **P. Phillips**, for defendant in error:

Two questions only were presented by the appellants to the court below.

After a very brief statement of the case, the bill of exceptions says: "Whereupon the counsel for defendant insisted that the policy was an open policy, and the insurers liable for only $1,000, to which the court ruled and so instructed the jury, that the agreement proved was for a valued policy. Then the defendant insisted that the $4,000 having been insured on the round voyage, the insurers, from the evidence, were liable only for one half the sum insured, the other half being covered by freight of the outward voyage; and prayed the court so to instruct the jury."

This second prayer was refused, and the judge charged "that the loss of the freight was a total

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founded on an ideal risk, where the insured has no interest in the thing insured, and can, therefore, sustain no loss by the happening of any of the misfortunes insured against. Bouvier's L. Dict.; Marshall on Ins. p. 199.

With reference to the amount they are distinguished into (1) *open* and (2) *valued*.

1. An *open* policy is one in which the amount of the interest of the insured is not fixed by the policy. If the subject insured is not estimated at any particular amount or rate, in the contract, it is an open policy. Phillips on Ins. § 1178; Marshall on Ins. p. 199.

By an "open" policy is also sometimes meant, in the United States, one in which an aggregate amount is expressed in the body of the policy and the specific amounts and subjects are to be indorsed from time to time. 12 La. Ann. 259; 19 N. Y. 305; 6 Gray, 214.

2. A *valued* policy is where a value has been set on the ship or goods insured, and that value inserted in the policy in the nature of liquidated damages. By allowing the value to be thus inserted in the policy, the insurer agrees that it shall be taken as there stated. Marshall on Ins. p. 199; Phillips on Ins. § 1178; Bouvier's L. Dict. Tit. Policy; Bisset on Marine Ins. p. 263; Snell v. Del. Ins. Co. 1 Wash. 509.

To constitute a valued policy there is inserted in the policy some such clause as the following, "380 Kegs of Tobacco worth 9,600 dollars." "In case of loss the said ship is valued 2,000*l.* and the said goods at 5,000*l.*" "The said ship, goods, &c., valued at the sum insured." "The said ship, &c., goods and merchandises, &c., for so much as it concerns the assured, by agreement between the assured and the assurers in this policy, are and shall be valued at ——" or after description of the subject insured the words "valued at,"—(amount.) Phil. on Ins. § 1180; Harris v. Eagle Ins. Co. 5 Johns. 368; Bisset on Mar. Ins. p. 263; Marsh. on Ins. p. 200.

If the valuation is intended to cover an illegal subject or risk, or is fraudulent, it will be void. In cases of fraudulent over-valuation, the valuation is not binding. Lewis v. Rucker, 2 Burr. 1167; Haigh v. De la Cour, 3 Camp. 319; Aikin v. Miss. Mar. & F. Ins. Co. 4 Mart. N. S. 661; Marshall v. Parker, 2 Camp. 69; 12 Mass. 75; 3 Caines, 16.

Where the valuation is subject to some objection, which does not infect the whole contract, it may be

loss, and that upon the case as above stated, the plaintiff was entitled to recover the whole amount underwritten by the defendants."

To this "last-mentioned instruction, the defendant excepted." There is, therefore, but one question for review in this court, and that is the correctness of the last instruction.

As the judge's first instruction was, that "the agreement proved was for a valued policy," even if this had been excepted to, the bill of exceptions should have set forth all the evidence that was given on that point. It must show this in express terms, or by equivalent averments, which would exclude the conclusion that there was other evidence.

Where the bill admits of two constructions, that will be adopted which is most favorable to the regularity of the judgment. All reasonable presumptions will be indulged in by an appellate court in favor of the judgment. This court, therefore, could not determine that this first instruction was wrong, for they have not all the evidence on which the judge below charged that "the agreement proved was for a valued policy," and if all the evidence was in, this question cannot here be raised, because there was no exception to that instruction.

If, however, we take the case as stated, the plaintiff is entitled to recover the full amount underwritten.

3 Cai. 42.

The second instruction, which was excepted to, raises only the question whether, on the assumption that the policy was a valued one, the amount insured was on the round voyage, or whether it was applicable to the risk of each voyage.

The defendant contended, and so asked the judge to instruct the jury, that the insurance was on the round voyage, and that they were therefore entitled to a deduction for the freight earned on the outward voyage. This was negatived in the charge, and to this "last-mentioned instruction, the defendant excepted." This excludes, with an emphasis, any intention to except to the first instruction, which declared the policy to be a valued one.

The only question, therefore, is whether this was a correct exposition of the law.

In the case of *Hugg* v. *Augusta Ins. Co.* 7 How. 610, the insurance was "on freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas, or a port in the United States, etc., to the amount of $5,000," etc.

It was insisted by defendants, that the voyage insured was one entire voyage, and that they were entitled to a deduction of the freight earned on the outward cargo from Baltimore to Rio.

But this court said: "We are of opinion, that upon a true construction of the policy, the insurance was upon every successive cargo that was taken on board in the course of the voyage out and home, and is to be applied to the freight at risk at any time, whether on the outward or homeward passage."

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of South Carolina.

The suit was brought in the court below on a policy of insurance, for $4,000, on the freight of the barque Susan, on a voyage from Charleston to Rio Janeiro, and from thence to a port of discharge in the United States.

The vessel sailed with a full cargo on the 11th June, 1855, when she was staunch and strong, and arrived at the port of Rio Janeiro, where she discharged her outward lading, and took in a return cargo, and on the 10th October, 1855, started on her return voyage, but was compelled, for want of strength and soundness, to put back to the port of departure, where she was condemned as unseaworthy, and sold, and the whole freight of the return voyage lost.

The counsel, upon this state of facts, which is all that appears *in the bill of exceptions, insisted that the policy was an open one, and the insurers liable for only $1,000; but the court instructed the jury that the agreement proved was for a valued policy. [*117

The counsel then insisted, that the $4,000 having been insured on the round voyage, the insurers, from the evidence, were liable only for one half the sum insured—the other half being covered by the freight of the outward voyage; but the court charged, that the loss of the freight on the return voyage was a total loss, and that, upon the case as it appeared, the plaintiff was entitled to the whole amount

set aside, and the policy still be a valid open one. McKim v. Phœnix Pa. Ins. Co. 2 Wash. 89; Adams v. Pa. Ins. Co. 1 Rawle, 107; Hughes v. U. Ins. Co. 8 Wheat. 294.

If the valuation is neither intended as a wager, by both parties, nor fraudulently made by the assured, it is binding on both the parties. It fixes the amount of the interest in the same manner as if the insurer were to admit it at a trial. In order to recover a loss, the assured need not prove the value. Marshall on Ins. p. 200; see cases cited above and Shawe v. Felton, 2 East, 109; Mar. Ins. Co. of Alex. v. Hodgson, 6 Cranch, 220, 7 Cranch, 332; McNair v. Coulter, 4 Browne, P. C. 450; Millar on Ins. 255; Marshall on Ins. §§ 1183, 1187; Feise v. Aguilar, 3 Taunt. 506; 2 Wash. 152; Howell v. Cincinnati Ins. Co. 7 Ham. 284.

The real value will not be closely inquired into. Miner v. Tagert, 3 Binn. 204; Hodgson v. Mar. Ins. Co. of Alex. 5 Cranch, 100, 6 Cranch, 206, 7 Cranch, 332; Feise v. Aguilar, 3 Taunt. 506.

If a party insures property expected to be shipped to a large amount upon a valued policy, and in fact ships much less, he is entitled, in case of loss, to recover a proportion *pro rata* only, notwithstanding the valuation. Alsop v. Com. Ins. Co. 1 Sumn. 451; Murray v. Col. Ins. Co. 11 Johns. 302; Post v. Phœnix Ins. Co. 10 Johns. 72; Wolcott v. Eagle Ins. Co. 4 Pick. 429; Forbes v. Aspinwall, 13 East, 323; Brook v. La. Ins. Co. 4 Mart. N. S. 640; Montgomery v. Eggington, 3 Term, 362; Riley v. Hartford Ins. Co. 2 Conn. 368; Coolidge v. Gloucester Ins. Co. 15 Mass. 341.

Weights mentioned in valuation refer to place where policy is made. Gracie v. Browne, 2 Caines, 30.

The valuation fixes the insurable interest. 2 Burr. 1167, 1171; 1 Johns. 433; 5 Johns. 368.

The valuation is to be adhered to and applied, so far as it is practicable, in settling partial as well as total losses. Lewis v. Rucker, 2 Burr. 1167; Tunno v. Edwards, 12 East, 488; Goldsmid v. Gillies, 4 Taunt. 803; Forbes v. Aspinwall, 13 East, 323; Shawe v. Felton, 2 East, 109; Emery v. Rogers, 1 Esp. 207; Phil. on Ins. § 1203.

The owner of a vessel may insure in a valued policy to two ports in the West Indies, the amount of the prime cost of the goods, together with the premium and freight to the first port. Pritchet v. Ins. Co. of N. A. 3 Yates, 458.

underwritten. To this last instruction, the counsel for defendants excepted.

The counsel for the plaintiff in error, on the argument, referred to the clause in the policy by which "it is also agreed, that if the above-named vessel, upon a regular survey, shall be declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be responsible on this policy;" and insisted that the condemnation of the vessel as unseaworthy, after returning back to the port of Rio Janeiro, brought the case within it.

But the answer to this position is, that no such question was made on the trial, or presented to the court for decision, and therefore cannot be entertained here; neither does the evidence in the case enable the counsel to raise any such question, as it does not appear that the condemnation proceeded from the causes specified in this clause of the policy. 7 Wheat. 610; 10 Wheat. 418. It is enough, however, to say, that the question, for aught that appears in the bill of exceptions, was not raised on the trial.

As it respects the question whether the policy was an open or valued one, no exception was taken to the ruling that it was a valued one. The point was not pressed, probably, as we see from a memorandum of the agents of the company in the case, that it was intended by the agreement to be a valued policy.

The remaining question, and indeed the only 118*] one presented *in the bill of exceptions, is, whether the voyage insured is one entire voyage from Charleston to Rio Janeiro, and back to the port of discharge in the United States, and consequently the underwriters entitled to a deduction of the freight earned on the outward voyage.

The court is of opinion, upon the true construction of the policy, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation.

The case in this respect is not distinguishable from *Hugg* v. *The Augusta Ins. and Banking Co.* 7 How. 595. See, also, 3 Caines, 16; 7 Gill & Johns. 293; 2 Phillips on Ins. 31, 34.

Judgment of the court below affirmed.

JUAN JOSE GONZALES, *Appt.*,
v.
THE UNITED STATES.

(See S. C. 22 How. 161-174.)

Mexican claim confirmed—omission of manner of location not erroneous.

The claim of Juan Jose Gonzales held to be a good and valid claim to the land known by the name of San Antonio, or Pescadero, to the extent and within the boundaries mentioned in the grant and map.

The failure to direct the precise manner of the location of the grant of land is not erroneous.

Argued Feb. 24, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by the appellant, for the confirmation of a claim to a certain tract of land.

The board of commissioners entered a decree confirming the claim, but limiting its extent from west to east to three fourths of a league.

The district court, on appeal, having affirmed this decree, the petitioner took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **H. P. Hepburn** and **V. E. Howard**, for appellant:

This claim will be found on examination, to be one of the most meritorious that has ever been presented for confirmation.

The government has never opposed it; yet, under the present decision, the claimant gains but little benefit from his title.

The claimant contends that the land should be confirmed to the boundaries mentioned in the decree of concession, making him, in the language of the decree of concession the "owner of the land known by the name of San Antonio, or Elpescadero, bounded by the *rancho* of Antonio Buelna, the Sierra, the coast, and the Arroyo del Butano," without limitation, as to quantity, there being none in the decree of concession.

The quantity of land mentioned in the grant was erroneously inserted through a clerical error.

But even admitting that it was inserted correctly, it is insisted by the claimant that the quantity should be disregarded, where all the boundaries are given in a grant, as in this case.

The naming of a quantity of land in a grant, and reservation of the surplus to the nation, does not prevent the title from passing to the grantee, if all the boundaries are given. A clause in a grant, naming quantity and reserving surplus in such a case, is an unmeaning formula. The utmost effect that could be given to the clause would be, to reserve the right to the government, on proper proceedings, to devest the title as to the surplus; but, in the meantime, the title to the whole land is vested in the grantee.

The decree of concession gave him the whole tract. Does the grant which was made by virtue of the decree, and in order to "revalidate" it, take away the greater portion of the land given by the decree?

The grant refers to the map to ascertain the land, and the map exhibits the natural objects which are its boundaries.

"When a deed of land describes the subject matter by monuments clearly defined, such as a river, a spring, a mountain, a marked tree, or other natural object, and courses, distances, and quantity are likewise inserted, which disagree with the monuments, the description by monuments shall, in general, prevail; for it is more likely that a party purchasing or selling land should make mistakes in respect to course, distance and quantity, than in respect to natural objects, which latter, from being mentioned in the deed, are presumed to have been examined at the time."

"The monuments which shall control course, distance, etc., under such circumstances, may be any objects which are visible and clearly as-

NOTE.—*Effect of words "more or less" or "by estimation" in a deed*—see note to U. S. v. Fossat, 15 L. ed. U. S. 944.

certained, as lands of other individuals, or their corners."

Phil. Ev, Cow. & H. N. p. 548, and authorities there cited.

Messrs. **J. S. Black**, *Atty. Gen.*, and **E. M. Stanton** for appellees.

Mr. Justice **McLean** delivered the opinion of the court:

This is an appeal from the district court of the United States for the northern district of California.

[Translation of Title.]

Provisionally authorized by the Administration of the Maritime Custom-House of Monterey, for the years 1832 and 1833.

Jose Figueroa, General of Brigade of the National Armies of Mexico, Commander-General, Inspector, and Superior Political Chief of Upper California.

Whereas, Juan Jose Gonzales, a Mexican by birth, has, for his own personal benefit and that of his family, petitioned for the land known by the name of San Antonio, or El Pescadero, bounded by the rancho Antonia Buelnos Sierra, the coast, and the Arroyo of Buntano, the proper measures and examinations being previously made, as required by laws and regulations, using the powers which are conferred on me in decree of the seventh of this month, in the name of the Mexican Nation, I have granted him the aforesaid land, declaring to him the ownership of it by these presents—said grant being understood to be in entire conformity with the provisions of the laws, subject to the approval or disapproval of the Most Excellent Territorial Deputation and of the Supreme Government, under the following conditions:

1. That he will submit to those which may be established by the regulation which is to be made for the distribution of vacant lands; and, in the meantime, neither the grantee nor his heirs can divide or alienate that which is granted to them, subject to any tax, entail, pledge, mortgage, or other incumbrance, even for pious purposes, nor convey it in mortmain.

2. He may inclose it, without prejudice to the crossings, roads, and servitudes; he will en-
166*] joy it freely and exclusively, *making such use or cultivation of it as may best suit; but within one year, at furthest, he shall build a house, and it shall be inhabited.

3. When the ownership is confirmed to him, he will request the proper magistrate to give him juridical possession in virtue of this title, by whom the boundaries will be marked out—in which, besides the bounds, he will place some fruit or forest trees, of a useful character.

4. The land of which donation is made him is one league in length by three quarters of a league in breadth, a little more or less, as shown by the map which goes in the *espediente;* the magistrate who may give the possession will cause it to be in conformity with the ordinance, in order to mark out the boundaries, leaving the surplus which may result to the nation, for its convenient uses.

5. If he contravene these conditions, he will lose his right to the land, and it will be subject to denouncement by another person.

In consequence I order, that the present serving him for a title, and being held as firm and valid, note be made of it in the corresponding book, and it will be delivered to the person interested.

Given in Monterey, on the 24th December, 1833. Jose Figueroa.

(Signed) Agustin V. Zamorano, Sec'y.

Office of the Surveyor-General of the United States for California.

Samuel D. King, surveyor-general, etc., and as such now having in my office and under my custody a portion of the archives of the former Spanish and Mexican territory or department of Upper California, do hereby certify that the fifteen preceding and hereunto annexed pages of tracing paper, numbered from one to —, inclusive, and each of which is verified by my initials (S. D. K.), exhibit true and accurate copies of certain documents on file and forming part of the said archives in this office.

In testimony whereof, etc.

*[Translation of *Espediente.*] [*167

Provisionally authorized by the maritime custom house of Monterey, for the years 1833 and 1834.

(Signed) Figueroa.
(Signed) Jose Rafael Gonzales.

To His Excellency the Commanding General:

I, citizen Juan Jose Gonzales, native of the mission of Santa Cruz, resident of the town of Branciforte, residing and employed in said mission of Santa Cruz and mayor domo of the same, married, with a family of thirteen persons; having served the nation eight years and two months as a soldier, and having obtained my discharge from His Excellency, the Commanding General, Don Manuel Victoria, with the condition of furnishing a recruit, which I did at my own expense; and finding myself with 500 head of large cattle, and having no land or place to settle on; tired of the trouble of being together in the same village where I have been, and am unable to progress on account of the same; living where I have rated a great loss in the stock which I have placed twelve years ago; and being now actually favored by the same mission of Santa Cruz, where my deceased father sacrificed himself for twenty years, and where I served in his place, the salaries of this post rent in the same mission (Friar Antonio Real), satisfied with my services and those of my deceased father, has wished to favor me, by assigning to me the *rancho* of San Antonio, formerly El Pescadero Realengo, which is not occupied by said mission, is distant twelve leagues to the northwest, bounded by the *rancho* of San Gregoria, which place —— delineated on the accompanying paper, including a square of about four leagues, extending from the coast to the sierra, and from the *rancho* of San Gregoria (*rancho* occupied by citizen Antonio Buelna) to the *rancho* of La Punta de Nuevo, which is the further occupied by the mission, and desiring a security or guaranty in the same place, I apply, with the consent of the minister, to your Excellency, with the due respect, praying that you will be pleased to give me in possession the aforesaid place, in consideration of my family, and which will
*confer favor and grace on your most [*168

attached subject and servant, who wishes you many years of life, etc. Juan Gonzales.

Santa Cruz, Nov. 26, 1833.

Monterey, Nov. 29, 1833.

In conformity with the laws on the matter, let the *ayuntamiento* of the town of Branciforte report whether the person interested in this petition possesses the requisities to the —— attended to in his petition; whether the land he asked is included in the 20 leagues from the boundary, or 10 from the sea shore referred to in the law of August, 1824; if it is irrigable, dependent on the seasons or pasture of land; if it belongs to the ownership of any private individual, corporation of Pueblo, with everything else which may be proper to explain the matter.

This being concluded, it will pass this *espediente* to the reverend father minister of the mission of Santa Cruz, that he may report what he knows on the matter. Señor Don Jose Figueroa, general of brigade and commandant, inspector-general, and superior political chief of the territory, thus ordered, decreed and signed; to which I certify. Figueroa.

Agustin V. Zamorano, Sec'y.

In compliance with your Excellency's —— to this *ayuntamiento*, under your command in the decree of November 29th, 1833, to report whether the person interested in this petition possesses the requisites to be attended to in his request and if the land he asks for be included in those referred to in the law:

The land asked for by the person interested in this petition may now be granted to him, for he has all the circumstances required to be attended to, and is entitled to it.

It is an unoccupied place, has no irrigable lands; has land dependent on the seasons; has been recognized as the property of the mission of Santa Cruz; and for the purposes it may serve, I sign this with the second *regidor*, on account of the absence ——, in the town hall of the town of Branciforte, on the 2d Dec., 1833.

(Signed) Antonio Robles.
(Signed) Jose Maria Salason.

169*] *I agree to there being granted the petitioner, Juan Jose Gonzales, the place he asks for, as it is a place which this mission does not at present occupy; nor is it deemed necessary for it, in consideration of the fact that it has land enough for its cattle, and that, being unoccupied, it is considered public land; besides, when the mission occupied it —— had abundance of cattle, —— have died and diminished, and the few that remain do not need the land. He is a person of merit, and the mission ought to place him before any other person. He has all the requisites and is entitled to it; and —— testimony I sign, on 7th Dec., 1833.

Friar Antonio Surra del Real,
Minister of Santa Cruz.

Monterey, December 10, 1833.

Let it pass to the alcalde of this capital, before whom the party will produce, on information of three fit witnesses, who will be questioned upon the following points:

1. If the petitioner is a Mexican by birth; if he has served in the army; if he is married and has children; if he is of good conduct.

2. If the land he asks for is of the ownership of any individual or corporation of Pueblo; if it is irrigable, dependent on the seasons, or pasture land, and what is its extension.

3. If he has cattle with which to stock it, or the possibility of acquiring them.

This examination being made, let him return the *espediente* for its decision. His Excellency, the political chief, commanding general, inspector and general of brigade, Don Jose Figueroa, thus ordered, decreed and signed it, to which I certify.

(Signed) Jose Figueroa.
(Signed) Augustus V. Zamerano.

Let the party interested in this *espediente* be notified to present the witnesses who are to be examined on the points included in the superior decree of the 10th instant which precedes this.

*Thus I, the alcalde, decreed, ordered, [*170 and signed it, with the assisting witnesses, in the established form.

Marcelino Escobar.

Assisting witnesses:
(Signed) Jose Maria Maldorado.
(Signed) Jose Antonio Romero.

On the same day, present, Juan Jose Gonzales, the foregoing act was made known to him, and having understood it, he said that he heard it, and that he presents citizens Salvio Pacheco, Manuel Larios, and Felipe Hernandez, and he signed it with me and the assisting witnesses.

(Signed) N. Escobar.
(Signed) Juan Gonzales.

Assisting witnesses:
(Signed) Jose Maria Maldorado.
(Signed) Jose Antonio Romero.

In the port of Monterey, on the 13th day of the month of December, one thousand eight hundred and thirty-three, present, Salvio Pacheco, witness presented on the part of the persons interested, oath was received in form of law.

The petitioner is a Mexican by birth; was in the army; has thirteen children. The land petitioned for has no private ownership; understood it belongs to the mission of Santa Cruz; that its extent is from a league to a league and a half from east and from north to south; he does not know how much of it is, as it is a cañon which reaches to the *rancho* of citizen Antonio Buelna. He has two hundred head of cattle, a drove of mares and tame horses, etc.

Manuel Larios, a witness, says he is a Mexican; was in the army; is married, has children; knows that the land petitioned for pertains to the mission of Santa Cruz; that the said place is dependent on the seasons; that the land is about a league or more wide, and two from the beach to the hills.

A witness, Felipe Hernandez, repeats the same facts as stated by the prior witness.

Monterey, Dec. 3d, 1833.

The official acts ordered in the foregoing superior being finished, *let the *espediente* [*171 be returned to the superior political chief for the superior decision. N. Escobar.

Monterey, Dec. 17, 1833.

Having seen the petition with this *espediente*, commences the report of the municipal authority of the town of Branciforte, that of the Rev. Father minister of Santa Cruz, the declarations of the witnesses, together with all other things which were presented and deemed proper to be

seen, in conformity with the provisions of the laws and regulations on the matter, Juan Jose Gonzales is declared owner in fee of the land known by the name of San Antonio (or El Pescadero), bounded by the *rancho* of Antonio Buelna, the sierra, the coast, the Arroyo del Bratano, subject to the conditions which may be stipulated. Let the corresponding patent issue, let note be made in the proper book, and let this *espediente* be directed for the approbation of the most excellent territorial, in which case the person interested, who will be made to know this decree, will again present his title, that it may be revalidated. Jose Figueroa.

The committee on colonization and vacant lands, to whom was referred the *espediente*, the formation of which was caused by the petition of citizen Juan Jose Gonzales for the place named San Antonio, or El Pescadero, having examined it with the corresponding circumspection, taking into consideration at the same time the law of August 18th, 1824, those agreeing with it, and the general directions which, on the 24th November, 1828, the supreme government of the Union gave for the better fulfillment of the first; from the examination of the *espediente*, the committee has become impressed with the opinion which it before held of the scrupulousness and tact with which His Excellency the political chief ordered it to be made, so that neither in its formation, nor in the steps taken, is any essential requisite wanting; wherefore the committee concludes by offering to the deliberation of this most excellent deputation the following proposition:

1. Approved the grant made to citizen Juan Jose Gonzales of the place named San Antonio **172*]** El Pescadero, on the 24th *December, 1833, in entire conformity with the provisions of the law of August 18th, 1824, and article 5th of the regulation of November, 1828.

Monterey, May 10, 1834.

(Signed) Carlos Antonio Carrillo.
" Jose Castro.
" Jose T. Ortega.
" Jose A. Estudillo.

Monterey, May 17, 1834.

In sessions of this day, the proposition of the foregoing report was approved by the most excellent deputation ordering that the *espediente* be returned to His Excellency, the superior political chief, for the convenient purposes.

(Signed) Jose Figueroa.
George Fisher, Sec'y.

Juan B. Alvarado, Sec'y.

Opinion of the Board by Com'r R. Aug. Thompson.

For the place called San Antonio, or El Pescadero.—Claim of for one square league of land in the county of Santa Cruz.

This claim is founded on a grant made by Governor Figueroa, on 24th December, 1833, to the present claimant, which was duly approved by the territorial deputation on the 17th day of May following. The grant describes the land as that known by the name of San Antonio, or El Pescadero, bounded by the *rancho* of Antonio Buelna, the sierra, the coast, and the Arroyo de Butario. The fourth condition states that the land of which donation is made is one league in length and three quarters of a league in breadth, a little more or less, as shown by the map which goes with the *espediente*, with the usual reservations of the *sobrante* or overplus to the use of the nation. The boundaries are distinctly marked out on the map; and although there is no scale on the map, by which the extent of the boundaries can be ascertained, yet there is a note made upon it, stating that they extend one league from north to south, and three quarters of a league from east to west. This description, taken in connection with that contained in the grant, shows very clearly that it is a grant by metes and bounds, and that consequently no *sobrante* can result.

*The original grant is in evidence, and [***173** the genuineness of the signatures of the governor and secretary appearing thereon are duly proved by the deposition of David Spence. Manuel Jimeno proves that the claimant has occupied the land since 1833; that he had a house, horses and sowings on it, and he still lives on it.

Entertaining no doubt, from the facts of the case, that the grant is a valid one to the extent of one league in length, and three quarters of a league in breadth, it is hereby confirmed to that extent; the three fourths of a *league to be surveyed within the out boundary represented on the diseno.*

Mr. Justice **Campbell:**

The plaintiff was confirmed in his claim to a parcel of land designated as San Antonio, or El Pescadero, in the county of Santa Cruz, by the board of commissioners. The description of the land in their decree is as follows:

"Being the same which has been held and occupied by the present claimant since the year 1833 to the present time, and is bounded as follows: Beginning at the mouth of the Arroyo de Butario, and running along the sea coast, and bordering thereon, to the boundary line of Antonio Buelna, the distance being one league, a little more or less; thence with the line of said Buelna east three quarters of a league; thence a line southerly parallel with the sea coast until it intersects the Arroyo de Butario, at the distance of three quarters of a league from the coast; thence along said arroyo and bordering thereon to its mouth, the place of beginning; the same being in extent three fourths of a square league, a little more or less. For a more particular description, reference being had to the original grant and map contained in the *espediente* from the archives now in the custody of the United States surveyor general for California, the first of which and a traced copy of the latter are filed in the case."

The parties appealed to the district court, and, upon the hearing of the cause, the decree of the commissioners was affirmed, and it was further ordered, that the claim of the *said Juan Jose Gonzales is a good and [***174** valid claim to the land known by the name of San Antonio, or Pescadero, to the extent and within the boundaries mentioned in the grant and map, the original of the former and copy of the latter being on file in the records of this case. From this decree the plaintiff appealed. The only question presented on the appeal is, whether the grant is to be located according to the natural calls in the grant, or whether the claimant is to be confined to the quantity specified in the 4th condition of the grant. But the decision of this question is reserved in the de-

cree of the district court, and will properly arise after the location. The failure to direct the precise manner of the location is not erroneous.

The result therefore is, that the decree must be affirmed.

I concur in the above opinion.

S. Nelson.

192*] *SAMUEL VERDEN, *Plff. in Err.*,
v.
ISAAC COLEMAN.

(See S. C. 22 How. 192, 193.)

Appeal does not lie to state court—writ of error, the proper remedy.

No appeal can be taken from the final decision of a state court of last resort, under the 25th section of the judiciary act, to the Supreme Court of the United States.

A writ of error alone can bring up the cause.

Argued Feb. 28, 1860. Decided Mar. 12, 1860.

APPEAL from the Supreme Court of the State of Indiana.

The case is stated by the court.

Messrs. **R. H. Gillet** and **D. Mace** for plaintiff in error.

Mr. **Zebulon Baird** for defendant in error.

Mr. Justice **Catron** delivered the opinion of the court:

Coleman sued Verden in a state court of Indiana, on a note of hand, and a mortgage of lands, to secure its payment. On various pleadings and proofs, the cause was submitted for judgment to the court, the parties having dispensed with a jury. Judgment was rendered against Verden, who appealed to the supreme court of Indiana. There the judgment of the circuit was affirmed.

This occurred on the 26th day of June, 1858. And then we find the following entry of record: "And afterwards, to wit: at a court began and held on the 24th day of May, 1858, and continued from day to day till July 16th, 1858, at which time come the appellant, by Hon. D. Mace, his attorney, and prays an appeal to the United States Supreme Court, which prayer is granted."

193*] *Bond was given to prosecute the appeal, and the clerk certifies the record to be a true copy of the proceedings.

No appeal can be taken from the final decision of a state court of last resort, under the 25th section of the judiciary act, to the Supreme Court of the United States. A writ of error alone can bring up the cause. We refer to the appendix of Curtis's Digest for the mode.

It is ordered that the case be dismissed.

THE UNITED STATES, *Appts.*,
v.
ROSA PACHECO *et al.*, Devisees under the Last Will and Testament of Juan A. Sanchez de Pacheco, Deceased.

(See S. C. 22 How. 225-227.)

Inconsistent description in grant—map, as evidence—construction of grant.

In ascertaining the quantity of a Mexican grant, where the general description and the call for "two square leagues," found in the condition of the grant, are inconsistent, and plainly contradict each other, the court is compelled to rely on other title papers and proofs.

A map, when taken in connection with the evidence of witnesses explaining its contents, may be conclusive.

It was intended in this case to grant equal to two leagues square, situate within the given out-boundary; that is to say, four leagues in one tract, if so much is found in the general description and *diseno.*

Argued Feb. 28, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, for the confirmation of a claim to a certain tract of land.

The board of commissioners entered a decree confirming the claim to the extent of two square leagues only. On appeal to the district court by the petitioners, this decree was reversed, and a decree was entered for the entire claim; whereupon the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **J. S. Black,** *Atty. Gen.*, and *Mr.* **Stanton** for appellants.

Mr. **H. S. McGraw** for appellees.

Mr. Justice **Catron** delivered the opinion of the court:

On the 31st of July, 1834, there was granted to Madame Pacheco a *rancho* of land, "included between the Arroyo de las Nueces and the Sierra de Golgones, bounded by the said places, and bounded by the *ranchos* Las Juntas, San Ramon, and Monte Diablo." This description was accompanied by a *diseno*, better defining the exterior boundaries than usual. But the grant has the following condition, amongst others: "The land of which mention is made is two square leagues, a little more or less, as shown by the map which goes with the *espediente.* 'The magistrate who may give the pos- [*226 session will cause it to be measured in conformity with the ordinance, for the purpose of marking out the boundaries, leaving the surplus which may result, to the nation, for its convenient uses."

The board of commissioners held that this condition must govern as to quantity, and decreed two square leagues.

In the district court, that decree was reversed, and the land, as above described, and as it is represented on the plan, was decreed to the claimants, regardless of any exact quantity. From this decree the United States appealed. The validity of the grant is not disputed; the contest respects quantity only.

The plan presented by the party, and referred to in the grant, will furnish a guide to the surveyor, as respects boundaries within which the survey shall be made. But, in ascertaining the quantity intended to be given, we think neither the general description, nor the call for "two square leagues," found in the condition of the grant, can be relied on, as they are inconsistent, and plainly contradict each other, and the adoption of the one must necessarily reject the

other. To find the true quantity intended to be granted, we are compelled to rely on other title papers and proofs.

The map shows, when taken in connection with the evidence of witnesses, explaining its contents, that the body of land petitioned for and granted was something more than two leagues long, and about two leagues wide. To this effect, the parol evidence is conclusive; and the map is equally so on its face, however inaccurate it may possibly be found when the objects called for, and laid down on the map, are sought on the ground. Nothing could be more manifest than that the grant was intended to give to Madame Pacheco a *rancho* of at least two leagues on each side line, making four leagues in superficies. And as the plan is part of and accompanies the last title paper, we feel bound to give it due weight, in reaching the undoubted equity of the claim.

This court is not dealing with a legal title; none such can exist until there is a survey, the land severed from the public domain, and the public title transferred by a final grant from the United States into private ownership.

227*] *What precise tract of land is to be surveyed and granted to Pacheco's heirs, "according to the principles of equity," must be ascertained in this proceeding, to the end that the United States may grant the legal title, in satisfaction of the treaty; and a concession by leagues being the rule, and one extending to indefinite outboundaries the exception, we hold that it was intended in this case to grant equal to two leagues square, situate within the given outboundary; that is to say, four leagues in one tract, if so much is found in the general description and *diseno*.

The decree of the district court is, therefore, reversed, and the cause remanded to that court, to be further proceeded in, according to this opinion.

270*] *HENRY O. CLARK, Ira Justin, Jr., and A. Hyatt Smith, *Plffs. in Err.*,

v.

HENRY C. BOWEN, Theodore McNamee, Samuel P. Holmes and Henry L. Stone.

(See S. C. 22 How. 270–273.)

Where judgment vacated, original indebtedness revived.

The state court properly vacated its own judgment, as respected the two partners, Clark and Justin, after Smith, the solvent partner, had been released from it, because Clark had no power to bind Smith by the confession; and because the goods that were assigned to secure the judgment, had been taken by a previous mortgage of them.

Where the whole arrangement to secure a debt was in effect annulled, the original indebtedness stood revived, and was properly enforced by the judgment of the circuit court.

Argued Feb. 17, 1860. Decided Mar. 12, 1860.

IN ERROR to the District Court of the United States for the District of Wisconsin.

It appears that the defendants in error, who constituted the firm of Bowen & McNamee, had a claim for goods sold and delivered against the plaintiffs in error, who constituted the firm of H. O. Clark & Co. of Janesville, Wisconsin. It was agreed between Gilkison, a collecting agent of Bowen & McNamee, and H. O. Clark & Co., Smith being absent at the time, that H. O. Clark & Co. would confess a judgment for the amount due, and make an assignment, preferring Bowen & McNamee, with other creditors of the firm, to secure the indebtedness. This was done, judgment being confessed in Rock county circuit court, before the return of Smith. Gilkison thereupon executed to H. O. Clark & Co. a receipt which admitted payment in full of all prior and existing indebtedness and canceled notes which had been given by Clark & Co. to Bowen & McNamee. Immediately after Smith's return, on August 17, 1854, the property was taken from the possession of Stevens, the assignee, on a chattel mortgage, executed by H. O. Clark & Co.

At the November term of the court, on the application of Smith, who was the only responsible member of the firm at that time, the judgment was vacated as to him. At the March term, Bowen & McNamee applied to have the judgment vacated as to all the defendants, in order that they might be restored to all the rights that they had before the judgment was confessed and the arrangement made.

On July 6, 1855, the judgment was vacated by order of the court as to all the defendants. On or about August 29, 1854, Bowen & McNamee, with some of the other preferred creditors, filed a bill in the United States district court for the district of Wisconsin, against H. O. Clark, A. Hyatt Smith, Ira Justin, Jr., Chas. Stevens, and others, to enforce the assignment.

April 2, 1855, Clark, Smith, and Justin filed their answers, denying the validity of the assignment. On the 3d day of November term, 1856, the bill was dismissed without prejudice. On the first Monday of September, 1856, the declaration in this suit was filed upon eight promissory notes, which had not been delivered up. After various proceedings the case was tried, and the court charged the jury that the judgment confessed and entered in the circuit court of Rock county was valid, and the notes in suit merged in it, until it was vacated and set aside by that court. If the assignment and the judgment were objected to by Smith and the other parties, and the assignment rescinded by Smith and these other defendants, by taking back the property, the original debt was revived, and the receipt is not a bar to this suit. The circuit court of Rock county had the power to vacate the judgment as to all these parties. It does not appear that the notes in suit were ever given up to the defendants. The exception to this charge presents the principal point in the case.

Messrs. **J. H. Knowlton, J. R. Doolittle,** and **W. P. Fessenden,** for plaintiffs in error:

1. The instrument canceling the notes in controversy, contained a sufficient consideration to make it binding.

Miller v. *Drake*, 1 Cai. 45; *Powell* v. *Brown*, 3 Johns. 100; *Forster* v. *Fuller*, 6 Mass. 58; *Overstreet* v. *Phillips*, 1 Litt. 123; *Townsley* v. *Sumrall*, 2 Pet. 182; *Lemaster* v. *Burckhart*, 2 Bibb. 30; *Seaman* v. *Seaman*, 12 Wend. 381; *Randle* v. *Harris*, 6 Yerg. 508; *Sampson* v.

Swift, 11 Vt. 315; *Hubbard* v. *Coolidge*, 1 Met. 93; *Chick* v. *Trevett*, 20 Me. 462; *Waydell* v. *Luer*, 3 Den. 410.

When judgment by confession, or otherwise, is entered against one or a part only of a partnership firm, it is an extinguishment of the firm liability, and it is quite immaterial that the creditor did not know that there were other members of the firm, against whom he took no judgment. When the creditor asks for and obtains such a judgment as he gets, he is bound by it, and he cannot enlarge his rights, so as to hold others originally liable, but who by the judgment are discharged.

Robertson v. *Smith*, 18 Johns. 459, 476, 484; *Woodworth* v. *Spafford*, 2 McLean, 168; *Willings* v. *Consequa*, 1 Pet. C. C. 302; see *Trafton* v. *U. S.* 3 Sto. C. C. 646.

One of two partners has not power to confess a judgment or authorize the confession of judgment against the firm, where no writ has been issued against both. Such judgment is not binding on the one who does not act, but is binding and conclusive on the one who does act, and he cannot have it set aside.

Girard v. *Basse*, 1 Dall. 119, 122; *Sloo* v. *State Bank of Illinois*, 1 Scam. 428; *Barlow* v. *Reno*, 1 Blackf. 252; *Grazebrook* v. *McCreedie*, 9 Wend. 437; *Crane* v. *French*, 1 Wend. 311; 1 Am. Lead. Cas. 448, 449.

Taking the note of one partner for a liability of the firm, is a valid discharge of the firm, when the creditor agrees that the original liability shall be considered paid, and cancels or delivers up, or agrees to deliver up or cancel, the evidences of the firm liability.

This is the ordinary rule upon these facts, other than the particular agreement. The intention of parties to this end is presumed. 1 Smith L. C.—note to *Cumber* v. *Wane*, 391 to 398.

If this is the law on the giving the note of one partner, a fortiori must the giving a sealed warrant of attorney to confess, and the actual confession of judgment binding upon two or three members of the firm, and taking also an assignment of property to a trustee for the benefit of the condition, be a discharge. Such is the case at bar.

There is no pretense that any of the defendants practised fraud upon Gilkison. There was no mistake even, unless perhaps Gilkison, the agent, may have mistaken the law as to whether Smith would be bound by the judgment confessed. There can be no doubt about the intention of the plaintiffs to cancel the notes. For such mistakes of law, the defendants in error can have no relief.

Hunt v. *Rousmanier*, 3 Mas. 294; 1 Pet. 1; *Bank U. S.* v. *Daniel*, 12 Pet. 32; *Champlin* v. *Laytin*, 18 Wend. 417; *Shotwell* v. *Murray*, 1 Johns. Ch. 516; *Lyon* v. *Richmond*, 2 Johns. Ch. 51; *Storrs* v. *Baker*, 6 Johns. Ch. 169; *Clarke* v. *Dutcher*, 9 Cow. 674, 681; *Gilbert* v. *Gilbert*, 9 Barb. 532; *Arthur* v. *Arthur*, 10 Barb. 9, 16.

The voluntary setting aside of their judgment as to the other two defendants without the consent of Smith, would not revive the liability against him.

Willett v. *Forman*, 3 J. J. Marsh, 292; *Street* v. *Mullin*, 5 Blackf. 563; *Manville* v. *Gay*, 1 Wis. 250.

Messrs. **William P. Lynde** and **B. K. Miller**, for defendants in error:

The court entering the judgment had vacated it and, therefore, the promissory notes still in possession of the plaintiffs, uncanceled, were still valid, and plaintiffs were entitled to recover upon them.

Whether the state court erred in vacating the judgment, this court will not inquire; it is enough that the judgment was vacated by the court in which it was entered.

A receipt may be contradicted or explained.

Graves v. *Key*, 3 B. & Ad. 318; *Harden* v. *Gordon*, 2 Mas. 561; *Chunn* v. *McCarson*, 2 Dev. Ch. 73; *Fuller* v. *Crittenden*, 9 Conn. 401; 1 Greenl. Ev. § 305; 1 Cow. & H. n. to Phil. Ev. 381; 2 Cow. & H.; n. to Phil. Ev. 581.

Mr. Justice **Catron** delivered the opinion of the court:

We deem it to be a matter not open to controversy in this suit, that the state court of Rock county properly vacated its own judgment, as respected Clark and Justin, after Smith, the solvent partner, had been released from it—because Clark had no power to bind Smith by the confession; and secondly, because the goods that were assigned to a trustee to secure the judgment had been taken from the assignee, by a previous mortgage of them.

The following admission is found in the bill of exceptions, and is conclusive of the merits of this controversy:

"It is conceded by defendants, that the judgment in the circuit court was confessed at the time of the execution of the assignment, and that the assignment was to secure the judgment, and the judgment and assignment were the mode adopted to secure the plaintiff's debt; and that Clark executed the assignment and judgment for Smith."

The whole arrangement to secure the debt being, in effect, annulled, the original indebtedness stood revived, and was properly enforced by the judgment of the circuit court, which we order shall be affirmed.

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*THE UNITED STATES, *Appts.*, [*274
v.
RAFAEL GARCIA.

(See S. C. 22 How. 274-282.)

Mexican claim rejected for want of grant.

Where claimant obtained an order of Governor Micheltorena to search after land and to take possession of it while the usual procedure was being prosecuted, and the claimant selected a tract and occupied and improved it, and solicited a grant, and the governor referred the petition to the alcalde for the usual *informe*, and this constitutes all the evidence of title produced by the claimant, and no grant was obtained; held, that the claim should be rejected.

Argued Feb. 9, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **E. M. Stanton,** for appellants:

The board of land commissioners rejected the claim unanimously. Judge Hoffman delivered an opinion concurring with the board, but Judge McAllister decided in favor of the claimant, expressing "considerable doubt" of its legal justice. The United States have appealed. We ask the court to reverse the decree of confirmation and reject the claim, upon the ground that there is absolutely no title whatever. A governor of the department in 1844 gave the claimant a passport, so that he might go out and hunt for nine leagues of land, and if he should happen to find any, gives him authority to take possession of it until a title could be made out. The claimant now says that he did happen to find exactly nine leagues of land, but he did not report to the governor who gave him the roving commission, under which he was traveling when he made the discovery. He waited nearly two years, until another governor came into office, and then he did proceed according to law, by presenting a petition and doing what the regulations of 1828 require. Nor did he ask for any definite action. The order of the governor was as vague as the petition. It was simply an order that the alcalde of San Rafael might report. The alcalde made report, and in that report falsely stated that the land had been previously granted to the claimant by Micheltorena, and added, somewhat paradoxically, that it did not belong to any private individual, on account of its distance from the frontier. Slight evidence of occupancy is added to this, and there rests the case.

Not a single provision contained in the act of 1824, or in the regulations of 1828, has been complied with or followed in all this business.

The claim, under such a title as this, is so preposterous, that it is impossible to argue against it with any sort of seriousness. It never was regarded as a title by the Mexican government. There was no *espedients* on file. The papers are all produced from the private custody of the claimant himself. There is no trace of the proceeding to be found anywhere upon record. The genuineness of the papers is extremely doubtful.

If anything were wanting to expose this claim to further contempt, it might be found in Micheltorena's proclamation of Dec. 16, 1844, wherein he states exactly how he was employed on the 15th of November, the day upon which his passport to Garcia is dated.

The seal affixed to Micheltorena's letter is a manifest forgery.

Messrs. **Calhoun Benham** and **F. Marbury,** for appellee:

The case presents two questions:

1. Was there a contract between the claimant and the Mexican government; and if so, what was it?

2. If there was such a contract as claimant pretends, had the governor power to make it?

1st. It is conceded, for the sake of argument, that there are no express words of grant in the decree of Micheltorena; but, at the same time, we think the decree furnishes proof enough to display an agreement between the government and the petitioners.

On this point the counsel cited 6 Pet. 738; 7 Cranch, 238.

The gift was a general one, but it became particular when it was located, and the plan was presented.

Frémont's Case, 17 How. 560; *Clark's Case,* 9 Pet. 169.

If the decree was a grant, as we think it too plainly was to require the aid of construction, without doubt the governor was bound; but if it was no more than a promise to grant, he was equally bound. Selection, occupation, eligibility, services rendered, petition with a plan, were a price—commanded an equivalent.

See case of *Chouteau's Heirs,* 9 Pet. 141; see, also, 10 Pet. 310, 315, 336, 340; 12 Pet. 434; 15 Pet. 220; 11 How. 63, 115; 12 How. 434, 437; 14 How. 191.

2d. If there was such a contract as claimant pretends, had the governor power to make it?

If it was a grant, he had the power. If it was only a promise to make a grant, he had the power also. It was necessarily involved in the general and complete power he had over the subject-matter. His own construction of the law conferring his powers, is conclusive.

Frémont's Case, 17 How. 551, 562.

We maintain there is title; legal, perhaps; certainly equitable. We care not to debate as to its dignity, since, for all purposes connected with this *quasi* litigation with the government, an equitable title is as good as a legal title. We think a promise of title is imported at least, in the authority to select, occupy with property (cattle), and hold possession of a tract, while the procedure (to obtain a *titulo*) was being had on the presentation of the requisite *diseno;* and that this promise of performance of the conditions of the decree and of the law being shown, entitles the claimant to a confirmation. He has held this land for sixteen years—save some parts from which he has been forcibly ejected.

The delay should not provoke remark. There was no hurry. He was occupying the land during the two years, which was all the government wanted. He had no reason to anticipate the change of flags.

Every provision but obtaining the *titulo* and the approval of the departmental assembly, was complied with. There was a petition with a *diseno;* there were cultivation and improvement; there was at least an implied order or promise to issue the *titulo.*

The proceeding was substantially the same as the one most usual; the difference was in favor of the government. Usually the grant was upon conditions subsequent; here they were to be performed in advance of the *titulo.* Custom and usage were well followed. The proceeding had not arrived at the stage of record.

Mr. Justice **Catron** delivered the opinion of the court:

The question in this case is, whether the land claimed was private property when we acquired California by treaty, or whether it then was part of the public domain of Mexico, and now belongs to the public lands of the United States.

1. If it was private property, it must have become so by the grant of a vested interest, that was good in equity; made by the granting power in the territory of California, being authorized to exercise the sovereign power, as no other authority could devest the public title.

2. If the land in dispute was acquired by the United States, as public property, then the courts of justice have no jurisdiction of the subject-matter, and cannot interfere. This is a postulate, not open to controversy. *United States* v. *Forbes*, 15 Pet. 182.

That the Mexican authorities, exercising the granting power in California, conferred no title on Garcia, we think satisfactorily appears, for the reasons set forth in the opinion of Judge Hoffman, delivered in the district court, and found in the records, the most material parts of which opinion we adopt. The district judge says:

"In support of his claim, the appellant exhibits an order of Micheltorena, dated November 15, 1844, which is as follows: 'According to your memorial of the 14th instant, you ask for the grant of a passport to penetrate into the points of the coast on the northern line of this country, with the object of locating a tract of land of the extent of eight to nine leagues, since that which you now occupy with your personal property is so limited. By this order, you are empowered to appear before the military 281*] *commanding authority of that frontier, in order that, after an examination, you may proceed to your research after the tract of land you ask for, as a recompense for the services rendered by you to the nation.

" 'If you should happen to select any tract of land, you are empowered to occupy it with your said property, and to take possession of it while the usual procedure is being prosecuted, presenting the requisite sketch.

" 'God and liberty.

"Manuel Micheltorena.

" 'Monterey, November 15, 1844.

" 'To Don Rafael Garcia, at his *rancho*.'

"Availing himself of the permission thus granted, the claimant appears to have selected a tract of land, and to have occupied and improved it to some extent. No steps, however, were taken by him to obtain a title until March 4th, 1846, when Garcia addressed a petition to Gov. Pico, in which, after referring to the order of Micheltorena, he solicits a grant of the land. Gov. Pio Pico, by a marginal order, dated April 7th, 1846, referred the petition to the alcalde of San Rafael, for the usual *informe*. On the 29th of April, 1846, the alcalde reported that the land did not belong to any private individual. The foregoing constitutes all the evidence of title produced by the claimant. It is not pretended that any grant was ever issued for the land, or that any further action whatever was taken by Pio Pico on receiving the alcalde's *informe*. Whether he determined not to grant the land, or whether he omitted to do so in consequence of the distracted condition of public affairs, we are ignorant. One fact is clear: no grant was obtained by the claimant.

"A mere petition to search for land, such as that given to the present claimant, finds no place in the Mexican system.

"The application of Garcia to Micheltorena was for a passport to enable him to search for land. In granting this, and also the permission to put his cattle upon the tract he might select, Micheltorena in no respect bound himself or his successors to issue a final title. Such seems to have been the view of Pio Pico and the claimant himself, for a petition, accompanied by the usual *diseno*, is formally presented to *that officer, and by him referred, for in- [*282 formation, as in other cases.

"If this claim is to be confirmed, every provisional license or permission temporarily to occupy land must be held to constitute an equitable title, provided the claimant has availed himself of the permission—a ruling which would astonish no one more than the old inhabitants of the country, by whom the importance of obtaining a 'title' from the governor was well understood.

"For aught we know, Pio Pico, when the petition was subsequently presented, found it inexpedient to grant the land; and if the claimant, under a mere permission to occupy it with his cattle, has built a house upon it, and for two years omitted any effort to procure a title, he must attribute the loss of the land to his own neglect."

The board of commissioners unanimously rejected the claim, from whose decision, Garcia, the claimant, appealed to the district court. There the judgment of the board was reversed, on a division of opinion, and a decree entered, confirming the claim, probably with a view of transmitting the case to this court for final determination.

For the reasons above stated, it is ordered that the decree of the district court be reversed. And the court below is directed to dismiss the petition; for which purpose the cause is remanded.

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*THE UNITED STATES, [*286
v.
THE WIDOW, HEIRS, and EXECUTORS OF WILLIAM E. P. HARTNELL, Deceased.

(See S. C. 22 How. 286–289.)

California governor can only grant eleven leagues to one person—grant must be concurred in by departmental assembly.

Under the law of 1824, the governor of California had no power, in 1844, to grant gratuitously, for the purposes of tillage, inhabitancy, and pasturage, more than eleven leagues of land to any one person, although it might be in different tracts.

The public domain was the property of the Mexican nation. The governors of California do not show that they did represent the nation, so as to conclusively bind it; to have this effect, the governor's grant must have the concurrence of the departmental deputation.

The assembly was the controlling power, and could preform or nullify the governor's grant.

Argued Feb. 23, 1860. Decided Mar. 12, 1860.

APPEALS from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty.-Gen.*, and **E. M. Stanton,** for the United States.

Mr. **Calhoun Benham,** for claimants:

I. The court will not go behind the grant of the *cosumnes*, to entertain the question how much land Hartnell had received, because the recitals of the grant show that the law was satisfied. The grant is a judgment upon all

questions of law and fact, involved in the transaction which it consummated. The Mexicans always considered the granting of lands an adjudication; they habitually spoke of them when granted as *terrenos adjudicandos*.

II. But if the court do entertain the question, we say:

1. The maximum restriction found in the 12th section of the colonization law of 1824, has only the effect of forbidding the granting of more than eleven leagues in one grant.

2. The maximum restriction did not curtail Micheltorena's power. That power was extraordinary, and extended beyond what the law of 1824 gave; it applied expressly to colonization, and was co-extensive with that of Santa Anna, which was *de facto*, if not *de jura*, dictatorial.

3. The estate was only voidable at the worst. It cannot be avoided in this proceeding. Every right or title unimpaired at date of cession is protected.

Act March 3, 1851, §§ 8, 11.

In view of this point, it may be said the estate did not vest so far as the supposed excess is concerned, but this cannot be maintained. The governor granted. The idea that the departmental or the supreme government participated in that function, is a bald attempt to engraft upon the regulations of 1828, what mere inspection of the text will show has no place there, and what construction in the most liberal spirit, can never authorize.

See *Frémont's Case*, 17 How. (58 U. S.) 559.

The land being once vested, the vote by the departmental assembly was ineffectual to devest it. The concurrence of the supreme government was necessary.

Reading's Case, 59 U. S. (18 How.) 7; *Cervantes' Case*, 59 U. S. (18 How.) 555.

There should have been an inquest of office. If the right to avoid passed by a conquest or cession, whichever it be held to have been, we have no machinery by which to effectuate it.

2 Cal. 559; 5 Cal. 378.

The proceedings authorized by the act of March 3, 1851, are in no respect in the nature of an inquest of office. Were such the case, the United States would be the actors.

We invoke no equity power for the confirmation of our title. Our title is a legal title, by which we can recover in ejectment.

We ask the court to ascertain and settle it, not to confirm it, in the strict legal sense of that word. We want no additional title, no additional patent.

4. The estate is not voidable now, in any proceeding. The law by which it could have been avoided, is abrogated. It was political in its nature, and was abrogated upon the cession.

5. The grant must be confirmed for all the land. It is a patent. It can only be contradicted by matter of record. There is no matter of record which has that effect. The non-approval by the departmental assembly as has been shown, though it may be regarded as matter of record, is not effectual to contradict it, because that act is not competent to devest the estate.

The other patent (for *Todos Santos y San Antonio*), which disclosed the fact that Hartnell had already received a large quantity of land, cannot be entertained as evidence for that purpose. It is *dehors* the patent for the *cosumnes* land. If our patent for *cosumnes* granted more than eleven leagues, then the illegality might be considered; but being legal on its face, it cannot be invalidated but by judgment in denouncement, or office found. Our allegation that we had more land has no effect, for the question is not involved in the case.

4 Bibb, 330; 7 B. Mon. 81.

6. The grant must be confirmed, because the court cannot know whether the grant for *Todos Santos y San Antonio* will be confirmed or not.

7. The maximum restriction did not affect the validity of the grant. No invalidity could attach to the grant as affecting any particular portion of the land, until some proceeding diminishing the quantity and segregating the portion withdrawn from the residue, was had.

8. The maximum restriction did not apply to Mexican citizens.

We submit, the decree must be reversed, and the grant confirmed for the whole quantity of the land claimed in the *cosumnes* tract.

Mr. Justice **Catron** delivered the opinion of the court:

Hartnell got a grant from Governor Alvarado, dated June 28, 1841, for a body of land lying in Lower California. The quantity is not specified in the grant, the out-boundaries only being designated.

In November, 1844, he obtained another grant for eleven square leagues, lying in Upper California. Both claims were duly set forth in a petition seeking confirmation, before the board of land commissioners, and they were confirmed, with modifications—the lower grant to the extent of five leagues, and the upper for six leagues.

From this decree the parties appealed, and brought their cause to the district court, held at San Francisco. That court, sitting in the upper district, had no jurisdiction to re-examine the judgment of the board, as respected the leagues confirmed in the district of Lower California; and as to that tract, the appeal was dismissed, and therefore that title stands confirmed.

There being cross appeals, the question arises here, whether the upper grant should be confirmed for six leagues or for *eleven— [*289 the grant of the governor calling for the latter quantity.

The district court adjudged six leagues as the proper quantity; and on this single point the cause comes before us—both parties being satisfied with the decree below in all other respects.

The narrow question is, Had the governor of California power, in 1844, to grant gratuitously, for the purposes of tillage, inhabitancy, and pasturage, more than eleven leagues of land to any one person? Section 12 of the law of 1824 provides, that it shall not be permitted to unite in one hand, as property, more than one league of irrigable land, four leagues of farming land, not irrigable, and six for stock raising.

Both titles of Hartnell were brought before the departmental assembly. That body held the law to be, that the governor could not "unite in the same hand" more than eleven

leagues, although it might be in different tracts; and so reported to him.

The public domain was the property of the Mexican Nation, and those who were enabled to displace that title, separate portions of it from the public lands, and vest such portions into individual proprietors by perfected titles, could only do so in the exercise of sovereign power, because the public title was a sovereign right; and agents who assumed to exercise this authority must show that they represented the nation. The governors of California do not show that they did represent the nation, so as to conclusively bind it; to have this effect, the governor's grant must have the concurrence of the departmental deputation. It follows, that the assembly was the controlling power, and could reform or nullify the governor's grant; and having reformed it to the extent of five leagues in the case before us, the claimant came in under the treaty of peace with Mexico, having no interest in these five leagues. 8 How. 303, 304.

We have no doubt that the departmental assembly, the board of commissioners, and the district court, construed the law of 1824 (section 12) correctly, *and order the decree below to be affirmed in all its parts.*

290*] *THE EXECUTORS AND HEIRS OF AUGUSTIN DE YTURBIDE, Deceased, *Appts.*,

v.

THE UNITED STATES.

(See S. C. 22 How. 290-293.)

Court bound by statute, as to grant—and as to appeal—cannot add saving clause to statute—act mandatory.

Where an entry is required by statute to be on a condition expressed, the court is bound by the statute.

Where the language of the act of August 31, 1852, is, "the appeal shall be considered as dismissed," where the notice is not filed as required, the court cannot say it shall not be so considered.

If there is no saving clause in the statute, the court cannot add one on equitable grounds.

The act of August 31, 1852, as to appeals from the board of commissioners, is mandatory on the court, and authorizes the exercise of no discretion.

Argued Feb. 28, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **M. Blair**, for appellants:

The district court dismissed the appeal on the ground that its own order, allowing the notice of appeal to be filed *nunc pro tunc*, was void.

I contend that this order was not invalid. The language of the statute, that "the appeal shall be considered as dismissed" in case the notice is not filed as required, is directory merely. It prescribes a rule as to the time of filing a paper in the progress of a cause, and such rules are directory merely, and are never construed to prohibit the filing of the papers after the time limited, and before the adverse party has taken advantage of the omission.

O'Hara v. *Nieury*, 1 Sand. 655; *Cook* v. *Forrest*, 18 Ill. 581; *Wood* v. *Fobes*, 5 Cal. 62; 1 Barb. 478; 3 Rich. 60; 9 Ala. 399; 1 Brev. 203.

The suit was instituted and notice given of its pendency to the United States, by filing the transcript from the record of the board of commissioners.

U. S. v. *Ritchie*, 58 U. S. (17 How.) 534.

The court being thus possessed of a cause which it was required to dispose of on the principles of equity, was authorized to permit a proceeding required in the subsequent progress of the cause, to be taken *nunc pro tunc*, for good cause and in aid of the ends of justice. That proceeding was altogether formal, and occasioned no surprise or injury to the adverse party, and it would be against the whole spirit of the act which required the courts to deal with the rights of the claimants according to the principles of equity, as well as against the ordinary rules of practice, to hold that the order in relation to it was void.

The ground upon which the commissioners rejected this claim is, that it was not located till after the change of government. This objection was overruled by this court, in *Rutherford* v. *Greene's* Heirs, 2 Wheat. 196; in *Frémont* v. *The U. S.* 58 U. S. (17 How.) 557, and in *Bissell* v. *Penrose*, 8 How. 317.

Messrs. **J. S. Black**, *Atty.-Gen.*, and **E. M. Stanton** for appellees.

Mr. Justice **McLean** delivered the opinion of the court:

This is an appeal from the district court of the United States for the northern district of California. A grant of twenty leagues square of land, equal to four hundred square leagues, was made by the supreme government of Mexico to President Yturbide, to be located in Texas, on the 25th February, 1822, "in recompense for his high merit, in having achieved the independence of his country."

In 1835, the Congress of Mexico authorized his heirs to locate the land in New Mexico, or in Upper or Lower California. On the 20th of February, 1841, it was decreed by the President that the land should be located in Upper California; and on the 5th of June, orders were given by the President to the governor of California to assign the land selected by Salvador de Yturbide, one of the heirs, in fulfillment of the grant, and the order was duly received by Pio Pico; but *when Salvador was [*292 near Mazatlan, *en route* for California, to locate and take possession of the land, he found that port in rebellion, and was obliged to return to Mexico.

The claimants took no further proceedings till after the close of the war with the United States, and Congress had passed laws to carry into effect the treaty stipulations. They proceeded then to locate the claim on the tract described on the map, and presented their petition to the board of commissioners, asking for the confirmation of the grant. The board rejected the claim, on the ground that it had not been located prior to the change of government.

An appeal was taken to the district court,

under the act of 1852; but the counsel of appellants, being detained from home by sickness, did not file the notice, directed by the act to be given within six months. Before any motion was made to dismiss the cause, they moved the court for leave to file the notice, *nunc pro tunc*, and proved, to the satisfaction of the court, that the omission to file the notice was wholly accidental; and the court thereupon allowed the motion, and ordered the notice to be filed *nunc pro tunc*. But, on hearing of the cause, the court decided that, under the statute of 1852, a failure to file the notice within six months precluded any further prosecution of an appeal, under any circumstances whatever, and therefore dismissed the appeal.

The district court, it is said, dismissed the appeal on the ground that its own order, allowing the notice of appeal to be filed *nunc pro tunc*, was void.

As the above statement is clear and concise, it was copied from the plaintiff's brief.

The counsel insists, that the allowance of the appeal, after the time limited, was not void; that the language of the statute, that "the appeal shall be considered as dismissed, in case the notice shall not be filed as required," is directory merely.

It must be admitted, that, as to the matter of filing papers and the entry of rules under the practice of the court, such modifications may be made as may facilitate the progress of the court and the convenience of parties; and, indeed, the court may, under peculiar circumstances, avoid 293*] an act of *injustice by the suspension of its rules; but this can only be done where the discretion of the court may fairly be exercised.

Where an entry is required by statute, on a condition expressed, the court is bound by the statute. The language of the act, that "the appeal shall be considered as dismissed" where the notice is not filed as required, would seem to admit of no doubt. "If the appeal shall be considered as dismissed," for want of notice, how can the court say it shall not be so considered?

If there be no saving in a statute, the court cannot add one on equitable grounds. The 12th section of the act of 31st August, 1852, provides that, in every case in which the board of commissioners shall render a final decision, it shall be their duty to have two certified transcripts of their proceedings and decisions, and of the papers and evidence on which the same were founded, made out, one of which transcripts shall be filed with the clerk, shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk of the court, within six months thereafter, of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the Attorney-General of the United States, within six months after receiving the said transcript, to cause to be filed with the clerk aforesaid a notice that the appeal will be prosecuted by the United States; and on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed.

This seems to be mandatory on the court, and authorises the exercise of no discretion.

THE UNITED STATES, *Appts.*,
v.
THE HEIRS OF FRANCISCO DE HARO, Deceased.

(See S. C. 22 How. 293-298.)

Mexican grant confirmed—alteration in, against claimant's interest, will not be imputed to him.

Where the father of petitioners obtained a former grant of Alvarado, governor of California, to the lot petitioned for, and remained in possession thereof up to his decease, and from that time petitioners have been, and still are, in the quiet and undisputed possession of said land, and such undisturbed possession has been for sixteen years, and it does not appear that anyone else has claimed or exercised a possession or right of possession over the premises; held, that the title should be confirmed.

Where the grant was originally made and dated by Governor Alvarado during his term of office, and the date which it now bears is an evident alteration against the interests of the claimants, it is not to be imputed to them.

Argued Feb. 24, 1860. Decided Mar. 13, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Mess. **J. S. Black**, *Atty.-Gen.*, and **E. M. Stanton** for appellants.

Mr. **P. Phillips** for appellees.

Mr. Justice **McLean** delivered the opinion of the court:

The petition of the heirs of Francisco de Haro represents:

That on the 30th July, 1843, the father of your petitioner made and presented his petition in writing to Alvarado, governor of California, soliciting for himself the grant of a lot of land in the mission of Dolores, to which he had previously obtained a provisional grant of Jose Ramon de Estrada.

That on the 16th of August, 1843, said Francisco obtained a formal grant of said Alvarado to the lot so petitioned for, and remained in possession thereof up to the time of his decease; and that, from that time up to this day, your petitioners have been and still are in the quiet and undisputed possession of said land.

That said land is situated in the mission Dolores, and in the block known and laid down on the official map of San Francisco as block No. 37, and forms the northeast of Centre and Dolores streets, containing fifty Spanish *varas* square—which grant has properly been recorded in the archives of California—and that the original documents are herewith submitted to the inspection of your honorable board.

*Francisco Sanchez was sworn, as to [*295 the genuineness of the grant, and he says: I never saw the paper before, but I have no doubt it is genuine. I am acquainted with the signatures of Francisco de Haro and Juan B. Alvarado, having often seen them write; and I recognize their signatures, as they appear on said document, as their genuine signatures.

There were some old houses on the land at the time of the grant, which had belonged to the mission. These were repaired by Francisco de Haro, and in 1846 he was living in them. The land had been inclosed since by his son-

in-law, Charles Brown. De Haro died there in 1848. The house was repaired by de Haro.

Francisco de Haro, over his own signature, represents: "That being established in the establishment of Dolores, in houses of the name called 'Mayor domos,' opposite the principal house and *plaza;* and, as I obtained them from the prefect of the 1st district, Don Jose Ramon Estrada, I solicit of Your Excellency the legitimacy in property, for the expenses that I have to make to repair them, to live therein with my family, in virtue of my services rendered, receiving grace from Your Excellency, by adding fifty *varas* eastward of the houses, inasmuch as I beg most humbly, etc."

Monterey, Aug. 16, 1843.

Most Excellent Sir: Whereas the citizen Francisco de Haro has rendered interesting services to the nation and to the departmental government, and in virtue of his being already in possession of the houses solicited by previous consent of the government, as it is shown by the concession of the prefect of the district, I have concluded by these presents, in conformity and ratifying said concession jointly with the fifty *varas* to the eastward of said houses, as solicited.

The judge of San Francisco will have it so understood, for the cases that may occur upon informations in relation to the new Town of Dolores. Alvarado.

This claim was at first held not to be valid and was, consequently, rejected by the commissioners. From this decision there was an appeal to the district court. On this appeal a 296*] *witness, Candelario Valencia, was sworn, who says he is forty-eight years of age, and resides in the mission of Dolores, San Francisco county, California. The witness first knew Francisco de Haro about thirty years since. He is now dead; he died in 1847 or 1848, at the mission of Dolores, and in the building now occupied by Louis Pruso, which is on the northeast of Centre and Dolores streets. The lot on which this house is situated is a fifty *vara* lot.

To the question, Who are the heirs of Francisco de Haro?—the witness answers: At the time of his death he left eight children—one died without issue; the names of those living are as follows: Josefa de Haro, wife of James Dennison—she was formerly wife of Guerrera, now dead; Rosalia de Haro, formerly wife of Mr. Andrews, deceased—now wife of Charles Brown; Natividad, formerly wife of Ignacio Castro, deceased, and now of Paul Tissot; Prudencia, unmarried; Candelaria, unmarried; Charlotta, wife of Fish; Dennison, brother of James; and Alonzo, not yet of age. Francisco de Haro lived in the house ten years. It was formerly part of the establishment of the mission, and was occupied by the mayor domos; it fronts upon the *plaza* of the mission, and also is opposite the principal house of said mission. Since the death of Francisco de Haro, it has been occupied, and is still, by the tenants of his heirs. Dolores and Centre streets have always existed, since the mission was established, but had not their present names; in fact, they had no names. This lot in question had the same position that it now has. A surveyor, without any difficulty, could locate said lot.

The witness says that he has lived at the mission Dolores for the last sixteen years, and has seen all that he has testified to.

The final decree of the district court before both the judges was as follows:

This cause came on to be heard upon the transcript of the proceedings in the board of the United States land commissioners, etc., and upon the proof taken in this court upon the appeal from the decision of the said board, taken therefrom by the complainant, and upon hearing counsel for appellants and *respondent, [*297 and due deliberation being thereupon had, etc., it is ordered, adjudged, and decreed, that the decision and decree of the said board be, and the same is hereby reversed.

And it is further ordered, adjudged, and decreed, that the claim of the said appellants to the land claimed by them is valid, and that the same be, and hereby is confirmed to them.

The land whereof confirmation is made is that certain fifty *vara* lot, situated in the mission Dolores, on the northeast corner of what are known as Centre and Dolores streets, on which lot there is a house which formerly formed a part of the establishment of the mission Dolores, occupied by the mayor domos thereof—said lot fronting on the *plaza,* opposite to the principal house of said mission, and which lot was in the occupancy of Francisco de Haro for some years previous to his death, and has been recently in the possession of one Louis Pruso, as tenant of the claimant, together with and adding fifty *varas* to the eastward and immediately adjoining said houses.

Subsequently, a notice was served on the district attorney, that the counsel for the complainants will move the court, on the 14th of September, 1857, on that day, or as soon thereafter as counsel can be heard, that the decree entered in this cause be reformed, by adding to the description of the property confirmed by the said decree, "together with the parcel of land, fifty *varas* square, to the eastward thereof. San Francisco, September 10th, 1857."

Afterwards, on motion of the District Attorney of the United States, "it is ordered that the decree heretofore rendered at this term in the above case be set aside, and that the cause stand for reargument at the next term of this court."

And the final entry, upon filing and reading the affidavit of B. S. Brooks, and upon inspection of a traced copy of the original grant of title, whereof confirmation was heretofore made, certified in due form from the office of the surveyor-general, from which it manifestly appears to the court that the said grant was originally made and dated by Governor *Alvarado [*298 during his term of office, and that the date which it now bears is an evident alteration against the interests of the claimants, and therefore not to be imputed to them; and upon filing a notice of motion and due proof of service thereof upon the District Attorney of the United States, and counsel having been heard for both parties on motion of Mr. Williams, of counsel for the claimants, it is ordered that the order heretofore made in this cause, setting aside and vacating the decree heretofore made confirming the claim, be, and the same is hereby vacated, set aside and annulled, and said decree revived and reinstated.

From this decree there was an appeal to the

Supreme Court of the United States by the government.

"It appears that an undisturbed possession of the property claimed has been in the possession of Francisco de Haro and his heirs sixteen years, and it does not appear that anyone has claimed or exercised a possession or right of possession over the premises. The copy of the original grant of title, whereof confirmation was heretofore made, certified in due form from the office of the surveyor general, from which it manifestly appears to the court that the said grant was originally made and dated by Governor Alvarado during his term of office, and the date which it now bears is an evident alteration against the interests of the claimants, and therefore not to be imputed to them." This, being the language of the court, imparts verity to the grant, and would seem to settle all doubt on the subject.

There were some old houses on the land at the time of the grant, which belonged to the mission, but it would seem no longer belong to it.

Upon the whole, we cannot doubt, from the title papers, and especially from the sixteen years' possession which has been enjoyed by de Haro, and his heirs—using property as their own, claiming it under the grant—that the title should be confirmed; *and it is hereby confirmed.*

JOHN P. JETER, *Plff. in Err.*,
v.
JAMES HEWITT, Melville Heron, and Mary Conrad.

(See S. C. 22 How. 352-364.)

Louisiana judgment, when res judicata—jurisdiction—state decisions, when binding.

In Louisiana, a judgment confirming and homologating a judicial sale, is *res judicata*, so as to operate "as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property so sold, in consequence of all illegality or informality in the proceedings, whether, before or after judgment."

And the judgment of homologation is to be received and considered "as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interest of the parties duly represented."

The jurisdiction of the courts of the United States, in cases like the present, is derived exclusively from the fact that the parties are citizens of different states.

The rights which originate in the law of Louisiana, must be ascertained by a reference to the principles adopted and administered by her constituted authorities.

The sentences of her courts, except in a few cases arising under the Constitution and laws of the United States, are entitled to the same force and effect here as they have in Louisiana.

Argued Feb. 27, 1860. Decided Mar. 12, 1860.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

The petition in this case was filed in the court below, by the plaintiff in error, to recover a plantation and slaves, and other property therein enumerated.

The court below having entered a judgment dismissing the petition, the petitioner sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Geo. E. Badger** and **J. M. Carlisle**, for the plaintiff in error:

1. If this were a case of which the court ordering a seizure had jurisdiction, still no title passed by the sheriff's deed, because he was bound to give three day's notice to the debtor before the seizure, if he resided on the spot; and if he did not, to count in addition a day for every 20 miles between the residence of the creditors and the residence of the judge to whom the petition was presented.

Code of Pr. 735; *Erwin* v. *Lowry*, 7 How. 181, 182.

2. But the whole proceeding was *coram non judice* and void. There was no action pending in that court.

See Code of Pr. arts. 78, 79, 95; *Babcock* v. *Williams*, 10 La. 396; *Jenkins* v. *Tyler*, 3 Mart. N. S. 183; *Andrews* v. *Bank of N. Orleans*, 5 La. Ann. 738; *Carrollton R. Co.* v. *Bosworth*, 8 La. Ann. 80.

3. The validity of this title set up by the defendants is not *res judicata*. The monition suit on which this pretension is founded, could have no such effect if the proceedings in the fifth district court were a nullity. See Monition act, B. & C.'s Dig. 586; *City Bank* v. *Walden*, 1 La. Ann. 47, and 16 La. Ann. 596.

Besides, the court where the monition suit was prosecuted, had no jurisdiction over the original suit, and could have none over that which was merely incidental.

Again, the judgment in the monition suit was not a judgment upon the merits, even against Mrs. Ford; and was not at all against Jeter.

Civ. Code, 2265.

Finally, the degree of homologation, in its terms, seems really to come to nothing, since it only confirms and homologates the sale, "in so far as the same has not been opposed;" while the record shows that it was totally opposed.

4. Jeter is not estopped to claim against the sheriff's sale, or to show the nullity of the proceedings upon which it is based.

In this respect this case is in striking contrast with *Erwin* v. *Lowry*, in 7 How. 172. There, Hector McNeill, under whom Lowry claimed, had actively participated in the proceedings at the sale, had joined in the selection of appraisers (p. 182), had requested the marshal to offer the land and the negroes together, which was done (p. 183), and all this in the presence of Erwin; and upon the faith of this conduct, Erwin purchased. In the present case, it is distinctly proven that Jeter, "in a loud and audible tone," announced "to the sheriff and the bystanders," "that he was the owner of the property, and forbade the sale of it; and this announcement was made before the property was adjudicated to Hewitt & Heron."

"He made his objections known publicly to the crowd." The sheriff answered, that "he would proceed with the sale."

The only facts relied on by the defendants as creating an estoppel, are, first, that Jeter was present at the sale, and when the property was first offered, bid for it $70,000, and it was

NOTE.—*Conclusiveness of judgments between Federal and state courts*—see notes, 21 C. C. A. 478; 49 C. C. A. 468.

knocked down to him; and second, that in 1852, he joined with Mrs. Ford in making a deed for forty arpents of the land to Hewitt & Heron, for $2,000.

As to the first, his bid was for the protection of his own interest, and to avoid litigation. He had already paid Mrs. Ford $5,000, and he had agreed to pay, not only the debts charged on this property, but all the debts. Such a fact, even if the other party had acted upon it, could create no estoppel.

Hearne v. *Rogers*, 17 Eng. C. L. 451, 452.

But Hewitt & Heron did not act upon it. The sheriff refused Jeter's draft on Hill, McLean, & Co., of New Orleans, with whom he had arranged for the money, and refused him time to go to New Orleans to produce the money, and "demanded that he should pay in cash the amount of his bid within half an hour, or he would set up the property and sell it again, which he did."

Then it was that Jeter gave notice of his title and forbade the sale; and Hewitt & Heron purchased under this notice.

As to the deed made in 1852, so far from importing a recognition of the title of Hewitt & Heron, it would rather signify an admission by them, that at least as to this fragment of forty acres, it required confirmation by a deed from Jeter.

In no view of these facts can they operate as an estoppel. The general current of authorities, English and American, establishes the principle that a declaration *in pais* shall not work an estoppel, unless it appears affirmatively that it was intended that the party for or to whom it is made, should act on the faith of it, and that he actually did so act, and will be prejudiced by the contrary assertion. If it be necessary to cite authorities for this, they will be found collected in Hare & Wallace's note to Howard & Hutchinson. 2Ell. & B. 13 Amer. ed. and in the principle case. Here there was express warning given.

For these reasons, it is respectfully submitted that the decree shall be reversed.

Mr. **J. P. Benjamin,** for defendants in error:

I. This action is plainly based on the assumption that the proceedings in the state courts of Louisiana (under which the title of Ford's succession to the property was devested. and the property sold to the defendants), are an absolute nullity.

It is an attempt indirectly to bring before the Federal courts, jurisdiction of a question which, under the decisions of this court, cannot be examined by them.

The courts of Louisiana had jurisdiction of the property appertaining to Ford's succession. and they have exercised that jurisdiction by disposing of that property.

How, then, can that disposition of the property be supervised or revised by the Federal courts?

This court has always declined to permit the proceedings of even the inferior courts to be attached collaterally before it.

Tarver v. *Tarver*, 9 Pet. 174; *Gaines* v. *Chew*, 2 How. 619, 644; *Fouvergne* v. *City of N. O.* 18 How. 471; *Hagan* v. *Preston*, 22 How. 473, decided at present term.

In this case the plaintiff goes to the extravagant length of calling on the court not to annul the proceedings of an inferior state court as irregular or illegal, but to treat the final decision of the supreme court of Louisiana, as an absolute nullity.

The form chosen for the action, a simple petitory action of ejectment, is a transparent device used by plaintiff, to avoid the necessity of bringing an action to set aside the judgment of the supreme court of Louisiana, he being conscious that such action would be utterly untenable.

II. Jeter was a party to the suit determined by the supreme court of Louisiana, and it forms *res judicata.*

'Tis true he was not a party by name, but the opinion of the supreme court is explicit, that Mrs. Ford's action as executrix was for the use of Jeter.

Having once litigated his rights through all the courts of Louisiana, the plaintiff cannot renew the contest in the Federal courts. The *exceptio rei adjudicatæ,* is a complete bar to his suit.

III. The monition proceedings and judgment on them, are in the nature of proceedings *in rem,* and bind all the world, even those ignorant of their pendency—*a fortiori* do they bind one who, like Jeter, was not only conusant, but was active in opposition.

The monition law of Louisiana (Acts 1834, p. 125; Rev. Stat. 1852, p. 425) is a wise and beneficial statute, and should be liberally construed. It was passed for the protection of innocent purchasers at sheriffs' sales, and by the 4th section, the court that issued the process had jurisdiction.

By the 6th section, the judgment is conclusive evidence that the proceedings of the court on the monition were regular; and by the 7th section, the judgment of the court confirming the sale, operated as *res judicata* and a complete bar against all persons, whether of age or minors, whether present or absent.

There is nothing in the 8th section which can release the plaintiff from the effect of this estoppel, because "notices of the sale and appraisement were served by the sheriff by leaving them on the plantation with the overseer, and plaintiff had notice of the sale, and was present at it, and bid for the property."

Besides, plaintiff was in the place and stead of Ford, and Ford had confessed judgment in the original mortgage, and thereby waived citation to make defense.

When a mortgage is granted with confession of judgment, executory process issues at once without citation (Code Practice, 734), and is in the nature of the fi. fa. that is issued on such judgments as are confessed in court.

IV. Jeter's presence at the sale, his bidding, his failure to notify other bidders of any opposition to the sale, form a complete estoppel *en pais*, as well under the principles of equity jurisprudence, as by the settled rules of the law of Louisiana.

Harris v. *Denison*, 8 La. 543; *Doser* v. *Squires*, 13 La. 130; *Walker* v. *Allen*, 19 La. 308; *McMasters* v. *Commissioners*, 1 La. Ann. 11; *Muir, Syndic*, v. *Henry*, 2 La. Ann. 593; *Moore* v. *Lambeth*. 5 La. Ann. 67; *Bk. La.* v. *Ford*, 9 La. Ann. 299.

V. Both Mrs. Ford and Jeter were parties to a deed, by which, in consideration of $2,000, they ratified the title of the purchasers.

This deed was passed on the 11th of April, 1851. It had reference to the property now in dispute.

Mr. Justice **Campbell** delivered the opinion of the court:

The plaintiff commenced this suit to recover a plantation and slaves, with the horses, mules, implements, and other things enumerated in the petition destined to the use and convenience of the plantation, and for an account of rents and issues for a term of years. He deduces his title from Christopher Ford, who was in possession of the plantation at his death, in 1849, through a conveyance from Louisa W. Ford, the widow, executrix, and instituted heir of her deceased husband, dated in November, 1850.

The defendants show, that in November, 1845, two banking corporations of Louisiana (Bank of Louisiana and New Orleans Canal and Banking Company) sold to Christopher Ford this plantation and twenty-eight slaves, for the price of $40,000, a portion of which was paid in cash, and for the remainder a credit was given, and that Ford mortgaged the property conveyed to him, and sixty-eight other slaves, which he agreed to place on the plantation. On the same day, he obtained from the bank of Louisiana a loan of money, which was secured by another **359*]** mortgage on the same property. At *the time of the death of Ford, he was in arrears for the debt and interest that had accrued.

In the mortgage to the Bank of Louisiana, Ford agrees not to alienate, deteriorate, or incumber, the property mortgaged, and confesses judgment for the sum of money to be paid. He renounces the benefit of the laws that require property seized on execution to be sold on credit or after appraisement, and agrees, that if the debt shall not be paid according to the tenor of the mortgage, then the banking company may obtain an order of seizure and sale, and sell the mortgaged premises and slaves by public auction, for cash, after an advertisement of thirty days. He waives his privilege to be sued in any other district than the first judicial district of the state, and agrees that process may issue from the district court for the first district, or any other court in New Orleans having jurisdiction.

The charter or the bank provides, that upon all mortgages executed under the act, the bank shall have the right to seize the property mortgaged, in whatever hands it may be, in the same manner and with the same facilities that it could be seized in the hands of the mortgagor, notwithstanding any sale or change of the title or possession thereof, by descent or otherwise.

On the 16th December, 1850, after the conveyance of Mrs. Ford to the plaintiff, the Bank of Louisiana instituted a suit upon the second mortgage above mentioned; a writ of seizure and sale issued, and the property was advertised for sale the 1st February, 1851. Jeter was present at the sale that took place on that day, bid for the property the sum of $70,000, and it was adjudicated to him at that price. He offered a draft for the amount of the execution, on merchants residing in New Orleans, and asked for time to go for the money; and these being refused, the property was again offered for sale, and purchased by Heron & Hewitt for the price of $66,000; and thereupon the sheriff executed a deed to the purchasers, conformably to the adjudication.

This sum being insufficient to discharge the incumbrances on the property, proceedings were taken for the seizure and *sale of [*360 other slaves, which were sold in September, 1851, and adjudicated to the defendants.

The defendants resist the claim of the plaintiff under these titles. The plaintiff objects to them—

1st. That Ford, the mortgagor, was dead at the commencement of these proceedings, and that the notice issued to him was nugatory; that his heir and executrix was not notified at all, and did not reside in the parish of Ascension, nor have any title to the plantation at which the notices of the seizure were left; and that the plaintiff is not concluded by his presence at the sale and bid for the property, having forbade the sale before the offer, at which the defendants became the purchasers, was made.

2d. That the sale was irregular and illegal, in respect of the notice of the seizure, the advertisements, appraisement, and refusal to allow the plaintiff time to complete his purchase.

3d. That the fifth district court was not authorized to entertain a suit for a thing in the parish of Ascension; and that, if consent could give jurisdiction, the consent given by Ford in his mortgage was personal, and binding only in respect to his own privilege, and did not affect his heir or her assignee.

The purchasers, Heron & Hewitt, in April, 1852, applied to the district court of New Orleans, under a statute of Louisiana, for a monition, citing all persons who can set up any right to the property adjudicated, in consequence of any informality in the order, decree or judgment of the court, under which the sale was made, or any irregularity or illegality in the appraisements and advertisements, in time or manner of sale, or for any other defect whatsoever, to show cause why the sale so made should not be confirmed and homologated, and, after due proceedings in the premises, that the said sales be confirmed, homologated, and made the final judgment of the court.

The executrix (Louisa W. Ford) appeared to this monition, and made opposition to the homologation of the sale, and disclosed at large the objections above specified, and prayed that the sale be declared null and void, and that the property might be restored to her possession.

*To this opposition Heron & Hewitt re- [*361 plied, that they were bona fide purchasers at a public sale by the Sheriff of Ascension, under a writ from the court, without any knowledge of neglect, or illegality, or want of jurisdiction; that the opponent had sold her interest in the property, and was estopped to oppose the sale by her acts. They pleaded that the mortgage contained a confession of judgment, and no notice was necessary to anyone to obtain a judgment; and assert there is no just cause to deny the homologation of the sales.

The district court, at the November term, 1852, entered an order describing the property embraced in the sheriff's deed, and reciting the

facts relative to the grant of the monition, and the motion for the homologation of the sale, and conclude:

"The court being satisfied, from inspection of the record and evidence adduced, that all the formalities of the law have been complied with; that the advertisements required have been inserted and published for the space of time and in the manner required by law; that the property has been correctly described, and the price at which it was purchased truly stated; and there being but one opposition filed thereto, to wit: by Mrs. Christopher Ford, it is adjudged and decreed that said sheriff's sale be confirmed and homologated according to law, in so far as the same has not been opposed."

The cause was continued in the district court, upon the opposition proceedings of Mrs. Ford.

In June, 1853, the district court rendered the judgment upon this opposition, that the sale was null and void, for the reasons pleaded, and condemned the petitioners (Hewitt & Heron) to costs. An appeal was taken to the supreme court of Louisiana. That court rendered its judgment in 1854.

The court says: The appellants are bona fide purchasers at a judicial sale of the plantation and slaves, at the instance of a mortgage creditor, at a fair price, which has been paid, and possession taken, and improvements made. That, as executrix, Mrs. Ford had done nothing, except to obtain probate of the will, and as heir she has sold her interest to Jeter in the estate, he covenanting to pay the debts, and that she 362*] gave him a power *to sell and administer the estate. That Jeter had failed to comply with his bid at the sheriff's sale, and that then the appellants had become the purchasers, settled with mortgage creditors, and took possession. "Under these circumstances," the court conclude, "we think it inequitable to permit this sale to be questioned by the executrix, whom we consider as merely attempting to aid Jeter, her vendee and agent, in a speculation, at the expense of these bona fide purchasers, under the guise of representing a small minority of the creditors, whom she, personally, and Jeter are bound to pay. It is obvious, under the facts above stated, that neither of them, Jeter and Mrs. Ford, would be permitted personally to question the sale, on account of the alleged informalities." And thereupon the decree of the district court was reversed, and the opposition dismissed, reserving to the creditors their right, if any, to sue for a rescission of the sale. *Bank of Louisiana* v. *Ford*, 9 La. Ann. 299.

The effect of the judgment confirming and homologating the sale is declared in the statute that authorizes the monition to issue, in favor of purchasers of property "at sheriff's sales," at those "made by the syndics of insolvents' estates," at those "made by the authority of justice," or of courts, and to enable them "to protect themselves from eviction from the property so purchased," and "from any responsibility to the possessors of the same." It confers upon the order made by the court upon the monition, "the authority of *res judicata*," so as to operate "as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property so sold, in consequence of all illegality or informality in the proceedings, whether before or after judgment;" and the judgment of homologation is to be received and considered "as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interest of the parties duly represented," saving and excepting, "that it shall not render a sale valid made in virtue of a judgment, when the party cast was not duly cited to make defense."

The judgment of the district court homologating the sale *concluded all parties [*363 except Mrs. Ford, who had filed opposition to the order. Subsequently the supreme court overruled her opposition, assigning as the reason that the sale was fair, the purchasers bona fide, and the opponent had no interest in the subject of contest. The plaintiff, whether we consider him as acting independently or in connection with Mrs. Ford, and under the "guise of her name" and character, is affected by these orders.

By the very terms of the statute, all the objections that apply to the manner of conducting the sale and to the form of the judgment are cut off by the judgment of homologation.

The only question that the judgment leaves open is whether the court that rendered the original judgment had jurisdiction of the person. But this question was presented to the district court and the supreme court upon the opposition of Mrs. Ford, in the same manner in which it is presented to this court. The facts of the death of Ford, the probate of his will in the parish of Ascension before the order of seizure, the seizure within three days from the date of the order, the notice directed to Ford, and left at the house of the overseer, in the absence of Mrs. Ford, and after her sale to Jeter; the presence of Jeter at the sale, the adjudication to him of the property upon his bid, and the resale upon his neglect to comply with the terms of the sale, and the purchase by Heron & Hewitt, with the sheriff's deeds to him, were presented to those courts upon the evidence that has been submitted to this court.

The decision of the supreme court of Louisiana was, that as executrix, Mrs. Ford did not really and truly represent the interest of the creditors of her husband in her opposition, and that she used that title to protect her own interest and that of Jeter, her agent and vendee —but that they would not be permitted "personally to question the sale, on the score of the alleged irregularities."

The authority of *res judicata* as a medium of proof is acknowledged in the Civil Code of Louisiana; and its precise effect in the particular case under consideration is ascertained in the statute that allows the proceeding by monition. Under the *system of that state, [*364 the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence, that commentators upon it have said, the *res judicata* renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum.* No other evidence can afford strength to the

presumption of truth it creates, and no argument can detract from its legal efficacy.

The jurisdiction of the courts of the United States, in cases like the present, is derived exclusively from the fact that the parties are citizens of different states. The rights of these parties originate in the law of Louisiana, and must be ascertained by a reference to the principles adopted and administered by her constituted authorities. We are not invested with power to review the sentences of her courts, except in a few cases arising under the Constitution and laws of the United States; nor is it our province to augment or diminish their value, or to place any different estimate upon them than they have in the municipal code of the state. They are entitled to the same force and effect here as they have in Louisiana.

The statement of the case of these parties shows conclusively that the whole subject of this controversy has been legally submitted to the tribunals of Louisiana, and that the adjudication was in favor of the defendants.

This was the decision of the circuit court of the United States in Louisiana, from whose judgment this writ of error has been taken. It remains for us only to affirm that judgment.

Judgment affirmed.

ADAM OGILVIE *et al., Appts.,*
v.
THE KNOX INSURANCE COMPANY,
Levi Sparks *et al.,*

(See S. C. 22 How. 380–392.)

Stockholders of insurance companies—when liable to creditors—continuing to act after knowledge of fraud, waives it—cannot avoid payment, because other stockholders not sued.

Where a number of special partners are incorporated to carry on the business of insurance, the stock subscribed and owned by the several stockholders or partners, constitutes the capital or fund publicly pledged to all who deal with them.

Where an insurance company did not require their stockholders to pay in cash more than ten per cent of their several shares, but they were allowed to retain the remaining ninety per cent in their own possession, substituting therefor other securities, the ninety per cent retained by the stockholders is as much a part of the capital pledged as the cash actually paid in.

When that portion of the capital represented by these securities is required, to pay the creditors of the company, the stockholders cannot be allowed to refuse the payment of them, unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash.

Those who seek to set aside their solemn written contracts, by proving loose conversations, should be held to make out a very clear case.

When they charge others with fraud, founded on such evidence, their own conduct and acts should be consistent with such a hypothesis.

Stockholders cannot repudiate their contracts on the allegation of fraud, if, after having a full prior opportunity to examine for themselves into the affairs of the company, they alleged no fraud, nor expressed any desire to withdrawn their subscriptions.

After they have a full opportunity to know the situation of the company its funds and its property, and they organize a branch of the corporation which continues to meet, till a succession of losses make it apparent that the capital of the company will be nearly all required to pay for the losses incurred, when the directors conclude to consider themselves defrauded, and withdraw their capital from the company; held, that this discovery was made too late, and that a court of equity cannot receive such a pretense as a valid defense against the creditors of the corporation.

The objection made to the bill, of want of proper parties, is equally untenable.

If a stockholder is bound to pay his debt to the corporation, in order to satisfy its creditors, he cannot defend himself by pleading that the complainants might have got their satisfaction out of another stockholder quite as well.

If the debts attached are sufficient to pay their demands, the creditors need look no further.

Argued Feb. 16, 1860. Decided Mar. 12, 1860.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The bill in this case was filed in the court below, by the appellants, who are judgment creditors of the Knox Insurance Company, against said insurance company and numerous of its stockholders.

The court below having entered a decree dismissing the bill, the complainants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **R. H. Gillet and S. Judah,** for appellants:

1. Exceptions to the answer of Cullum, which was admitted by the other defendants, were well taken and should have been allowed. The bill stated numerous facts distinctly, and by interrogatories called upon the defendants for explicit answers, which they did not give. Among other questions, they were asked if they subscribed for and took stock in the company. Instead of stating they did or did not, they state facts, and say they did not unless those facts amounted to a subscription.

2. The witnesses, Cullum, Savitz, and Schwartz, were parties to the record and interested and their depositions must be suppressed.

2 Daniel, Ch. Pr.; *Whipple* v. *Lansing*, 3 Johns. Ch. 612; *Lingan* v. *Henderson*, 1 Bland's Ch. 266; *Barrett* v. *Gore*, 3 Atk. 402; *Dixon* v. *Parker*, 2 Ves. 219; *Clark* v. *Van Reimsdyk*, 9 Cranch, 153; *De Wolf* v. *Johnson*, 10 Wheat. 367; *Scott* v. *Lloyd*, 12 Pet. 145; *Stein* v. *Bowman*, 13 Pet. 209, 219; *Bridges* v. *Armour*, 5 How. 91, 95.

3. Where one of two innocent parties must suffer by a fraud, the one who had full opportunities to inquire into the facts and protect himself, must suffer instead of him who had no such opportunity.

In the present case, those called upon to subscribe for the stock, if they had chosen so to do, might have ascertained the amount of stock previously subscribed, and the amount of eastern exchange on hand owned by the company.

4. The subscriptions and obligations of the defendants are not void or voidable, even if it shall be admitted that the facts set up in their answers are true.

The defendants do not aver that the company authorized the false representations complained of, or that they approved of them after they were made. Nor do they aver that they repudiated the transaction as soon as they learned the true state of things. Nor do they state that they offered to restore things to their original condition. They set up that on the 25th of June, 1851, more than a year afterwards, they would have nothing more to do with the company, nor would they pay their notes or bills. This was about a year after they knew of the heavy losses. In order to de-

feat their liability, they must connect the company with the fraud alleged.

"It (a corporation) is not, however, responsible for unauthorized or unlawful acts, even of its officers, though done *colore officii.*"

Ang. & A. pp. 250, 251; *Thayer* v. *Boston*, 19 Pick. 516, 517.

5. The fact that from May, when the true amount of the Vincennes stock must have been known by the Jeffersonville stockholders, to the middle of August, no complaint was made on that account, is conclusive evidence that the defendants did not consider themselves injured by that fact.

6. The objection, in May, by the Jeffersonville stockholders, to an increase of the Vincennes stock before the dividend expected in July, is conclusive that they were not deceived or dissatisfied with the amount subscribed at that place. They were satisfied then, and are bound to be so now.

7. The fact that no complaint was made concerning the quantity of stock subscribed at Vincennes, until after the Jeffersonville stockholders were called upon to pay the $50,000 loss at Owensburg, is conclusive evidence that it was the losses, and not the limited amount of stock taken at the former place, that occasioned the dissatisfaction.

8. If a fraud had not in fact been committed, it was the duty of the party promptly and distinctly to repudiate and rescind it, and restore things to their original condition. In the present case, the subscribers waived the right to rescind, if they ever had the right, and could not afterward resume it, especially to the injury of innocent third persons or creditors.

See *Mason* v. *Bovet*, 1 Den. 69; 2 Pars. Cont. 278, 279; *Wheaton* v. *Baker*, 14 Barb. 594; *Munn* v. *Worrall*, 16 Barb. 221.

The defendants did not conform to the rules laid down in these authorities.

9. The meeting and action of the Jeffersonville board from May to August, after they knew the true state of the subscriptions, is conclusive evidence that they ratified and approved their subscriptions and obligations, and they are estopped from disputing either.

10. No fraud committed by the members of a corporation upon one another, can impair their respective liabilities or that of the company, so far as third parties, doing business with said corporation and trusting it, are concerned.

As to the alleged misrepresentations, the rules concerning such representations are:

1st. The fact represented must be material.

2 Pars. Cont. 266. 267.

2d. It must appear that the defendants did rely, and had the right to rely, on the representations.

2 Pars. Cont. 270.

3d. The representations must be contemporaneous.

Story, Agency, § 137.

4th. It must be in the peculiar knowledge of the party.

But admitting the charge of fraud to be proven, and that defendants relied on the representations, the defendants cannot protect themselves by it. It is too late.

2 Pars. Cont. 278; *Masson* v. *Bovet*, 1 Den. 69: 2 Pars. Cont. 278, note S; *Wheaton* v. *Baker*, 14 Barb. 594; *Munn* v. *Worrall*, 16 Barb. 221.

12. If these defendants might set up this fraud against the company or their co-stockholders, they cannot set it up against the creditors of the company. When one of the two innocent parties must suffer by the fraud of a third party, he of the two who afforded the means or gave the credit, must bear the loss.

Story, Agen. § 127, pp. 142, 143, and note 1; Story, Eq. Jur. §§ 384, 388; *Hiorns* v. *Holton*, 13 Eng. L & Eq. 596.

13. It is a rule, that when a man votes at a corporate election or acts as an officer of a corporation, he is estopped to deny the validity of the organization, or of his subscription.

Ang. & Ames, Corp. § 532, p. 518.

Mr. **R. Crawford**, for appellees:

1. The plaintiff's exceptions to the answers to the interrogatories are not well taken.

Whether the insurance company had been organized or not, and had authority to receive subscriptions, involved matter of law as well as of fact.

2. The defendants were not stockholders of the insurance company. They did not subscribe to the capital stock, as alleged in the complaint. The charter of the insurance company is a public act, and this court will notice it.

The 8th section provides that books for the subscription of the capital stock should be opened at Vincennes, and it should be lawful for any person to subscribe for any number of shares. To become a subscriber, required the writing of the name to such a book, or to some paper, which expressed in substance that the party agreed to take a given number of shares of stock.

Thames Tunnel Co. v. *Sheldon*, 6 B. & C. 341; *Fox* v. *Clifton*, 6 Bing. 776; *Galvanized Iron Co.* v. *Westoby*, 14 Eng. L. & Eq. 386; *Tracy* v. *Yates*, 18 Barb. 152; *T. & B. R. Co.* v. *Warren*, 18 Barb. 310; 14 N. Y. 574.

Giving their notes and bills did not make them subscribers or stockholders.

The notes and bills were without consideration, and cannot be enforced. There was no mutuality.

Lees v. *Whitcomb*, 5 Bing. 34; *Sykes* v. *Dixon*, 9 A. & E. 693.

The defendants never afterwards became stockholders, by accepting certificates of stock.

14 N. Y. 533; 18 Barb. 152.

The defendants never did any acts which estopped them to deny that they were stockholders. They never voted as such, or did any corporate act, or in any way whatever held themselves out to the world as stockholders.

3. The notes and bills described in the complaint were obtained from the defendants by fraud of the Insurance Company's agent, and were repudiated by them as soon as they were informed of the fraud.

The evidence upon this point, the depositions of Cullam, Schwartz, and Savitz, is objected to on the ground that the witnesses were parties to the suit, and that they were interested.

It is a familiar and unquestioned rule in the books of practice and of evidence, that one defendant in chancery may be examined by a co-defendant, if not interested in favor of the latter.

2 Daniel Ch. Pr. 1036, 1043; 1 Barb. Ch. Pr. 261; 1 Hoff. Ch. Pr. 485; 1 Greenl. Ev.

§ 318; see, also, 3 P. Wms. 288; 2 Ves. & B. 405; 2 Cox. 413; 14 Sims. 632; 1 Wood. & M. 90; 10 Conn. 121; 2 Johns. Ch. 550; 6 Johns. Ch. 204; 2 Cow. 129; 5 Paige, 251; 7 Paige, 457; 1 Bland. 503; 1 Ired. Ch. 92; 2 McCord, Ch. 185; 12 Ala. 396; 7 J. J. Marsh, 1; 6 Blackf. 221; 4 Scam. 135.

The plaintiffs have objected that if Carnan did practise this fraud upon the defendants, it was his own wrong only; the Insurance Company did not authorize it, nor ought it to be affected by it. It is true it had the alternative to reject or adopt the unauthorized acts of its agent. If it had rejected them, there would have been no contract between it and the defendants. But it chose to adopt them, and therefore it took them tainted as they were.

Chit. Cont. 679; 2 Pars. Cont. 276 and n. (*a*); 1 Story, Eq. Jur. § 256; *Doggett* v. *Emerson*, 3 Story, 735; Atwood v. Small, 6 Cl. & F. 448; *Mason* v. *Crosby*, 1 Wood. & M. 342; *Jeffrey* v. *Bigelow*, 13 Wend. 518; *Swatara R. Co.* v. *Brune*, 6 Gill. 41; *Crump* v. *U. S. Mining Co.* 7 Gratt. 352.

It is also objected that these misrepresentations were not made at the time when the notes and bills were given, and therefore are not a good cause for avoiding them. As to some of the defendants, it appears expressly that they gave their notes at the time of the representations; but this is immaterial.

No man can publish a falsehood to-day, and to-morrow contract with an innocent victim and hold him bound.

See *Crocker* v. *Lewis*, 3 Sumn. 8; *Smith* v. *Babcock*, 2 Wood. & M. 246; 8 Bing. N. C. 97; 26 Eng. L. & Eq. 129.

But the plaintiffs contend that if the fraud has been ever so strongly proved, and it has not been waived, and might be a good defense in a suit brought by the insurance company, yet it is no defense against them. They claim to have a peculiar equity.

Yet their complaint alleges that the defendants severally made the subscriptions, notes and bill stated in it, and the issue joined; and the very question, therefore, to be tried, is as to their validity. It follows that the plaintiffs must prove them to be valid and binding on the defendants, or they do not maintain the issue. If the transactions are void on account of fraud, then there is legally no subscription, note or bill.

In effect, the plaintiffs ask to be substituted in the place of the insurance company, and to be permitted to enforce the payment of debts which it has wrongfully neglected to enforce. If there is no valid debt due from any of the defendants to the insurance company, there is no matter alleged in the complaint on which the plaintiffs can recover. The plaintiffs can acquire no greater rights than it had, and where it had none, they acquire none.

Hyde v. *Lynde*, 4 N. Y. 387; in matter of *Howe*, 1 Paige, 125; *Mech. Bank* v. *N. Y. & N. H. R. Co.* 13 N. Y. 599; *Roberts* v. *Alb. & W. Stock R. Co.* 25 Barb. 662.

4. There is an utter failure in the proof of the main *corpus* of the plaintiff's case. The complaint alleges that they were severally creditors of the insurance company, and had obtained judgment against it, and returns of "no property."

The answers deny all knowledge of the matters alleged, and the record contains no proof of them.

5. Necessary parties are wanting to the action. This objection was taken in all the answers.

In this kind of cases, each defaulting stockholder is liable *pro rata* only, with all the other defaulters, for his portion of the unpaid subscription which may be necessary to satisfy the plaintiff's debts and costs.

Mann v. *Pentz*, 3 N. Y. 415; *Bank* v. *Iglehart*, 6 McL. 568.

The decree must be several against the defendant for his separate liability; therefore, in order that the relative share each has to pay may be ascertained, all the defaulting stockholders must, as far as possible, be brought before the court.

3 Com. 415; 6 McL. 568; *De Wolf* v. *Mallet*, 2 J. J. Marsh. 401; *Crease* v. *Babcock*, 10 Met. 525; *Caldwell* v. *Taggart*, 4 Pet. 190.

Where the parties are so numerous as to render it very inconvenient, the court may allow the case to go on with only a part of them before it.

But this is an exception to the rule, and it is for the court and not the plaintiff's counsel, to decide whether persons proper to be made defendants are to be left out under this exception; and, therefore, the reason must be stated why they are not made parties.

Martin v. *McBride*, 3 Ired. Ch. 531; *Gilham* v. *Cairns*, Breese, 124.

In the present case, the defendants are not very numerous, and nearly all of them are shown to be within the jurisdiction of the court, and no excuse is offered, except in one case, for not making all of them defendants.

Mr. Justice **Grier** delivered the opinion of the court:

The complainants in this case are judgment creditors of the Knox Insurance Company. The numerous other defendants are stockholders of the company, and are severally charged as debtors to it, for the unpaid portion of the stock subscribed by them.

The company is insolvent, or at least is unable to pay its creditors, without calling in the capital subscribed and secured, but not actually paid in cash. This it has failed or refused to do. This bill is filed to compel these stockholders or debtors to the corporation to pay the amount of their debts, in order that the creditors of the company may obtain satisfaction.

The bill was taken *pro confesso* as against the corporation. The other defendants, being corporators, are consequently concluded as to the averments of the bill affecting them as such. As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the several amounts due by each of them. As to them, this bill is in the nature of an attachment, in which they are called on to answer as garnishees of the principal debtor.

Where a number of special partners are incorporated to carry on the business of insurance, the stock subscribed and owned by the several stockholders or partners constitutes the capital or fund publicly pledged to all who

deal with them. Insurance companies or corporations, unless they have the privilege of using their capital for banking purposes, seldom require the actual payment of it all in cash. 388*] Contracts of *insurance or indemnity, though not literally "gaming contracts," are, nevertheless, in the nature of wagers against the happening of a certain event. The calculation of chances is greatly in favor of the insurer. In a large number of policies, it is but reasonable to expect that the amount of premiums will exceed that of the losses. The insured are thus made to pay one another, and with common good fortune afford an overplus to make a dividend for the insurers. Hence the Knox Insurance Company, like others of the same description, did not require their stockholders to pay in cash more than ten per cent of their several shares. They were allowed to retain the remaining ninety per cent in their own possession, substituting therefor their bonds, or other securities. Thus every stockholder became a borrower from, and debtor to, the capital stock of the company. If in the course of events the chances were favorable, a dividend of twenty per cent on capital would give a profit of two hundred on the money actually paid out by them. On the contrary, if they were adverse, the capital represented by securities must necessarily be paid in to satisfy the just debts of the company.

The ninety per cent retained by the stockholders is as much a part of the capital pledged as the cash actually paid in. When that portion of the capital represented by these securities is required to pay the creditors of the company, the stockholders cannot be allowed to refuse the payment of them, unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash.

Let us now examine their defense, and see if they have established such an equity.

They do not deny that they paid the ten per cent, gave their securities for the balance, and have received their certificates for their several shares of stock; but they contend that they are not bound to pay these securities, because the agent of the corporation, who took the subscriptions of stock, made certain representations concerning the state of the affairs of the corporation, which were not true; and as a consequence thereof, they are not bound to pay these securities.

389*] *The numerous defendants, with some immaterial variations and qualifications, adopt the answer of their co-defendant, Collum, which we shall give *verbatim* from the record, to show we have not misstated or mistaken the nature of the defense set up.

"And, by way of defense to said suit, s'd Collum alleges that just before he gave s'd note, accepted s'd first bill, Robert N. Carnan, an agent of said ins. company, came to Jeffersonville to procure persons there to give notes and bills for stock in s'd ins. company; and in order to induce said Collum to give his s'd note, and accept s'd first bill for such stock, s'd Carnan, as such agent, then and there falsely and fraudulently s'd and represented to s'd Collum, and in his hearing, that stock in s'd ins. company to the amount of seventy-five dollars had then been subscribed for at Vincennes, and on the Wabash river, and all of s'd amount had then been paid or secured as the charter of s'd insurance company required. S'd Collum did not then know, nor then have the means of knowing, to the contrary of s'd representations, and he fully believed them to be true, and with that belief he gave his s'd note, and accepted s'd two bills for stock in s'd ins. company; and if he had not fully believed s'd representations he would not have given said note nor accepted s'd bills, or either of them. At the time s'd representations were so made, and s'd given and s'd first bills accepted, there had not been more than twenty-five thousand dollars of stock in s'd ins. company subscribed for and paid and secured, as s'd charter required, at Vincennes, on the Wabash river, which said Carnan then well knew. Said Carnan also, at and just before s'd Collum made his s'd note and accepted his s'd first bill, represented to him that s'd ins. company then had $40,000 of funds on hand, mostly in Eastern exchange, which they could not dispose of at Vincennes, and they wished to get stockholders at Jeffersonville, so as to have an officer of s'd insurance company there, and they would then send those funds there to be sold and used. Said Collum did not then know, and had no means of knowing, to the contrary of s'd *repre- [*390 sentation, but he believed it, and it was a strong inducement with him to make his s'd note and accept his s'd bills; yet he is now informed and believes said representation was grossly false, and that s'd ins. company did not at that time have, and had not at any time, had that sum or anything like that sum of money on hand, and mostly in Eastern exchange, which they could not dispose of at Vincennes."

Carnan, who was examined as a witness denies the charges made in this answer, and declares that he was not authorized by the company to make such representations, and did not make them.

To establish their defense, several of the defendants themselves were called as witnesses, alleging that, as their responsibility was several, and not joint, each one may be called as a witness for all the rest. Much of the argument of this case has been expended on the question of the competency of these witnesses to testify in their own case; but we do not think it necessary to decide it, as there are other facts in the case which show clearly that the matter pleaded cannot affect the relative rights of the parties in the case, assuming it to be true.

Those who seek to set aside their solemn written contracts, by proving loose conversations, should be held to make out a very clear case; and when they charge others with fraud, founded on such evidence, their own conduct and acts (which speak louder than words) should be consistent with such a hypothesis. Assuming the fact that Carnan did make the representations charged, what was the conduct of these Jeffersonville stockholders, who now seek to repudiate their contracts on the allegation of fraud? After having a full opportunity to examine for themselves into the affairs of the company, they alleged no fraud, nor expressed any desire to withdraw their subscriptions; on the contrary, when fully informed that the amount of stock subscribed at Vincennes did not equal that taken at Jeffersonville, and when an offer was made to increase the Vincennes subscriptions, so as

to equal those at Jeffersonville, the defendants and those who acted with them objected, and insisted that the lower the amount of stock the 391*] *higher would be the dividend, and consequently it had better not be increased till after the first dividend of twenty-five per cent had been made.

2. After the defendants had a full opportunity to know the situation of the company, its funds, and its property, they organized at Jeffersonville a branch of the corporation, having resident directors at that place. This board met from time to time, through the months of April, May, June, July, and up to 13th August, 1850. While there was a prospect of a dividend of 250 per cent on the amount of cash paid in, their eyes were shut to the deceit supposed to have been practised on them. In the month of May a fire at Owensville, Kentucky, was reported, in which the company lost about $50,000. This seemed to injure the prospect of the large dividend; yet even then it was not so clearly perceived that the defendants were defrauded.

The directors at Jeffersonville, who represented their interests, continued to meet till the middle of August, and till a succession of losses made it apparent that the capital of the company would be nearly all required to pay for the losses incurred. When these facts became patent, the directors at Jeffersonville, at their last meeting in August, "after taking time to consider what was best to be done," concluded to consider themselves defrauded and withdraw their capital from the company.

We need not cite authorities to show that this discovery was made too late, and that a court of equity cannot receive such a pretense as a valid defense against the creditors of this corporation.

II. The objection made to the bill, for want of proper parties, is equally untenable. The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders or partners, corporators or debtors. If A is bound to pay his debt to the corporation, in order to satisfy its creditors, he 392*] cannot *defend himself by pleading that these complainants might have got their satisfaction out of B quite as well. It is true, if it be necessary to a complete satisfaction to the complainants, that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In this way, all the other stockholders or debtors may be made to contribute.

For these reasons, we are of opinion that the decree of the circuit court should be reversed, with costs, and that the record be remanded, with instructions to that court to enter a decree for the complainants against the respondents severally, for such amount as it shall appear was due and unpaid by each of them on their shares of the capital stock of the Knox Insurance Company, and to have such other and further proceedings as to justice and right may appertain.

THE UNITED STATES, *Appts.*,
v.
HENRY F. TESCHMAKER, Joseph P. Thompson, George H. Howard, and Julius K. Rose.

(See S. C. 22 How. 392-406.)

Record evidence of Mexican grant should be produced, or its absence accounted for—occupation, next best evidence—antedating grant.

Raising cattle and other stock, furnishes very unsatisfactory evidence of possession and cultivation of the land, in the sense of the colonization laws of Mexico.

The nonproduction of record evidence of Mexican title excites suspicions as to its validity, and throws upon the claimant the burden of producing the fullest proof of which the party is capable, of the genuineness of the grant.

Record evidence should be produced, or its absence accounted for to the satisfaction of the court.

The genuineness of the official signatures to the paper title alone, can never be regarded as satisfactory.

The record proof is, generally speaking, the highest. Possession and occupation of some duration, permanency, and value, are next entitled to weight.

At least, satisfactory evidence should be required, to make the antedating of Mexican grant irreconcilable with the proof; otherwise, there can be no protection against imposition and fraud in these cases.

Argued Jan. 27, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **E. M. Stanton,** for appellants:

The grant, if made at all, was made without any previous petition, investigation, reference or report; no map; no order of concession; no registry. Arce's certificate (or the certificate with his name to it), that note had been taken of this title is the proper book, is false. The proper book is here, and it contains no such thing. There is not a vestige or trace of this title, or anything like it, to be found among all the records of the department. The title was never produced, nor its existence publicly asserted in any way whatever, before the 25th August, 1852, when the deed from Salvador Vallejo to the claimant was acknowledged before a notary. The deed from Juan to Salvador Vallejo is dated Dec. 30, 1849, but it is not acknowledged or recorded; nor does it appear ever to have been seen by anybody but the parties.

Salvador Vallejo and Carillo, their brother-in-law, swear that there was a sort of possession from 1842 or 1843, with some improvements which the former witness says cost a great deal of meat and spunk. But they do not say, and there is no reason to believe, that the

NOTE.—*Presumption from failure to produce evidence*—see note, 14 L. R. A. 470.

title now set up was exhibited, or the land claimed under it. Juan Castenada says the possession was not taken until after the grant in 1844 or 1845.

1. The grant is illegal for want of a petition, map, inquiry, etc.

2. It is not proved, because a grant produced from the private custody of the claimant, without any record of it among the archives, is no grant at all.

3. It is false, forged, fabricated.

If it had been really made by the government at the time it bears date, why was it not recorded? Why was the false note of Arce placed at the foot of it?

The bad character of the Vallejos, as well as of their principle witnesses, renders it extremely probable that all the papers, including the petition for license to occupy, the license itself, and the pretended grant from the governor, are sheer fabrications, fraudulently got up long after the change of government.

The chief of the Vallejos (General Mariano) was a professional witness, until his credit run down so low that he was no longer worth calling. In the case of *Luco* v. *United States*, 64 U. S. (23 How.) 515, it was proved that he had forged a grant, and the claim under it was rejected on that ground alone.

Juan Castenada is a well known professional witness. So is Francisco Arce, who falsely certifies that this grant was recorded in the proper book.

The grant is dated in September, 1844. That was the very time at which the Vallejos were banding themselves and their followers against Micheltorena, to drive him from the country, and he knew it. It is not probable that he was making grants of valuable lands to them at such a time.

Mr. **R. H. Gillet**, for appellees:

Material facts established by the evidence in the record:

First. The grant was made by Governor Micheltorena to Salvador and Juan A. Vallejo, September 5, 1844, for the premises in question.

Second. The grantees settled upon and occupied the land granted.

[Counsel reviewed the evidence in the case on this point, and referred to the following cases: *Vaca*, 59 U. S. (18 How.) 556; *Sutherland*, 60 U. S. (19 How.) 363; *Frémont*, 58 U. S. (17 How.) 542; and said these three cases must be overruled or the present grant must be confirmed.]

Third. Judicial possession was not given, because the magistrate applied to was afraid of the Indians.

Fourth. The United States offered no evidence in this case on any point, by way of contradiction, or explanation, or otherwise; but left that of the claimants wholly unquestioned.

Sixth. No objection was raised before the board, except that the conditions subsequent had not been performed, and that the localities and boundaries were not given with sufficient definiteness, and these were removed by testimony taken in the district court.

But two questions were presented to the district court, and they were questions of fact upon which the claimants made full proof, and the United States offered no evidence at all.

Argument.

1. No additional evidence can be introduced on an appeal to this court except in admiralty cases.

9 U. S. L. 633; 1 U. S. L. 84; 2 U. S. L. 244; 61 U. S. (20 How.) 261.

2. No question can be raised and decided on appeal which was not raised below.

Larkin's Case, 59 U. S. (18 How.) 561; 1 Barb. Ch. Pr. 396; *Ringgold's Case*, 1 Bland, Ch. 21; *Chamley* v. *Lord Dunsany*, 2 Sch. & L. 712; 2 Hoff. Ch. Pr. 53; *Frankland* v. *McGusty*, 1 Knapp, 274; *Barnes* v. *Lee*, 1 Bibb, 526; *Morgan* v. *Currie*, 3 A. K. Marsh. 294.

3. When an equitable right is once vested under a grant by a governor, it cannot be devested, except by the action of the government upon a denouncement by a third person.

Frémont's Case, 58 U. S. (17 How.) 567; *Reading's Case*, 59 U. S. (18 How.) 6.

4. Confirmation by the departmental assembly is not necessary, in order to confirm a California grant made by a governor.

It was the duty of the governor, and not of the grantee, to present it for confirmation.

See *Frémont* v. *U. S.* 58 U. S. (17 How.) 542, 563; *Cruz Cervantes' Case*, 59 U. S. (18 How.) 553; *Larkin's Case*, 59 U. S. (18 How.) 562; *Reading's Case*, 59 U. S. (18 How.) 7.

5. When an officer of the Mexican government having the power to make grants, exercises that power so as to create the reasonable belief in the mind of the grantee that he received the valid grant, and he takes possession under it, such grant, whether made after compliance with all legal formalities or not confers an equitable right, which this court is bound to confirm.

U. S. v. *Sutter*, 62 U. S. (21 How.) 178.

6. By the laws, usages, and customs of Mexico, a grant is valid, whether the preliminary formalities were observed or not.

The act of 1851 (9 U. S. L. 633, § 1), under which these proceedings were had, provides that the board and ports shall be "governed by the treaty of Guadaloupe Hidalgo and the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity and the decisions of the Supreme Court, as far as they are applicable."

The grantees' rights are the same under the treaty and the laws of nations. Whatever rights they had, whether perfect or imperfect, full and complete or otherwise, are protected under both.

In equity, all rights, whether legal and perfect or equitable and imperfect, are protected and can be enforced. Congress declared that those having rights of any kind should have all the advantages that a court of equity could decree them. The rules applied in equity cases should apply in these. It is a well-settled rule that a court of equity cannot apply its power to confirm or enforce a forfeiture, while there is another which requires it to exert them whenever practicable, to prevent forfeitures, and to set them aside, and to relieve against them in all proper cases.

In these land cases, except where the title is a strictly legal one, the whole case is an equi-

table one, and the court deals exclusively in equitable principles and enforces them.

The claimant shows that he has received some sort of title under the government, and calls upon the court, under the law of 1851, to confirm it. Here he is met by claim of forfeiture, and in the exercise of equity powers, the court is requested to enforce it. The law is too well settled that this cannot be done, to require the citation of authorities.

In the present case the grant cannot be questioned. But, it is objected, there were formalities usually observed which were omitted. If these were required by positive law to confer a legal title, they are not required to create an equitable one.

No one will contend that an equitable right is invalid because it was not acquired in the same manner that is required to vest legal rights; because if that were so, an equitable right could not be acquired at all, for all rights would then be legal rights. The very object of a court of equity is to relieve in those cases which are defective under the strict rules of law.

Mexico did not sell her lands.

She gave them away to have them used, and they were principally used for raising horses and cattle. This very grant was applied to that purpose, as soon as it was safe to put cattle and horses there, and as early as Frémont took possession of the Alvarado grant. The government got all it expected from this or any other grantee. Could Governor Micheltorena, the day after making this grant, have declared it null and void, and have taken the land from the grantee and made it part of the public domain? Clearly not. In *Reading's Case*, 59 U. S. (18 How.) 1-7, this court said: "In other words, from our reading of these decrees, the governor could not either directly recall a grant made by him, or indirectly nullify it when it had been made conformably with them, and the laws and regulations." If he could not, then the grant must be held to convey an interest which has not been, and cannot now be, taken from the grantee. When Mexico ceded to us, the power to take away a grant by denouncement ceased.

7. It is to be presumed that Governor Micheltorena performed his duty in relation to the necessary preliminaries to this grant, till the impeaching party proved the contrary.

See the cases of California land grants already cited: *Peralta's Case; U. S.* v. *Clark*, 8 Pet. 436.

The United States are estopped from denying the fact of the petition, etc., by the previous recital of their grantor in the grant, to the claimant, which was prior to theirs.

9. The regulations specifying preliminary steps to be taken in applications for grants, are merely directory, and may be dispensed with without vitiating the grant.

The regulation of November 21, 1828, is as follows:

"2. Every person soliciting lands, whether he be an *impresario*, head of a family, or single person, shall address to the governor of the respective territory, a petition setting forth his name, country, profession, the number, description, religion, and other circumstances of the families or persons with whom he wishes to colonize, describing as distinctly as possible by means of a map, the land asked for."

There is no provision declaring that the grant shall be invalid if there is no petition to the governor in writing, specifying the various particulars thus enumerated. It is not probable that in all the cases confirmed by this court, there is one where the petition has conformed in every particular with this regulation. By the regulation, a map is just as essential as the petition. It is a highly important document. But it appears only in a part of the cases before this court. It was not shown in *Ritchie, Arguello*, or *Peralta's Case, Reading* or *Fossat* or *Frémont's Case*. On the contrary, in the latter case the petition showed there was no map, and an excuse was offered for not presenting. This court held that the map was not essential, and confirmed the grant without it. In 58 U. S. (17 How.) 561, the Chief Justice said: "According to the regulations for granting lands, it was necessary that a plan or sketch of its lines or boundaries should be presented with the petition. But in the construction of these regulations, the governors appear to have exercised a discretionary power to dispense with it under certain circumstances."

Now, if the governor can dispense with one condition, precedent or requirement of the regulation, he can with another, without rendering the title invalid in equity. The omission here is no greater than in *Frémont's Case*, and the same indulgence must be shown.

In *The U. S.* v. *Sutherland*, 60 U. S. (19 How.) 363, 364, this court said:

"In construing grants of land in California, made under the Spanish or Mexican authorities, we must take into view the state of the country and the policy of the government; it was the interest and policy of the King of Spain, and afterwards of the Mexican government, to make liberal grants to those who should engage to colonize or settle upon them."

10. Conditions subsequent, if not performed, do not render the grant void, nor authorize the government to forfeit the grantee's right for its own use.

Frémont, Reading, and *Larkins' Cases*, already cited.

Conclusions:

I. The genuineness of the grant has been fully proved.

II. All the conditions subsequent that were to be performed by the grantees, were performed, such as possession, building, and cultivation.

III. The place and boundaries are definite, and capable of location, and have been actually located.

IV. Every question raised by the district attorney, in the court below, was met and answered by conclusive evidence.

It follows that the claim must be confirmed.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the district court of the United States for the northern district of California.

The case involved a claim to sixteen square leagues of land known by the name of "La La-

guna de Lup Yomi," situate north of Sonoma, in the county of Napa, California. It was presented to the board of land commissioners on behalf of the appellees, who derived their title from the two brothers, Salvador and Juan Antonio Vallejo, claiming to be the original grantees of the Mexican government. The board rejected the claim, but, on appeal to the district court, and the production of further evidence, that court affirmed it.

The first document produced is a petition of the two brothers, S. and J. A. Vallejo, to the senior commandant-general and director of the colonization of the frontiers, for a grant of eight leagues of land each, reciting that they were desirous of establishing a ranch in the Laguna de Lup Yomi, situate twenty leagues north of this place (Sonoma), which tract is uncultivated, and in the power of a multitude of savage Indians, who have committed and are daily committing many depredations; and being satisfied that the tract does not belong to any corporation or individuals, they earnestly ask the grant, offering to domesticate the Indians, and convert them by gentle means, if possible, to a better system of life. Salvador Vallejo adds, that being in actual service in quality of captain of cavalry, and not having received his pay, he proposes to apply $2.500 out 402*] of his pay for his portion of the *land. This petition was dated at Sonoma, October 11, 1838.

Under date of March 15, 1839, the senior commandant-general, M. G. Vallejo, a brother of the petitioners, accedes to their petition so far as to permit them to occupy the tract, but, for the accomplishment of the object, they must hasten to ask a confirmation from the departmental government, which will issue the customary titles; and, at the same time, they must endeavor to reduce the wild nature of the Indians, assuring them that the government wishes a treaty and friendship with them.

The next document is a title, in form, granted by the Governor Micheltorena, dated Monterey, 5th September, 1844. At the foot of the grant is a memorandum, as follows:

"Note has been made of this decree in the proper book, on folio 4.

In the absence of the com'r.

Francis C. Arce."

The signatures of M. G. Vallejo to the permit of occupation, and of Micheltorena and F. C. Arce, the governor and acting secretary, are genuine, if three witnesses are to be believed—Castenada, W. D. M. Howard, and Salvador Vallejo, one of the original grantees. The proof of possession and occupation is slight, and not entitled to much consideration, in passing upon the equity or justice of the title, or even upon its bona fides.

This proof rests mainly upon the testimony of S. Vallejo. He was examined twice on the subject—once when the case was before the board of commissioners, and again when on appeal before the district judge. In his first examination he states that, immediately after permission was given to occupy the ranch (March, 1839), he placed on the land about one thousand head of cattle, between three and four hundred head of horses, and from eight hundred to one thousand head of hogs; that he built a house on the land the same year, and also corrals, and left an overseer and servants in charge of the place.

*In his second examination he states [*403 that in the year 1842 or 1843 he placed cattle on the ranch, built a house and corrals, and in the year 1843 or 1844 received a title for the land; that he then lived on it, but was frequently absent visiting his house and lot in Sonoma, and his other farms, but always left a mayor domo on the ranch; and during this time he cultivated beans, corn, pumpkins, watermelons, etc. The last house he built on the place was about the time the country was invaded by the Americans. That during the time mentioned, he had on the place from 1,500 to 2,000 head of cattle, 500 to 600 head of horses, and from 1,500 to 2,000 head of hogs. He further states that most of his stock was subsequently stolen and driven off by the Indians and emigrants. This evidence is slightly corroborated by the testimony of Castenada and Carillo.

From the numerous cases that have already been before us, as well as from our own inquiries into the customs and usages of the inhabitants of California, especially those engaged in the business of raising cattle and other stock, this mode of occupation furnishes very unsatisfactory evidence of possession and cultivation of the land in the sense of the colonization laws of Mexico. Any unappropriated portion of the public lands was open to similar possession and occupation without objection from the public authorities. Indeed, according to the laws of the Indies, the pastures, mountains, and waters, in the provinces, were made common to all the inhabitants, with liberty to establish their corrals and herdsmen's huts thereon, and freely to enjoy the use thereof, and a penalty of five thousand ounces of gold was imposed on every person who should interrupt this common right. 2 White's Recop. 56.

There is also a fact, stated by the witness Vallejo himself, that is calculated to excite distrust as to the extent of the possession and occupation, and for the purpose stated. He says that there were constant revolutions among the Indians at the time; that it was unsafe for families to live there, and that the alcalde at Sonoma refused to deliver him judicial possession in 1845, on account of the danger.

*It is quite apparent, also, from the [*404 testimony of this witness, that the huts built for the herdsmen of the cattle were of a most unsubstantial and temporary character. No possession of any kind is shown since the cattle and other stock were carried off by the Indians and emigrants. When that took place does not appear; but doubtless as early as the first disturbances in the country, in the fore part of the year 1846.

The possession and occupation, therefore, even in the loose and general way stated, was only for a comparatively short time.

We have said that the signatures of the officers to the documentary evidence of the title are genuine, if we can believe the witnesses—Castenada, Howard, and Vallejo; but, as all of these officials were living after the United States had taken possession of the country during the war, and even after the cession by Mexico, and, with the exception of the governor,

resided in California, these signatures may be genuine, and still the title invalid. It was practicable to have made the grant in form genuine, but antedated.

The permit to take possession of the tract, in connection with the short and unsubstantial character of the possession, is not of much importance in making out the claim. Vallejo had no power to dispose of the public lands. We do not understand that his permission to occupy, as director of colonization on the frontiers, laid the governor or Mexican government under any obligations to grant the title. If followed by valuable and permanent improvements, considerations might arise in favor of a claimant that should influence a government, when called upon to grant the property to another. We think, therefore, that the claim rests chiefly, if not entirely, upon the grant of the title by the governor of the 4th September, 1844.

This grant stands alone. None of the usual preliminary steps, prescribed by the Regulations of 1828, such as the petition, marginal reference for a report as to the situation and condition of the land, report of the proper officers and minute of concession, were observed. These, with satisfactory proof of the signatures to the papers, give some character to the grant, and 405*] *tend to the establishment of its genuineness. Even the permit of Vallejo is not noticed by the governor, nor any present occupation of the premises by the grantees.

So far, therefore, as respects the title, or even any rightful claim to the tract, it depends mainly upon proof of the signatures of Micheltorena and of F. C. Arce, the acting secretary. There is no record of the title in the proper book, shown in the case, nor exists in fact, as it is understood this book of records exists for the years 1844, 1845, and no record is there found. The memorandum, therefore, at the foot of the grant, by Arce, the secretary, "Note has been made of this decree in the proper book, on folio 4," is untrue. Nor has there been found any approval of the grant by the departmental assembly, for those records are extant, as found in the Mexican archives. The archives are public documents, which the court has a right to consult, even if not made formal proof in the case. The absence of any record evidence is remarkable, if the title is genuine, as one of the grantees, Juan Antonio Vallejo, resided at the time in Monterey, where these records were kept, and where all the formalities of a regular Mexican grant might readily have been complied with. The parties, also, were men of more than ordinary intelligence, and belong to one of the most influential Mexican families of the territory, and doubtless well understood the regulations concerning grants of the public domain.

The nonproduction of this record evidence of the title, under the circumstances, is calculated to excite well-grounded suspicions as to its validity, and throws upon the claimant the burden of producing the fullest proof of which the party is capable of the genuineness of the grant. We do not say that the absence of the record evidence is of itself necessarily fatal to the proof of the title; but it should be produced, or its absence accounted for to the satisfaction of the court.

We have already said, that the genuineness of the official signatures to the paper title might be established, and yet the title forged, and stated our reasons. Proof of the genuineness of these alone can never be regarded as satisfactory. It must be carried farther by the claimant. The record proof is, generally speak- *ing, the highest. Possession and occu- [*406 pation of some duration, permanency, and value are next entitled to weight.

At least, satisfactory evidence should be required, under the circumstances in which most of these Mexican grants were made, as to make the antedating of any given grant irreconcilable with the proof; otherwise, there can be no protection against imposition and fraud in these cases.

The decree of the court below reversed, and the case remanded for further evidence and examination.

THE UNITED STATES, *Appts.*,
v.
ANDRES PICO *et al.*

(See S. C. 22 How. 406-416.)

Same decision as in United States v. Teschmaker, ante, p. 353.

In this case, no record of the grant or title paper is found among the Mexican archives or in any book, nor is there any evidence of possession or occupation, deserving notice or consideration.

The case falls within the principles, and is governed by the views of the court, in the case of the United States v. Teschmaker, decided at this term.

Argued Feb. 8, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **E. M. Stanton,** for the appellants:

This is a claim for eleven leagues of land called Moquelemos, which the claimant alleges, in his petition to the board of commissioners, was granted to him by his brother, Pio Pico, in the month of May, 1844, and confirmed to him in June, 1846. The land lies on the Moquelemos river, in what is now the county of Calevaras.

The documentary evidence of title produced by the claimant is:

1. A grant signed by Pio Pico and countersigned by Jose Morias Moreno, describing the land in question, dated at the city of Los Angeles, on the 6th day of June, 1846.

2. A paper headed "Departmental Assembly of California," and signed Narciso Botello, Deputy-Secretary, addressed to Secretary Moreno, in which the fact is stated that this grant and others which are named, were approved by the departmental assembly in that day's session. Note. The date of this paper (July 15, 1846) is certainly the date which it truly bears. It is so in all the records, the original Spanish as well as the translations.

3. The paper signed by Pio Pico and Jose Morias Moreno, dated June 15, 1846, setting forth that the most excellent departmental assembly, "in session of to-day," decreed the approval of the grant in question.

This is all the documentary evidence in the case. There is no petition, order of reference, information, decree of concession, map or copy of the grant found among the archives. No map or *diseno* of the land was exhibited to the court below, or is to be found upon the records sent here. There is no registry, nor any kind of entry upon any book. The grant was produced from the private custody of the grantee himself. So it appears was the certificate of Pico and Moreno, that it had been approved by the departmental assembly. Judge Hoffman distinctly declares that the only paper found in the archives is the communication of Botello, transmitting the title deed and asserting its approval. Who placed that paper upon the record and how or when it came there, are questions not easily solved. That it did not get there honestly, will be very apparent to the court long before this examination is finished.

The objections which the government now makes to the affirmance of this decree, are those which follow:

1. The grant is made by the governor to his brother, and is therefore void.

2. It is void because Pio Pico, at the time of making it, had no authority, jurisdiction or power to make any grant in this case, for want of petition, investigation and map, such as the laws of 1824 and 1828 require in all such cases.

3. There is no record evidence of the grant, nor any explanation furnished of its absence, and therefore it is, to all intents and purposes, the same as if no evidence at all of it had been given.

4. It is a forgery. The proof of this is powerful and overwhelming. It is not possible to furnish any reason why the grant was not entered upon the record, if it was really made at the time it bears date. In addition to that, the journals of the departmental assembly furnish very strong circumstantial evidence against the genuineness of this title.

Mr. **R. H. Gillet**, for appellee:

Facts established by the evidence in the record.

1. A grant was made by the governor on the 6th of June, 1846.

2. This grant was approved by the departmental assembly on the 15th of June, 1846, at Los Angeles.

3. Owing to the Indian hostilities, immediate possession could not be taken of the grant, nor judicial possession given.

4. The claimant, when the country permitted, took and continued actual possession.

5. The grant has distinct boundaries, which distinguish it from the residue of the public domain.

6. No evidence was offered by the United States, to contradict or repel any offer by the claimant.

7. No question as to the want of a petition, reference, report, or map, was raised by the United States, either before the board or district court.

No question was raised before the board or district court concerning the power and authority of the government to grant, or the assembly to confirm.

9. The bona fides of the grant was not questioned, either before the board or the district court.

Argument.

1. No question can be raised and decided upon appeal, which was not raised below.

2. When an equitable right is once vested under a grant by a governor, it cannot be devested by the action of the government, upon a denouncement by a third person.

3. Conditions subsequent, if not performed, do not render the grant void, nor authorize the government to forfeit the grantees' rights for its own use.

4. When an officer of the Mexican government having the power to make grants, exercises that power so as to create the reasonable belief in the mind of the grantee, that he received a valid grant, and takes possession under it, such grant, whether made after compliance with all legal formalities or not, confers an equitable right which this court is bound to confirm. In this case the record shows that a grant was actually made, and no question was raised as to its genuineness.

5. By the laws, usages, and customs of Mexico, a grant is valid when confirmed by the departmental assembly, whether the usual preliminary formalities were observed or not.

6. It is to be presumed that Governor Pico performed his duty in relation to the necessary preliminaries of this grant, until the impeaching party proves the contrary.

7. The United States are estopped from denying the fact of the petition, etc., by the previous recital of their grantor in the grant to the claimant, which was prior to theirs.

8. The regulation specifying preliminary steps to be taken in applications for grants, are merely directory, and may be dispensed with without vitiating the grant.

9. No additional evidence can be introduced on an appeal to this court, except in admiralty cases.

See, also, argument in the preceding case.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the northern district of California.

The appellee presented to the board of commissioners a claim for eleven square leagues of land, known by the name Moquelamos, situate in the county of Calaveras, California. The board rejected the claim; but, on appeal to the district court, and the production of some further proof, that court affirmed it.

The preliminary proceedings required by the regulations of 1828, before a grant of the public lands, were not produced, if any existed. The only evidence of the title is a grant of the tract by a formal title to the claimant, dated Los Angeles, 6th June, 1846, signed by the Governor, Pio Pico, and J. M. Moreno, the secretary of state, and two other papers relied on as furnishing proof that the grant was approved by the departmental assembly. One of them is a certificate to that effect of the governor and secretary, bearing date 15th June, 1846, the other purports to be a communication from N. Botello, deputy secretary of the departmental assembly,

of the approval to Moreno, secretary of state, for the information of the governor. This approval, according to the deputy secretary of the assembly, was in a session held on the 15th July, 1846. The paper was found among the Mexican archives.

416*] *The other documents—the grant and certificate of approval—came from the hands of the claimant. No record of them was found among the Mexican archives or in any book, nor is there any evidence of possession or occupation deserving notice or consideration.

The case falls within the principles and is governed by the views of the court in the case of *The United States* v. *Teschmaker et al.*, decided at this term. Besides the suspicious character of the grant, it appears to be wholly destitute of merit.

The decree below reversed, and the case remanded for further evidence.

THE UNITED STATES, *Appts.*,
v.
MARIANO G. VALLEJO.

(See S. C. 22 How. 416–422.)

Same decision as in U. S. v. Teschmaker, ante, p. 353.

Where neither the grant nor the certificate of approval has been found among the Mexican archives, nor the record of them upon any book of records, and both papers came from the hands of the claimant, and the genuineness of the title depends upon proof of the official signatures, and some evidence of possession, held, that this case falls within the views of the court in the United States v. Teschmaker, decided this term.

Argued Feb. 28, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **E. M. Stanton,** for appellants:

The usual effort is made to supply the legal proof, by testimony of occupation and possession.

There is no *espediente* on file. The grant is not found in Jimeno's index. The claim rests upon the production of two papers and proof of handwriting. It is not supported by any legal evidence requisite to establish a valid claim.

The following specific objections are made to confirmation:

1. No *espediente*, or official record of the proceedings, required by the Mexican laws in granting lands, is produced, nor any record evidence whatever.

The law required the "*titulo*" to be authenticated by the secretary of the department. Jimeno was the secretary; and if from any cause Arce acted as secretary *ad interim*, the facts should have been shown, and he should have been called to prove the execution of the instrument by the governor.

3. Handwriting is secondary evidence, and competent only when, from the nature of the case, primary evidence by the attesting witness cannot be obtained.

4. The paper bearing the names of Pico and Corvarubias is nothing more than a private certificate by those persons. No proof is made as to when it was given, and it affords no evidence of the action of the departmental assembly, which should be shown by their own journal. The journal of the assembly for 1845, shows no cession on the 18th of February, 1845, the day that the certificate states the confirmation to have been made. If there was a cession on that day, the fact might be, and should have been, proved.

5. If this grant were genuine, it would have appeared regularly numbered and entered in Jimeno's index, with a corresponding *espediente* on file in the archives. It would also have been noted in the Toma de Razon of that year, but there is no mention of it. Every claimant is bound to establish his claim by legal proof in conformity with the Mexican laws and usages in granting land. The whole burden of proof is upon him, and unless that burden is fully discharged, he has no right to a decree of confirmation. The absence of an *espediente*, or any record evidence of the grant, is unaccounted for. No excuse is shown or ground laid for secondary evidence.

Mr. **P. Phillips,** for appellees:

The present claimant derives his title under a deed of warranty, in consideration of $3,000 from Miguel Alvarado, dated 20th February, 1849, for "three *sitios de gando mayor*, which I have granted to me by the departmental assembly of this territory, approved by the assembly of the same."

This deed is witnessed by Castenada and Salvador Vallejo, and is acknowledged before the alcalde on 22d February, 1849.

The title on which confirmation is rested, is a grant from Micheltorena to Miguel Alvarado, dated at Monterey, 23d November, 1844.

In this formal grant, the following facts are recited:

1. That Alvarado had solicited the land.

2. That the proper measures and examinations had been made.

3. That the land is shown by the map attached to the *espediente*.

4. That the interest was to confirm him in the ownership of the title, which he had obtained from the Señor director, etc., Don Mariano Vallejo.

If the court is satisfied that this grant is genuine, then these facts are established by their recital.

Besides the grant, there is the approval of the departmental assembly, signed by Pio Pico and Jose M. Corvarubias.

These were produced as original documents, and the signatures of all the parties proved.

No objection can be made in this court, that they were not proved by competent evidence.

The genuineness of the title was established to the satisfaction of the board of commissioners, who rejected the claim on the ground that the quantity of land was not sufficiently designated.

The decree of Judge Hoffman shows that this defect was cured by the evidence of other witnesses, "whose testimony, taken on appeal, in our opinion establishes the identity of the land granted to Alvarado, and removes the only objection urged to a confirmation of the claim."

The absence of record evidence, either in the

archives or in Jimeno's index, can amount to no more than cause of suspicion. It cannot of itself invalidate the title.

The attempt to raise the question as to the bona fides of the grant, is condemned by the decision of this court.

"It has been urged that this grant is a fictitious one, etc. Our answer to this suggestion is that no objection to the bona fides of the grant was taken before the tribunals below, where it should have been made if relied on by the government, so as to have given the complainants an opportunity to have met it. To permit it to be taken in the appellate court for the first time, where there is no opportunity for explanation, would be a surprise upon them, of which they may justly complain.

Larkin's Case, 59 U. S. (18 How.) 561.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the northern district of California.

The appellee, Vallejo, presented to the board of land commissioners a claim for three square leagues of land, known by the name of Yulupa, situate in the county of Sonoma, California, having derived his title from Miguel Alvarado, the original grantee.

The documentary evidence of the title is: (1) A grant in due form, dated Monterey, 23d November, 1844, purporting to be signed by Micheltorena, governor, and Francisco Arce, secretary, with a memorandum by the secretary: "Note has been made of this title in the proper book;" and (2) a certificate of approval by the **422*]** departmental assembly, bearing date *at the city of Los Angeles, 18th February, 1845, signed by Pio Pico, governor, and Jose M. Corvarubias, secretary.

Neither the grant nor the certificate of approval has been found among the Mexican archives, nor the record of them upon any book of records. Both papers came from the hands of the claimant. The genuineness of the title depends upon proof of the official signatures, and some evidence of possession.

The board rejected the claim; but on appeal to the district court, and the production of further proof of possession, that court affirmed it.

The case falls within the views of the court in *The United States* v. *Teschmaker et al.*, decided this term.

Decree reversed, and the case remanded for further evidence.

CHARLES EMERSON, *Plff. in Err.*,
v.
HORATIO N. SLATER.

(See S. C. 22 How. 28-45.)

***Time**, when essence of contract—performance within time limited—subsequent performance and acceptance—verbal agreements before or at execution of written contract, inadmissible —after written agreement made, when verbal contract may waive or vary it—but not contract within statute of frauds—common counts, when proper for recovery.*

In an action upon written contract that the plaintiff would complete all the bridge work agreed to be done by defendant for a railroad company, by the first day of December next after the date of the contract; held, that time was of the essence of the contract.

Where time is of the essence of the contract, there can be no recovery on the contract, without showing performance within the time limited.

But subsequent performance and acceptance by the defendant, will authorize a recovery on a *quantum meruit*.

Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are, in general, inadmissible to vary its terms or to affect its construction.

After the contract has been reduced to writing, it is competent for the parties, in cases falling within the genral rules of the common law and not within the statute of frauds, at any time before the breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former contract, or in any manner to add to or subtract from, or vary, or qualify the terms of it, and thus to make a new contract.

A written contract, within the statute of frauds, cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing.

Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds.

Other cases also fall within the statute, where the collateral agreement is subsequent to the making of the debt, and the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties.

The written agreement in this case was an original undertaking on a good and valid consideration at the time the instrument was executed, therein expressed.

The plaintiff had a right to proceed upon the common counts, where he claimed performance subsequent to the time named in the contract and acceptance by defendant.

Argued Feb. 21, 1860. Decided March 12, 1860.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **C. Cushing** and **Henry C. Hutchins**, for plaintiff in error:

1. At common law a contract reduced to writing, may, by parol agreement of the parties subsequently made, be varied, waived, or discharged, whether the same is a simple contract or under seal.

Browne Stat. Frauds, § 409 (b), § 423; 1 Greenl. Ev. §§ 302, 304; *Snow* v. *Inhab. of Ware*, 13 Met. 42; *Marshall* v. *Baker*, 19 Me. 402; *Ballard* v. *Walker*, 3 Johns. Cas. 60; *Goss* v. *Lord Nugent*, 5 B. & Ad. 65; 1 Phil. Ev. (Cow. & H. ed.) p. 563, 987; *Sherwin* v. *Rut. & Bur. R.* 24 Vt. 347; *Vicary* v. *Moore*, 2 Watts, 451; *Barker* v. *Troy & Rut. R.* 27 Vt. 766; *Neil* v. *Cheves*, 1 Bail. S. C. 537; *Munroe* v. *Perkins*, 9 Pick. 298; *White* v. *Parkin*, 12 East, 578; *Fleming* v. *Gilbert*, 3 Johns. 528; *Keating* v. *Price*, 1 Johns. Cas. 22.

2. And there is no distinction in this respect between a contract in writing at common law, and a contract required to be in writing by the statute of frauds.

Browne Stat. of Frauds, § 423; 1 Greenl. Ev. §§ 302, 304; *Cummings* v. *Arnold*, 3 Met. 486;

NOTE.—*Time, when of the essence of the contract* —see note to Slater v. Emerson, 15 L. ed. U. S. 626.

Parol evidence as applicable to written contracts —see note to Bradley v. Washington, &c., St. Packet Co. 10 L. ed. U. S. 72.

Stearns v. *Hall*, 9 Cush. 31; *Cuff* v. *Penn*. 1 M. & S. 26; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

3. If the promise of Slater is within the statute of frauds, it is within the statute of frauds of Massachusetts. And the decisions of the courts of Massachusetts have been uniform, that the time of performance and terms of a contract required to be in writing by the statute of frauds of that state, may be extended, or waived, or varied, or wholly discharged by parol.

Cummings v. *Arnold*, 3 Met. 486; *Stearns* v. *Hall*, 9 Cush. 31.

4. The decisions of the courts of Massachusetts upon their own statute of frauds, are obligatory upon this court; at least this court will follow them.

McCutchen v. *Marshall*, 8 Pet. 220; *Polk's Lessee* v. *Wendal*, 9 Cranch, 87; *McKeen* v. *Delancy's Lessee*, 5 Cranch, 22; *Elmendorf* v. *Taylor*, 10 Wheat. 152; *McDowell* v. *Peyton*, 10 Wheat. 454; *Thatcher* v. *Powell*, 6 Wheat. 119; *Harpending* v. *Dutch Ch.* 16 Pet. 455; *Green* v. *Neal's Lessee*, 6 Pet. 291; *Henderson* v. *Griffin*, 5 Pet. 151; *Pease* v. *Peck*, 59 U. S. (18 How.) 595–598; *Jackson* v. *Chew*, 12 Wheat. 153–167; *United States* v. *Morrison*, 4 Pet. 124; *Swift* v. *Tyson*, 16 Pet. 1; *Carpenter* v. *Prov. Wash. Ins. Co.* 16 Pet. 495.

Similar decisions have been made on the statute of frauds in other states.

See *Clark* v. *Dales*, 20 Barb. 42; *Lawrence* v. *Dole*, 11 Vt. 549; *Dana* v. *Hancock*, 30 Vt. 616; *Buel* v. *Miller*, 4 N. H. 196; *Grafton Bank* v. *Woodward*, 5 N. H. 99; *Cuff* v. *Penn*. 1 M. & S. 21; *Goss* v. *Lord Nugent*, 5 B. & Ad. 65.

The case of *Clarke* v. *Russel*, 3 Dall. 415, is distinguished from the present.

6. There is a fact in proof in this case, which did not appear in the case when before this court before, and that is, that when Slater made the agreement upon which suit is brought, securities were placed in his hands by the principal debtor, to indemnify him for his liability. His promise is not, therefore, within the statute of frauds.

7. A parol promise to pay the debt of another in consideration of property placed by the debtor in the promisor's hand, is not within the statute of frauds. It is an original promise and binding upon the promisor, and in this respect it is immaterial whether the liability of the original debtor continues or is discharged.

1 Browne, Stat. of Frauds, § 187, p. 184; *Wait* v. *Wait*, 28 Vt. 350; *Farley* v. *Cleveland*, 4 Cow. 432; 1 Smith's Lead. Cas. 329; *Hindman* v. *Langford*, 3 Strob. 207; *Cross* v. *Richardson*, 30 Vt. 641; *Fish* v. *Thomas*, 5 Gray, 45; *Rand* v. *Mather*, 11 Cush. 1; *Olmstead* v. *Greenly*, 18 Johns. 12; *Hilton* v. *Dinsmore*, 21 Me. 410; *Cameron* v. *Clark*, 11 Ala. 259; *Laing* v. *Lee*, Spenc. (N. J.) 337; *Goddard* v. *Mockbee*, 5 Cranch. C. C. 666; *Stanly* v. *Hendricks*, 13 Ired. 86; *Lee* v. *Fontaine*, 10 Ala. 755; *McKenzie* v. *Jackson*, 4 Ala. 230; *Lippincott* v. *Ashfield*, 4 Sandf. 611; *Westfall* v. *Parsons*, 16 Barb. 645; *Todd* v. *Tobey*, 29 Me. 219.

The defendant, having waived by parol, the performance of the work at the day, thereby himself prevented performance, and he cannot avail himself of the nonperformance he has himself occasioned.

Browne, Stat. Frauds, §§ 423. 424. 425, 436, p. 436; *Fleming* v. *Gilbert*, 3 Johns. 531; *Lawrence* v. *Dole*, 11 Vt. 549; *Young* v. *Hunter*, 6 N. Y. 203.

8. When this case was before this court before, no question was made nor discussion had whether the promise of the defendant was within the statute of frauds. The question was simply whether time was of the essence of the contract; and this court decided that it was.

Slater v. *Emerson*, 19 How. 224.

9. The evidence offered by the plaintiff in error under the common counts that the defendant in error had securities in his hands to indemnify him for his promise took the case from the statute of frauds. It made him an original promisor for the work done after November 14, 1854 (the date of the contract), and he is, therefore, liable upon the common counts upon a *quantum meruit* as an original debtor.

Mr. **S. W. Bates**, for the defendant in error:

This case was before this court at the December term, 1856, and is reported in 19 Howard, 224. This court then decided:

1st. That the original contract between Emerson and the corporation, to build the bridges for the corporation, remained in full force unaffected by the contract between Emerson and Slater.

2d. That by force of his contract Slater stood in the relation of a surety for the corporation for the amount for which he had agreed to become liable.

3d. That the time of performance (December 1) was of the essence of Slater's contract and he was not liable thereon, as Emerson had failed to perform within the time fixed.

The judgment of the circuit court was reversed and the cause was remanded for a new trial.

As this court had decided that Emerson could not sustain his action on the written contract with Slater when the case came on for a new trial in the circuit court, the plaintiff offered to prove by parol that after November 14th, 1854, and before the 1st day of December, 1854, and after the 1st day of said December, the defendant, by his acts and declarations, waived and dispensed with the performance of work, by the plaintiff, on the 1st of said December, and agreed to substitute therefor performance thereon, on or before the 20th day of December, 1854, and to deem performance by the plaintiff, on or before the 20th of December, 1854, a substitute for an equivalent to performance on the 1st day of said December, according to the contract, and that the corporation also assented thereto, and that the work was fully performed within the extended time.

This testimony was objected to by the defendant, upon the ground that the contract of November 14, 1854, was a special promise for the debt, default, or misdoings of another, and was within the statute of frauds, and that the alleged waiver, extension and substitution, were not by writing. The court sustained the objection and excluded the testimony, to which ruling the plaintiff then and there excepted.

This ruling was right.

This court had decided what performance by the 1st day of December was an essential part

of this contract. And manifestly a contract cannot be varied in one of its essential parts without making a new contract.

And when such new contract has been made, it must be declared on.

This plaintiff declares on such new contract in his last count. And inasmuch as the contract declared on is that of a surety, it must be in writing, and wholly in writing. The statute of frauds is not complied with by producing a contract which is partly in writing, while one of its essential parts rests in parol.

Clarke v. *Russel*, 3 Dall. 415; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Harvey* v. *Grabham*, 5 Ad. & L. 61; *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Stead* v. *Dawber*, 10 Ad. & El. 57; *Marshall* v. *Lynn*, 6 Mees. & W. 109; *Emmet* v. *Dewhirst*, 8 Eng. L. & Eq. 88; *Hasbrouck* v. *Tappen*, 15 Johns. 200; *Blood* v. *Goodrich*, 9 Wend. 68; *Stevens* v. *Cooper*, 1 Johns. Ch. 429. 430.

The decision in *Stearns* v. *Hall*, 9 Cush. 31, is not binding on this court.

1st. This contract of Slater to give notes does not appear to be a Massachusetts contract. Slater was a citizen of Rhode Island, and the contract to deliver not money, but specific articles, was legally performable by him at his residence in Rhode Island.

Chipman, Cont.; *Vance* v. *Bloomer*, 20 Wend. 196; *McMurray* v. *The State*, 6 Ala. 324; *Minor* v. *Michie*, 1 Walk. Miss. 24; 2 Kent's Com. 508.

2. The construction of the statute of frauds is not a question of local law. The same statute exists in every state and territory of the Union.

When the decisions of a state court are inconsistent to show that no rule has been finally settled, this court will decide according to its own unbiased judgment.

Pease v. *Peck*, 18 How. 598; *Homer* v. *Brown*, 16 How. 354; *Swift* v. *Tyson*, 16 Pet. 1.

This court having decided the point now in question in the case, cited from Dallas, will not now hold otherwise because the state court has held otherwise.

Rowan v. *Runnels*, 5 How. 139.

The plaintiff, at the trial in the circuit court, introduced three deeds of land from the railroad corporation to the defendant, dated three days after the defendant entered into the contract of November 14, and said to have been made to indemnify the defendant from his liability under the said contract.

But we are not aware of any case or *dictum* showing, that because a surety, after he has become bound, as such, takes security from his principal to indemnify himself against loss by his contract of suretyship, he thereby ceases to be a surety and becomes a principal debtor.

However true it is that assumpsit for a *quantum valebat* or *quantum meruit* will lie, where the terms of a special contract have not all been complied with, to recover the value of the land and materials held and enjoyed by the defendant, yet nothing is better settled than that no action can be maintained on the contract itself, without alleging with exactness, performance in entire accordance with the terms of the contract, including that in relation to time of performance and proving the allegation.

This proposition has been affirmed in nearly every state.

Smith, Lead. Cas. 5th Am. ed. note to Cutter & Powell, vol. II. pp. 49, 50; *Bank of Columbia* v. *Patterson*, 7 Cranch, 299; *Bank of Columbia* v. *Hagner*, 1 Pet. 455; *Wash. Pack. Co.* v. *Sickles*, 10 How. 419; *Marshall* v. *Jones*, 11 Me 56; *Britton* v. *Turner*, 6 N. H. 483; *Gilman* v. *Hall*, 11 Vt. 513; *Taft* v. *Montague*, 14 Mass 282; *Snow* v. *Inhabitants of Ware*, 13 Met. 43; *Smith* v. *Scotts R. School Dist.* 20 Conn. 312; *Gregory* v. *Mack*, 3 Hill. 380; *Jewell* v. *Schroeppel*, 4 Cow. 564; *Philips* v. *Butler*, 8 Johns 392; *Alexander* v. *Hoffman*, 5 Watts & S. 382; *Baldwin* v. *Lessner*, 8 Ga. 71; *Brown* v. *Gauss* 10 Mo. 265; *Morrison* v. *Ives*, 4 Sm. & M. 652; *Hawkins* v. *Gilbert*, 19 Ala. 55; *Simpson* v *McDonald*, 2 Ark. 371; *Newman* v. *McGregor* 5 Ohio, 349; *Eldridge* v. *Rowe*, 2 Gilm. Ill. 91; *Lomax* v. *Bailey*, 7 Blackf. 599; *Morford* v *Mastin*, 6 Mon. 609.

In this case there has been no performance within the time, and no legal excuse for the breach on the part of Emerson.

On November 14th he agrees to complete the work in sixteen days. He was more than double that time in doing it, and no hindrance on the part of anyone is shown, and no excuse for its non-completion.

Emerson cannot recover therefor unless it be on the common courts, and not then unless it be on the *quantum meruit* and *valebat*. Can he recover on these?

The agreement of November 14 shows that the money and notes given by Slater were to to apply to the then indebtedness of the company to Emerson, and were not to apply to any work to be done heretofore—and this was one of the points argued at the former trial, contending that Slater was only a surety. That Emerson understood that he was doing the work for the company is evident from the fact that he charged the company with it, presented to them his bills, settled with its committee, and never presented any charges for work to Slater.

If, as this court has heretofore decided, Slater was a surety for the price of the work done for the corporation, there can be no recovery had against him on counts for work, labor and materials furnished to himself. None were furnished to himself. The law will not imply a promise to pay another's debt. It requires an express promise in writing.

There is no case of recovery on a *quantum meruit* or *quantum valebat* except for some work or materials done or furnished, and that, to, for the defendant.

But Emerson furnished no work or materials for Slater. They were all for the railroad company.

Suppose Emerson had died, become insolvent, or in some other way had become absolutely incapacitated from completing the work agreed on by December 1st, would Slater have been liable on a *quantum meruit?*

How long a time after December 1st would have been allowed to executors of Emerson to complete the work so as to bind Slater?

If Emerson and the railroad company had canceled their contract, or had the company refused to allow Emerson to continue his work. would Slater have been liable on a *quantum meruit?*

Mosby v. *Hunter*, 9 Ired. 119.

Mr Justice Clifford delivered the opinion of the court:

This case comes before the court upon a writ of error to the circuit court of the United States for the district of Massachusetts. It was an action of *assumpsit*, brought by the plaintiff in error against the present defendant, upon a written agreement, bearing date on the 14th day of November, 1854.

By the terms of the instrument, the plaintiff covenanted and agreed with the defendant, in consideration of the agreements of the latter therein contained, and of $1 to him paid, that he, the plaintiff, would complete all the bridge work to be done by him for the Boston and New York Central Railroad Company, ready for laying down the rails for one track by the first day of December next after the date of the contract. In consideration whereof, the defendant agreed that he would pay the plaintiff, within two days from the date of the agreement, the sum of $4,400 in cash; and also give to the plaintiff, on the completion of the bridges, and when the rails for one track were laid from Dedham to the foot of Summer street in Boston, his, the defendant's, five notes, for $2,000 each, dated when given, as provided, and made payable to the plaintiff or order, in six months from their date. Another stipulation of the agreement was, that the notes, when paid, were to be applied towards the indebtedness of the railroad company to the plaintiff, and that the agreement was in no way to affect any contract of the plaintiff with the railroad, or any action then pending between them.

When the declaration was filed, it contained three special counts, drawn upon the written agreement, together with the common counts, as in actions of *indebitatus assumpsit*.

36*] *Performance on the part of the plaintiff, and neglect and refusal on the part of the defendant to give the five notes specified in the agreement, after seasonable demand, constitute the cause of action set forth in the several special counts. They differ in nothing material to be noticed in this investigation, except that, in the first count, performance on the part of the plaintiff is alleged, according to the contract, on the 1st day of December, 1854, while in the second and third counts it is alleged at a period twenty days later.

An additional special count was afterwards filed by consent, which, in one respect, varies essentially from the other counts. After setting out the substance of the contract, it alleges that the defendant waived performance at the day stipulated in the agreement, and extended the time to the twentieth day of the same December, and that the plaintiff performed and completed the work within the extended time. Demand of the notes prior to the commencement of the suit, substantially as alleged, was admitted at the trial, as were also the execution of the agreement and the payment by the defendant of the $4,400.

As appears by the transcript, the cause has been twice tried upon the same pleadings. At the first trial, the verdict was for the plaintiff; but the defendant excepted to the rulings and instructions of the circuit court, and, after judgment, removed the cause into this court by writ of error.

Among the questions presented on the writ of error, the principal one was whether, by the true construction of the written agreement, time was of the essence of the contract. That question was directly presented by the fourth exception; and this court held, that the refusal of the circuit judge to instruct the jury, as prayed by the defendant, that the plaintiff could not recover on the special counts without showing that the work was completed by the day stipulated in the contract, was error. Accordingly, the judgment was reversed, and the cause remanded, with directions to issue a new *venire*.

In the opinion delivered on the occasion, this court said, in effect, that in cases where time is of the essence of the contract, there can be no recovery on the written agreement, *with- [*37 out showing performance within the time limited; but added, that a subsequent performance and acceptance by the defendant will authorize a recovery in a *quantum meruit*. *Slater* v. *Emerson*, 60 U. S. (19 How.) 239.

Failing to show performance at the day named in the agreement, the plaintiff, at the last trial, offered to prove by parol to the effect that, after the date of the agreement, and before as well as after the day specified for the completion of the work, the defendant, by his conduct, acts and declarations, waived and dispensed with performance at the day named in the written agreement; and agreed to substitute therefor, performance on the twentieth day of the same December, and to deem performance on the day last named as equivalent to performance on the day specified in the written agreement, and that the work was fully performed within the extended time.

Objection was made by the defendant to this testimony, upon the ground that the written agreement declared on was a special promise for the debt, default or misdoings of another; and that the alleged waiver, substitution and extension not being in writing, were within the statute of frauds; and the court sustained the objection and excluded the testimony. To which ruling of the court the plaintiff excepted.

He then proposed to proceed upon the common counts, and offered evidence accordingly. After reading the agreement set up in the special counts, he introduced three deeds, each dated November 17, 1854, purporting to convey certain parcels of real estate therein described. They were each given by the railroad company to the defendant, to indemnify him for the liability he assumed in the before-mentioned written agreement with the plaintiff. Estimating the value of the real estate so conveyed by the considerations expressed in the respective deeds, it amounted in the aggregate to the sum of $13,500.

He also introduced a memorandum agreement between the defendant and the railroad company, whereby the former leased to the latter ten hundred and fifty tons of railroad iron, to be laid down by the company and used on their railroad. By the terms of the last-named agreement, the railroad iron *was [*38 estimated at the value of $68,400; and the company agreed to pay the defendant for the use of the iron, $5,000 per month, the first payment to be made on the first day of March then

next, and so upon the first day of each succeeding month, until the whole sum was paid, with interest on the same from a given day—the defendant agreeing, if there was no default of the payments, when the whole was paid, to sell and deliver the iron to the company for the estimated value including the interest.

To secure these payments together with the interest, the railroad company, by the same instrument, assigned and set over to the defendant the proceeds of the railroad, to an amount equal to the estimated value of the iron, with the interest, and authorized and required the superintendent of the road to retain in his own hands, out of the proceeds, a sum sufficient to pay the amount to the defendant, in the manner and at the times specified in the agreement.

Emerson's contract with the railroad company was also introduced, and makes a part of the record. It bears date on the 17th day of December, 1853, and provides, on the one part, that the plaintiff shall build and complete, sufficient for the passage of an engine over the same, by the first day of May then next, all the bridging, as then laid out and determined upon by the engineer, from the wharf, near the foot of Summer street, in Boston, to Dorchester shore, and to complete the same as soon thereafter as might be reasonably practicable. On the other part, the agreement prescribes the compensation to be paid by the railroad company to the plaintiff, for building and completing the respective works therein designated and described, stipulating that eighty-five per cent upon the estimated value of the materials furnished, and seventy-five per cent upon the estimated value of the labor performed, should be paid monthly, as the work was done, and that the balance should be paid by the company upon the completion and acceptance of the whole work.

Parties to the suit are, by law, competent witnesses in the courts of Massachusetts; and under that law the plaintiff was examined in this case.

39*] *He also called and examined five other witnesses. From this parol testimony, it appears that securities were put into the hands of the defendant, deemed by him and the company adequate, at the time, to indemnify him against his contract with the plaintiff. Those securities, two of the witnesses say, consisted of real estate, and the bonds of the company for $1,700, secured by a mortgage upon the road. In respect to the real estate, it is to be observed that the deeds of conveyance bear date three days after the date of the contract; but the presumption from the circumstances is a reasonable one, that they were given in pursuance of the arrangement made at the time the contract was executed. It also appeared that the company failed in July, 1854, and that it was actually insolvent at the date of these transactions.

Prior to the date of the agreement of the 14th of November, 1854, the plaintiff had stopped work under his contract with the company, and refused to continue it. As soon as the contract with the defendant was made, he resumed the work on the bridges, and finished them about the middle of December, 1854; but the rails were not all laid by the company until the twenty-first day of the same month.

At the date of the contract between these parties, the defendant was a large stockholder in the corporation, and holder of the bonds of the company, which were secured by a mortgage of the road to trustees. During the progress of the work under the contract between these parties, and before the day therein named for the completion of the work, the officers of the company, or some of them, repeatedly stated to the plaintiff, in the presence of the defendant, and without objection on his part, that all the company wanted was that the plaintiff should keep out of the way of the tracklayers.

Three of the directors, including the defendant, on the 24th day of November, 1854, called on the plaintiff while he was at work on one of the bridges, and inquired of him if he could complete it by the fourth day of the then next month, stating to him the reason why it was desirable that he should do so—and by working nights and Sundays he completed it, according to their request.

*Several witnesses state—and among [*40 the number the one who laid the rails for the company — that the tracklayers were not delayed by the plaintiff; and the plaintiff testified that the defendant never objected because the bridges were not completed by the day specified in the written agreement. On being recalled, he further testified that he paid, for work done and materials furnished after that day, the sum of $11,157.84, and that he had not received a dollar for it from any source.

Thereupon the presiding justice ruled and instructed the jury that, upon this testimony, the plaintiff was not entitled to recover on the common counts, and directed the jury to return their verdict for the defendant. Accordingly, the jury found that the defendant never promised; and the plaintiff excepted to the rulings and instructions of the court.

Several questions were discussed at the bar, which, in the view we have taken of the case, it will not be necessary to decide.

Both of the exceptions to the rulings and instructions of the court necessarily involve the construction of the contract between these parties; but the question presented is widely different from the one considered and decided by this court on the former record. On that occasion, the single question of any importance was whether, by the true construction of the contract, it was agreed and understood between the parties to the instrument that the completion of the work at the time therein prescribed was a condition on which the obligation of the defendant to give the notes was to depend.

Contrary to the ruling of the circuit judge, this court held that the covenants of the respective parties were dependent; that time was of the essence of the contract, and remanded the cause for a new trial.

That rule of construction, beyond doubt, is the law of the contract, and no attempt has been made to evade or question it on either side in this controversy. But the question now presented is of a very different character.

It is insisted by the plaintiff that the promise of the defendant *was an original [*41

undertaking, on a good and valid consideration, moving between the parties to the instrument. On the part of the defendant, it is insisted that his undertaking was a special promise for the debt, default, or misdoings, of another, and so with the statute of frauds.

If the theory of the plaintiff be correct, then it would seem to follow that the rulings and instructions of the circuit court were erroneous. Verbal agreements between the parties to a written contract made before or at the time of the execution of the contract, are in general inadmissible to vary its terms, or to affect its construction. All such verbal agreements are considered as merged in the contract. But oral agreements subsequently made, on a new and valuable consideration, and before the breach of the contract, in cases falling within the general rules of the common law, and not within the statute of frauds, stand upon a different footing. Such subsequent oral agreements, not falling within the exception mentioned, may have the effect to enlarge the time of performance specified in the contract, or may vary any other of its terms, or may waive and discharge it altogether. On this point, the authorities are numerous and decisive, of which the following are examples: *Goss* v. *Nugent*, 5 Barn. & Ad. 65; *Nelson* v. *Boynton*, 3 Met. 402. Speaking of the exceptions to the general rule, that parol evidence is not admissible to contradict or vary the terms of a written instrument, Mr. Greenleaf says: "Neither is the rule infringed by the admission of oral evidence to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the old one, or in addition to and beyond it; and if subsequent, and involving the same subject-matter, it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or totally adopts the provisions of the former contract in writing, provided the whole agreement be rescinded and abandoned." 1 Greenl. Ev. 303. But the rule, so far as it is applicable to this case, is better stated by Lord Denman in *Goss* v. *Nugent*, 5 Barn. & Ad. 65, wherein he says: "After the agreement has been reduced into writing, it is competent to the parties, in 42] cases falling within *the general rules of the common law, at any time before the breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul, the former agreement, or in any manner to add to or subtract from or vary or qualify the terms of it, and thus to make a new contract." That rule was afterwards qualified by the same learned judge in a particular not essential to the present inquiry; and with that qualification it appears to be the rule constantly applied by the English courts, in cases not within the statute of frauds, to the present time.

Harvey v. *Grabham*, 5 Ad. & El. 61; 1 Phil. Ev. (Cow. & Hill's ed.) p. 563, n. 987; *Munroe* v. *Perkins*, 9 Pick. 298; *Snow* v. *Inhabitants of Ware*, 13 Met. 42; *Vicary* v. *Moore*, 2 Watts, 451; *Cummings* v. *Arnold*, 3 Met. 489; *Fleming* v. *Gilbert*, 3 Johns. 528.

On the other hand, assuming the theory of the defendant to be correct, that, by the true construction of the contract, his undertaking was a special promise for the debt, default or misdoings of the railroad company, then perhaps the better opinion is, according to the weight of authority, that a written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing.

Marshall v. *Lynn*, 6 Mees. & W. 109; *Goss* v. *Nugent*, 5 Barn. & Ad. 58; *Harvey* v. *Grabham*, 5 Ad. & El. 61; *Stowell* v. *Robinson*, 3 Bing. N. C. 927; *Stead* v. *Dawber*, 10 Ad. & El. 57; *Emmett* v. *Dewhirst*, 8 Eng. L. & Eq. 88; *Hasbrouk* v. *Tappen*, 15 Johns. 200; *Blood* v. *Goodrich*, 9 Wend. 68; *Stevens* v. *Cooper*, 1 Johns. Ch. 429; *Clarke* v. *Russel*, 3 Dall. 415.

Decided cases, however, are referred to, from the Massachusetts reports, which evidently wear a different aspect, and it is contended by the counsel for the plaintiff that the principle adopted in those cases constitutes the rule of decision in this case; but it is unnecessary to determine that point at the present time, as we are of opinion that the promise of defendant contained in the written agreement was an original undertaking, on a good and valid consideration moving between the parties to the instrument. *Nelson* v. *Boynton*, 3 Met. 396; *Stearns* v. *Hall*, 9 Cush. 31.

*Cases in which the guaranty or [*43 promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

Nelson v. *Boynton*, 3 Met. 400; *Leonard* v. *Vredenburg*, 8 Johns. 39; *Farley* v. *Cleveland*, 4 Cow. 432; *Alger* v. *Scoville*, 1 Gray, 391; *Williams* v. *Leper*, 3 Burr. 1886; *Castling* v. *Aubert*, 2 East, 325; 2 Pars. Con. 306.

Nothing is better settled than the rule, that if there is a benefit to the defendant, and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation. 2 Addison, Cont. 1002, and cases cited. Other authorities state the proposition much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action.

Violett v. *Patton*, 5 Cranch, 150; Chit. Cont. p. 28; *Townsley* v. *Sumrall*, 2 Pet. p. 182.

Apply these principles to the terms of the

written agreement, in view of the attending circumstances and the subject-matter, and it is quite clear that the promise of the defendant 44*] *was an original undertaking on a good and valid consideration moving from the plaintiff at the time the instrument was executed. On its face it purports to be a contract between the parties for their own benefit; one agreeing to do certain work, and furnish certain materials, and the other agreeing to pay therefor a stipulated compensation. Their promises are mutual, and in one respect dependent. In consideration that the plaintiff engaged to do the work and furnish the materials by a given day, the defendant, on his part, agreed, among other things, when the work was completed, to give the plaintiff the five notes therein described. Reference was made to the contract of the plaintiff with the railroad company in the first instance, as descriptive of the work to be done, and of the materials to be furnished; and in the second instance, doubtless for the reason that, as a part of the transaction, the company had placed, or agreed to place, securities in the hands of the defendant, to indemnify him for the liability he thereby assumed to the plaintiff. Part of those securities were delivered over to the defendant at the time, and the residue as soon thereafter as the conveyances could conveniently be made. But when we consider the attending circumstances, the presumption is much stronger, that the arrangement was one mainly, if not entirely, for the individual benefit of the defendant.

Prior to that date, the railroad company had failed, and was utterly insolvent, owning nothing, it seems, except the securities transferred to the defendant, for his indemnity in this transaction, and the franchise of the road. Unlike what was exhibited in the former record, it now appears that the defendant had large interests of his own, separate from his relation to the company as a stockholder, which were to be promoted by the arrangement. He had leased to the company railroad iron for the use of the road, amounting in value to the sum of $68,000, and, as a security for payment, held an assignment of the proceeds of the road to that amount, with interest, which was to be paid in monthly instalments of five thousand. Now, unless the bridges were completed and the road put in a condition for use, there would be no proceeds; 45*] *and as he had already taken into his possession all the available means of the company to secure himself for this new liability, should the road not be completed, the company could not pay for the iron.

In this view of the subject, it is manifest that the arrangement was one mainly to promote the individual interest of the defendant. Damage also resulted to the plaintiff, as is obvious from the whole transaction. Under his contract with the company, they had stipulated to pay him monthly eighty-five per cent upon the estimated value of the materials furnished, and seventy-five per cent upon the estimated value of the labor performed as the work was done. Failing to receive those monthly payments from the company, the plaintiff, as he had a right to do, stopped the works, and refused to proceed, in consequence of the failure of the company to make the monthly payments. To remedy this difficulty, and insure the completion of the bridges so as to render the road available for use, this arrangement was made by the defendant. It was not an arrangement to pay a subsisting indebtedness, but only for work to be done and materials to be furnished; monthly payments were discontinued, and the plaintiff was induced, with an advance of $4,400, to resume and complete the work at his own expense. Without detailing more of the evidence, as exhibited in the statement of the case, it will be sufficient to say that, in view of all the attending circumstances, we think it is clear that the promise of the defendant was an original undertaking upon a good and valid consideration moving between the parties to the written agreement.

For these reasons, we think the plaintiff had a right to proceed upon the common counts, and that it was error in the presiding justice to direct a verdict for the defendant. It is also contended by the plaintiff that the effect of the indemnity given by the railroad company to the defendant was to take the contract out of the statute of frauds; but we do not find it necessary to determine that question at the present time.

The judgment of the Circuit Court is, therefore, reversed, with costs, and the cause remanded with directions to issue a new venire.

THOMAS OTIS LE ROY and Daniel Smith,
Appts.,
v.
BENJAMIN TATHAM, JR., Henry B. Tatham, and George N. Tatham.

(See S. C. 22 How. 132-141.)

Discovery must be of practical use, or no patent will be granted—Tatham's patent.

However brilliant the discovery of a new principle may be, to make it useful it must be applied to some practical purpose, or no patent can be granted.

Tatham's patent for making pipes and tubes from lead, tin, or soft metals, is sustainable.

Argued Jan. 13, 1860. Decided Mar. 19, 1860.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The bill in this case was filed in the court below, by the appellees, to restrain an alleged infringement by the appellants of a patent for making lead pipe, and for an accounting and general relief. A final decree was entered by the court below, in favor of the complainants, for $16,815.57, with interest to the date of the master's report, making an aggregate of $27,133.34; whereupon the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

NOTE.—*Patentability of inventions*—see notes, 37 L. ed. U. S. 553; 38 L. ed. U. S. 138; 39 L. ed. U. S. 285; 40 L. ed. U. S. 1025.

Messrs. **W. C. Noyes** and **E. W. Stoughton,** for appellants:

1. In ascertaining whether that which is claimed as novel was before known, courts disregard mere differences in form, proportion, size, strength and materials. Variations in all these respects may exist, and still the prior machine or improvement be substantially the same as that patented.

2. The application of an old machine to a new use is not patentable, unless such application requires a change to be made in the machine or apparatus so applied, in which case the invention consists in the change so made, and not in the mere application.

Curt. Pat. §§ 85, 88.

If the mechanical combination of the Hansons—assuming them to have been its first inventors—were used for the purpose of making lead pipes, by causing the lead to pass the bridge in a fluid instead of a "set" state, and to cool within the die and around the core, no one would question that such use would be an infringement of their patent.

Indeed, this necessarily follows from the proposition, that the mere application of old machinery to a new purpose, is not patentable.

Howe v. *Abbott,* 2 Story, 190, 193; *Bean* v. *Smallwood,* 2 Story, 408, 410; *Hovey* v. *Stevens,* 1 Wood. & M. 290; *Kay* v. *Marshall,* 5 Bing. N. C. 492; *Hotchkiss* v. *Greenwood,* 11 How. 248, 266.

Messrs. **C. C. Goddard, L. W. Goddard,** and **C. M. Keller,** for appellees:

The discovery of the fact that lead possesses the property of welding after being separated in the solid state, was of practical utility. That alone did not teach how to manufacture leaden pipes of a better quality; for it was merely an abstract discovery that lead possesses this property, and, therefore, not the proper subject-matter of letters patent.

But when the Hansoms discovered that by the use of a mechanical combination having a defined mode of operation, working on lead at a high degree of heat, but yet in a set or solid state, it can be separated and perfectly reunited or welded, to manufacture pipes either of a better quality or at less expense than by any other known method, they cannot be said to have simply discovered an abstract fact not before known; but how, and by what means to produce a useful result—a result never before produced in that way and by such means; the exercise of which would be useful to society. And in determining what is the new thing discovered or invented, the discovery of the practical fact cannot be separated from the employment of the means by which the newly discovered property of the lead is rendered indispensable to the result to be produced.

The employment of a known mechanical combination or construction, to produce a given result not before produced in like manner, by acting on the material to be wrought in a different condition necessary to produce the required result, is the subject-matter of patent, and not a mere double use.

Russell v. *Cowley,* Web. Pat. Cas. 459, 465; Curt. Pat. § 88, and cases there cited.

Mr. Justice **McLean** delivered the opinion of the court:

This is an appeal from the final decree of the circuit court of the United States for the southern district of New York, on a bill filed by the appellees to restrain the infringement, by the appellants, of a patent for making lead pipe, and for general relief.

A suit at law was commenced, after the filing of the bill, on or about the 10th of May, 1847, to recover damages for the same infringement.

This action was twice tried—once on the 3d May, 1848, and resulted in a verdict for the appellants, which was set aside by the court, and a new trial awarded. It was tried in May, 1849, when the jury gave a verdict for the respondents for $11,394 in damages. Exceptions were taken to the charge, and the judgment was reversed, and a new trial ordered in December term, 1852. 14 How. 156.

Before this decision was made, and in January, 1852, it was stipulated between the counsel for the respective parties that the testimony taken on the last trial in the action at law should be read; and it forms the principal part of the evidence on both sides in this suit.

The action at law was not to be tried again; but the suit in equity was prosecuted in its stead.

The patent, under which the plaintiffs claim, bears date the 14th March, 1846; and in their schedule they say: "Our invention consists in certain improvements upon and additions to the machinery used for manufacturing pipes and tubes from lead or tin, or any alloy of soft metals, capable of being forced, by great pressure, from out of a receiver, through or between apertures, dies and cores, when in a set or solid state, set forth in the specification of a patent granted to Thomas Burr, of Shrewsbury, in Shropshire, England, dated the 11th of April, 1820, recited in the Repertory of Arts, etc., London, etc."

The bill alleges that John and Charles Hanson, of England, were the inventors of the improvements specified, on or prior *to [*135 the 31st of August, 1837; that on the 10th of January, 1840, the Hansons assigned to H. B. & B. Tatham, two of the defendants in error, the full and exclusive right to said improvements; that on the 29th March, 1841, letters patent were granted for the improvements to the Tathams, as the assignees of the Hansons; that afterwards H. B. & B. Tatham assigned to G. N. Tatham, the remaining defendant, an undivided third part of the patent.

On the 14th March, 1846, the said letters patent were surrendered, on the ground that the specifications of the improvements claimed were defective; and a new patent was issued, which granted to the patentees, their heirs, etc., for the term of fourteen years from the 31st August, 1837, the exclusive right to make and vend the improvements secured.

The defendants denied the infringement charged.

A great number of facts were proved, showing the successful manufacture of lead in the mode stated in the specifications, and particularly that "pipes thus made are found to possess great solidity and unusual strength, and a fine uniformity of thickness and accuracy is arrived at, such as, it is believed, has never been attained by any other machinery." And they say the essential difference in the character of

this pipe, which distinguishes it, as well as that contemplated by Thomas Burr, from all others heretofore known or attempted, is, that it is wrought under heat, by pressure and constriction, from set metal, and that it is not a casting formed in a mold.

"And it was proved, that in all the modes of making lead pipe previously known and in use, it could be made only in short pieces; but that, by this improved mode, it could be made of any required length, and also of any size; and that the introduction of lead pipe made in the mode described had superseded the use of that made by any of the modes before in use, and that it was also furnished at a less price." And it was proved that lead, when recently become set, and while under heat and extreme pressure, in a close vessel, would re-unite perfectly after a separation of its parts.

In the case of *The Household Company* v. *Neilson*, Web. Pat. Cas. 683, it is said: "A patent **136*]** will be good, though *the subject of the patent consists in the discovery of a great, general and most comprehensive principle in science or law of nature, if that principle is, by the specification, applied to any special purpose, so as thereby to effectuate a practical result and benefit not previously attained."

Mr. Justice Clerk Hope, in his charge to the jury, said: "The specification does not claim anything as to the form, nature, shape, materials, numbers, or mathematical character, of the vessel or vessels in which the air is to be heated, or as to the mode of heating such vessels."

Now, in this case it must not be forgotten that the machinery was not claimed as a part of the invention; but the jury were instructed to inquire "whether the specification was not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in said letters patent and specification;" and that, in order to ascertain whether the defendants had infringed the patent, the jury should inquire whether they "did, by themselves or others, and in contravention of the privileges conferred by the letters patent, use machinery or apparatus substantially the same with the machinery or described in the plaintiffs' specification, and to the effect set forth in said letters and specification."

Now, as no specification was claimed in regard to the machinery, it is not perceived how the patent could be infringed, unless upon the principle, that, having claimed no specific mode of applying the heat, he could use any mode he might prefer, in defiance of the rights of other patentees.

Now, this cannot be law; certainly it is not law under the patent act of this country. That act requires the making and constructing "the thing, in such full, clear, and exact terms, as to enable any person skilled in the art or science to which it appertains, to make, construct, and use the same."

Alderson B. Webster's Patent Cases, 342, says: "The distinction between a patent for a principle and a patent which can be supported is, that you must have an embodiment of the principle in some practical mode described in the specification of carrying into actual effect; **137*]** and then you take out *your patent, not for the principle, but for the mode of carrying the principle into effect."

"It is quite true, that a patent cannot be taken out solely for an abstract philosophical principle—for instance, for any law of nature or any property of matter, apart from any mode of turning it to account. A mere discovery of such a principle is not an invention, in the patent law sense of the term." Web. Cases, 683.

However brilliant the discovery of the new principle may be, to make it useful it must be applied to some practical purpose. Short of this, no patent can be granted. And it would not seem to be a work of much labor for a man of ingenuity to describe what he has invented.

The "newly discovered property in the metal, and the practical adaptation of it, by these means, to the production of a new result, namely: the manufacture of wrought pipe out of solid lead," was the discovery. "There can be no patent for a principle; but for a principle so far embodied and connected with corporeal substances as to be in a condition to act and to produce effects in any trade, mystery, or manual occupation, there may be a patent."

"It is not that the patentee conceived an abstract notion that the consumption in fire engines may be lessened; but he discovered a practical manner of doing it, and for that he has taken his patent. This is a very different thing from taking a patent for a principle."

The principle may be the new and valuable discovery, but the practical application of it to some useful purpose is the test of its value.

In the case of *Le Roy* v. *Tatham*, 14 How. 156, it was said, "that in the view taken by the court in the construction of the patent, it was not material whether the mere combination of machinery referred to was similar to the combination used by the Hansons, because the originality did not consist in the novelty in the machinery, but in bringing a newly discovered principle into practical application, by which a useful article is produced, and wrought pipe made, as distinguished from cast pipe."

*Now, it must be observed that the [**138** machinery used was admitted to be old, and any difference in form and strength must arise from the mode of manufacturing the pipes. The new property in the metal claimed to have been discovered by the patentees belongs to the process of manufacture. The result is before us. We see the manufactured article, and are told that its substance is greatly modified and improved, but we derive little or no knowledge from inspecting it. Except by the known process of its formation we cannot appreciate its value, or comprehend the various purposes for which it was made. We want to see and understand the processes by which it was formed, the machinery in action, and a full explanation of its parts.

The claimants say: "We wish it to be understood that we do not confine ourselves to the mode of operation herein described, by making the cylinder rise with the hydraulic ram and other parts, and keeping the piston stationary, as the same effects will take place when the cylinder is stationary, and the power of the ram is applied to the top of the piston to cause it to descend into the cylinder, and our improve-

ments might be applied to a cylinder and press, fitted up in other respects upon Burr's plans, whereby the pipe is received over the top of the machinery, etc., all which and other variations will readily suggest themselves to any practical engineer, without departing from the substantial originality of our invention.

"The combination of the following parts above described is claimed, to wit: The core and bridge, or guidepiece, with the cylinder, the piston, the chamber, and the die, when used to form pipes of metal, under heat and pressure, in the manner set forth, or in any other mode substantially the same."

To the above is added: "We do not claim as our invention and improvement any of the parts of the above-described machinery, independently of their arrangement and combination above set forth."

The machinery described in both the above sentences is only claimed when used to form pipes of metal under heat and pressure. And it must be admitted, that the machinery described and illustrated by the drawings is suf- **139*]** ficiently explicit to show *the nature of the invention. If it be admitted that the machinery, or a part of it, was not new when used to produce the new product, still it was so combined and modified as to produce new results, within the patent law. One new and operative agency in the production of the desired result would give novelty to the entire combination.

The specifications are drawn with care and no ordinary skill, and they cannot be misunderstood. No one can be supposed to mistake the new product for the machinery through which it is developed. And in regard to a practical application of the new conception, it is as necessary as the conception itself; and they must unite in the patent. "The apparatus described is properly regarded by the patentees as subordinate, and as important only as enabling them to give practical effect to the newly discovered property, by which they produce the new manufacture." Certainly no comparison was instituted between the mechanical contrivance used and the new discovery.

In the case of *Le Roy* v. *Tatham*, 14 How. 176, the court instructed the jury, "that the originality of the invention did not consist in the novelty of the machinery, but in bringing a newly discovered principle into practical use."

Principle is often applied to a machine to describe its movements and effect; and we are told that the originality of this invention did not "consist in the novelty of the machinery, but in bringing a newly discovered principle into practical effect." Whether the new manufacture was the result of frequent experiments or of accident, it will be admitted that the process has been demonstrated to the satisfaction of all observers; and this has been done in the mode described.

In the complicated and powerful machinery used to produce this result, it is not perceived why it should not be adverted to, as showing the most natural and satisfactory explanation of the discovery. It is only necessary to examine the machinery combined, to see that its parts are dissimilar to others in use; and there would seem to be no other reason for the use of the new principle, to the exclusion of the mechanical structures employed, except a higher reach of knowledge. *However this may be, it [***140** would seem that, when dealing with a patentable subject, its appropriate name should be given to the machinery by which it was developed. The admitted want of novelty in the machinery, referred to so frequently, might invite criticism, if it were necessary, to the case in 14th Howard; but the case now before us is in chancery, and has been deliberately considered.

Up to the year 1837, the date of Hanson's invention, two methods only were known of making wrought pipe from lead, in the set or solid state, and these were the Burr method and the draw-bench method. As soon as the plan of the Hansons was introduced, it superseded all other methods.

Both of the above methods were defective—the draw bench on account of the great labor, limited length of pipe produced, and unequal thickness; and the Burr, because of the difficulty of holding the core central in the die, in forming pipes of small caliber.

The superiority of the Burr method, for the general purposes of manufacturing leaden pipes which require different sizes to be made, was so slight, as it seems, that for seventeen years after the date of the Burr patent, not one of such machines was put in use in the United States or in Europe.

In this combination of machinery there are six essential parts:

First. A metal cylinder, capable of receiving the lead in a fluid state, and permitting it to become set or solid therein, and of great strength.

Second. A piston, which is a solid metallic body, fitted to the bore of the cylinder, to work therein accurately, to prevent the charge of lead from escaping around it, and so connect with a hydraulic press, or other motor of great power, as to traverse the length of the cylinder with a force applied, of several tons, to force out the charge of lead, not in the liquid state.

Third. A die, which is simply a block of steel, with a central hole of a cylindrical form, and of a diameter of the pipe to be made.

Fourth. A core, which is simply a short cylindrical rod of steel, of the diameter of the caliber of the pipe to be made.

*Fifth. A bridge or core holder, which [***141** is a plate of metal with apertures, having four or more arms radiating from the central part, which has a central hole of the size of the core.

Sixth. A chamber of construction, located between the bridge and the die, and extending from the one to the other, and either conical or cylindrical, provided the end next the bridge be made of greater diameter than the die.

It is rare that so clear and satisfactory an explanation is given to the machinery which performs the important functions above specified. We are satisfied that the patent is sustainable, and that the complainants are entitled to the relief claimed by them.

In the order of the court, entered by Mr. Justice **McLean**, appears the following:

"It is the opinion of this court, that the complainants in the court below are entitled to recover from the defendants the sum of $16,815.57. Whereupon it is now here ordered, adjudged, and decreed by this court, that the decree of the said circuit court in this cause be, and the same

is hereby affirmed, to the extent of the aforesaid sum of $16,815.57, and that it be reversed as to the residue; and that this cause be, and that the same is hereby remanded to the said circuit court, with directions to enter a decree for that amount in favor of the complainants. And it is further ordered and decreed by this court, that the costs in the court below be paid by respondents in that court, the appellants here, and that each party pay his own costs in this court."

EDWARD KILBOURNE, Deming & Love, Coleman & Foote, and R. B. Foote,
v.
THE STATE SAVINGS INSTITUTION of ST. LOUIS, in the State of Missouri.

(See S. C. 22 How. 503, 504.)

Where writ of error was sued out for delay, judgment will be affirmed with ten per cent damages.

Where no question was raised upon the trial in the court below, for the consideration of this court, and none was made here, and the writ of error was obviously sued out for delay, this court will affirm the judgment, with ten per cent damages and costs.

Submitted Mar. 21, 1860. Decided Mar. 26, 1860.

IN ERROR to the District Court of the United States for the District of Iowa.

The defendants in error commenced two actions at different times in the court below, against the plaintiffs below, on three bills of exchange, each drawn by Coleman & Foote on Edward Kilbourne, and indorsed by R. B. Foote, the payee, and Deming & Love. Two, the subject of the second action, were accepted by Kilbourne. The two cases were subsequently consolidated. Judgment was entered in the court below against Coleman & Foote and Kilbourne, as principals, and R. B. Foote, Deming & Love, as sureties.

The case was brought to this court on a writ of error by the plaintiffs below.

Mr. **S. R. Curtis** for the plaintiffs in error.

Messrs. **M. Blair** and **T. Polk** for the defendants in error.

The case was submitted to the consideration of the court on the record and a prayer for ten per cent damages, pursuant to the 2d section of the 23d rule, by the counsel for the defendants in error, the counsel for the plaintiffs in error not appearing.

Mr. Justice **Wayne** delivered the opinion of the court:

No question was raised upon the trial of this case in the court below, for the consideration of this court, nor have the plaintiffs in error, by counsel or otherwise, made one here. The writ of error was obviously sued out for delay.

We direct the affirmance of the judgment and ten per cent damages.

LOUIS L. REFELD, A. B. K. Thetford and Terrence Farrelly, Executors; Mary F. Notrebe, Widow, and Edwd. C. Morton and his Wife, Mary F. Morton, Heirs, of Frederick Notrebe, Deceased, *Appts.*,
v.
WILLIAM W. WOODFOLK.

(See S. C. 22 How. 318-330.)

In equity, payment of price of lands, and transfer of title, correlative obligations—vendee may pay incumbrance, from purchase money, or for defects—after contract executed, the only remedy is on covenants of deed, or for fraud—purchase money cannot, after payment, be reclaimed as security—conveyance of less, with idemnity, not decreed—nor security for fulfillment of contract.

A court of chancery regards the transfer of real property in a contract of sale, and the payment of the price, as correlative obligations.

The one is the consideration of the other; and the one failing, leaves the other without a cause.

A vendor is allowed a lien for the price of the property, against the vendee and his assigns.

The vendee is permitted to appropriate the purchase money, to exonerate his estate from a lien or incumbrance, and, in some cases, to compensate for original defects in the estate, as respects its quantity, quality, or extent of vendor's interest therein.

If the contract has been executed by the delivery of possession and the payment of the price, the grounds of interference are limited by the covenants of the deed, or to cases of fraud and misrepresentation.

If there is no fraud and no covenants to secure the title, the vendee is without remedy, as the vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of the covenants in his deed.

A vendee, in possession under a contract of purchase or a deed with covenants, cannot reclaim the purchase money already paid, to be held as a security for the completion or protection of his title.

In a suit for the specific performance of a contract, if it turns out that the defendant cannot make a title to that which he has agreed to convey, the court will not compel him to convey less, with indemnity against the risk of eviction.

The purchaser is left to seek his remedy at law, in damages, for the breach of the agreement.

Where the vendee had notice of an incumbrance when he made and performed his agreement of purchase, and did not stipulate for any additional indemnity to that resulting from the covenant of warranty, the court must conclude that he was willing to rely upon the protection afforded by the covenants in his deed, and cannot, in addition, compel the vendor to deposit security for the fulfillment of his contract.

Submitted Mar. 1, 1860. Decided Apr. 9, 1860.

APPEAL from the Circuit Court of the United States for the District of Arkansas.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **Albert Pike**, for the appellants:

The first position of the learned counsel for

Woodfolk in the court below was that, as the covenant was "to make a good and sufficient conveyance in fee simple with general warranty," and as the fee is not in Notrebe's heir, but in the bank, it follows that they cannot perform the covenant. It is too late a day in the law for us to need to produce authorities to show that the mortgagor retains the fee in the land, the mortgage being a mere lien or security.

The law is perfectly well settled, that the covenant of seisin that the grantor is seised of a good, sure, sole, lawful, absolute and indefeasible estate of inheritance in fee simple, is not broken by the existence of incumbrances which do not strike at the technical seisin of the purchaser.

See *Fitzhugh* v. *Croghan*, 2 J. J. Marsh, 439; *Sedgwick* v. *Hollenback*, 7 Johns. 380; *Runyan* v. *Mersereau*, 11 Johns. 538; 16 Johns. 254; *Tuite* v. *Miller*, 10 Ohio, 383; *Lewis* v. *Lewis*, 5 Rich. 12.

The agreement here is, to make "good and sufficient conveyance in fee simple," that will be satisfied by a conveyance by deed of bargain and sale with covenant of seisin (*i. e.*, indefeasible title in fee simple), or of good title and right to convey, which is the same thing.

The chief question in this case is a perfectly simple one. Woodfolk proposed to purchase certain land of Notrebe; he was informed that it was mortgaged to the Real Estate Bank, which was insolvent. The mortgage was of record and the charter of the bank, showing the liability under mortgage, was a public law of the land. It was totally uncertain what would be the ultimate liability under the mortgage. It was meant to cover the share of Notrebe and Cummins, in any of the deficit of the assets of the bank. Whether there would be any deficit or not, was not known. Notrebe told Woodfolk all he knew about it; that the bank attorney thought there would not. All the sources and means of information on the subject were as open to Woodfolk as to Notrebe; and knowing, or having the means of knowing, all that anybody could know, he purchased the land at the low price of $10.50 per acre, and took a bond from Notrebe, to make him "a good and sufficient conveyance in simple, with covenant of warranty."

Can he, after occupying the land several years, and paying up the purchase money, when it is still as uncertain as ever, what, if any, will be the ultimate liability under the stock mortgages, claim at the hands of a court of equity, that it shall compel Notrebe's heirs to indemnify him against such contingent liability? or will it not be held that he made a chancing bargain, an aleatory contract, getting the land at the price he did, on account of the contingent incumbrance upon it, and taking the risk of that incumbrance? That is the whole question.

The words of the covenant do not bind Notrebe to make the conveyance with a covenant against incumbrances.

It is not a case of a defective title, where, as held in *Galloway* v. *Finley*, 12 Pet. 297, the vendee may enjoin payment of the purchase money, until ability to comply with the agreement for title is shown.

It is very clear, that if Woodfolk had a covenant against incumbrances, and were now to sue on it, in the absence of any eviction or foreclosure, he could recover only nominal damages.

Delavergne v. *Norris*, 7 Johns. 358; *De Forest* v. *Leete*, 16 Johns. 128; *Stanard* v. *Eldridge*, 16 Johns. 256; *Clark* v. *Perry*, 30 Me. 148.

There is no doubt as to the rule, that where a vendor does not in his covenants specially except such incumbrances as are known to the purchaser, and subject to which the purchaser agrees to take the property, the fact of their being known to the purchaser will not prevent a recovery at law on the covenants. That we admit. But it is perfectly obvious, that such knowledge on the part of the purchaser should operate strongly, if not conclusively, against his right to equitable relief, where the covenants are yet not so broken as to give a right to actual damages.

If suit were now brought on a covenant against incumbrances, on account of this mortgage, nominal damages only could be recovered.

Vane v. *Lord Barnard*, Gilb. Eq. 7; *Bean* v. *Mayo*, 5 Me. 94; *Randell* v. *Mallet*, 14 Me. 51; *Herrick* v. *Moore*, 19 Me. 313; *Richardson* v. *Dorr*, 5 Vt. 9; *Davis* v. *Lyman*, 6 Conn. 255; *Jenkins* v. *Hopkins*, 8 Pick. 348; *Leffingwell* v. *Elliott*, 8 Pick. 457; *Tufts* v. *Adams*, 8 Pick. 549; *Brooks* v. *Moody*, 20 Pick. 474; *Commings* v. *Little*, 24 Pick. 269; *Baldwin* v. *Munn*, 2 Wend. 405; *Gilbert* v. *Wiman*, 1 N. Y. 563; *Patterson* v. *Stewart*, 6 Watts & S. 528; *Pomeroy* v. *Burnett*, 8 Blackf. 143; *Foote* v. *Burnet*, 10 Ohio, 317; *Halsey* v. *Reed*, 1 Paige, 446.

The *quia timet* jurisdiction of the court of equity is one which the court has often exercised; but it will be extremely tender in so doing, because it materially varies the agreement of the parties at the time of the transaction.

Flight v. *Cook*, 2 Ves. 620.

And the doctrine seems to be well settled, that where a deed has been executed, and the only covenants in it are for quiet enjoyment or of warranty, and so long as there has been no eviction, actual or constructive, equity will, as a general rule, refuse to entertain a bill for relief, either by way of enjoining the purchase money, or *a fortiori*, by rescinding the contract; and although it has at times been intimated that the presence of a covenant for seisin may in some cases fortify the position of the purchaser, it does not appear that the cases generally draw much distinction between the different covenants for title.

Rawle, Cov. 679, and the many cases cited.

If this contract is still executory, then in that case, as a general rule, the purchaser is entitled to a good title, free from incumbrances. He cannot be forced specifically to perform, unless such title can be made. If sued for the purchase money, he may enjoin its collection or compel the removal of incumbrances. That is the general rule. But the question here is, what relief has he in equity, if, making the bargain, knowing of an incumbrance, he pays the purchase money without requiring it to be removed, and when it is of the nature of the one here complained of.

It is not a question here whether he could be compelled to perform his contract. He has performed it; he is in possession; he has used the

land and enjoyed its issues now for nearly ten years. He does not offer to give it up. He protests against doing so. If he had all the covenants he could possibly demand, there has been no breach of any of them that would entitle him to damages, and therefore he would be entitled to recover only nominal damages at law, and would have no relief in equity; it is too clear to be denied.

Rawle, 680.

How can he be entitled to any more relief because he has not yet taken a deed?

In *Anonymous*, Freem. Ch. 106, a case was cited, "where a purchaser brought his bill to be relieved where incumbrances were concealed; but was dismissed; for he ought to have provided against it by covenants; but it was said by Rawlinson, that if the purchaser had in this case had his money in his hands, this court would have helped him, but not after he had paid his money."

The difference between the principles that govern executed contracts, and those that govern executory ones, is a broad one; before the consummation of the contract, the criterion of which event is the execution of the deed, the right of the purchaser to a title clear of defects and incumbrances, is an undoubted one, given by law and not created by the particular terms of a covenant in the agreement, nor lost or even weakened by the absence of any stipulation for covenants, or as to warranty and title; after that time, his rights are regulated, both at law and in equity, solely by the covenants he has received.

Rawle, 604-666, 703, 704.

Looking into the cases on executory contracts, we find as follows: "A purchaser discovering an incumbrance, shall retain so much for it as remains in his hands."

Troughton v. *Troughton*, 1 Ves. 86; see, also, 2 Sug. Vend. 419; *Hart* v. *Porter's Ewrs.* 5 Serg. & R. 201; *Witherspoon* v. *Anderson*, 3 Desaus. 246.

Notrebe, by his bond for title, did not agree to warrant against incumbrances. He agreed to make a good and sufficient conveyance in fee simple, with general warranty. A deed, with covenants of title and right to convey and general warranty, without any covenant against incumbrances, would fully satisfy that contract.

When a man covenants against incumbrances he cannot be allowed to show by parol that a particular incumbrance was accepted, for that would be to contradict and vary the terms of a written instrument; and therefore he cannot show that the vendee knew of such incumbrance, because that is offered solely as tending to prove that he took the contract subject to that incumbrance. That is the rule and the reason of the rule.

Funk v. *Voneida*, 11 Serg. & R. 112; *Levitt* v. *Withrington*, Lutw. 317; *Hubbard* v. *Norton*, 10 Conn. 422; *Grice* v. *Scarborough*, 2 Spears, 654; *Harlow* v. *Thomas*, 15 Pick. 70; *Townsend* v. *Weld*, 8 Mass. 146; *Porter* v. *Noyes*, 2 Me. 22: *Donnell* v. *Thompson*, 10 Me. 117; *Collingwood* v. *Irwin*, 3 Watts, 309; *Suydam* v. *Jones*, 10 Wend. 184.

Woodfolk does not ask to be excused from performing his contract— that is, from taking the it. There is no suit against him to compel him to take it; none by him to procure a rescission. He has to no covenant on which he could now recover. He has no right to ask a covenant against incumbrances. And knowing of the incumbrances when he purchased, and when he paid for the land, he must be satisfied with such covenants as he has, and with his legal remedy thereon, whenever he is endamaged. Until then as he has no cause of action at law, so equity has no relief to give him.

Allen v. *Lee*, 1 Smith, Ind. 12; 1 Cart. 58; 2 Hughes' Prec. 2d ed. 205; *Savage* v. *Whitebread*, 3 Ch. R. 24; *Ogilvie* v. *Foljambe*, 3 Meriv. 48; Rawle, 607, and cases there cited; *Ludwig* v. *Huntzinger*, 5 Watts & S. 58; *Ross's Appeal*, 9 Pa. 497; *McGhee* v. *Jones*, 10 Ga. 127; *Fludyer* v. *Cocker*, 12 Ves. 27; *Burroughs* v. *Oakley*, 1 Meriv. 52; *Margravine of Anspach* v. *Noel*, 1 Madd. 316.

We have sought in vain for a case where a bill, asking indemnity alone, has been sustained or even heard of, filed by a purchaser, when that indemnity was sought against an encumbrance by mortgage well known to the purchaser at and before the time of purchase, and where he had fully paid the purchase money, without requiring indemnity or complaining of the incumbrance.

It is a mere attempt "to amend the plaintiff's security in equity; to give him a better remedy for his money in chancery, than he had provided for himself by the condition of the bond which he took." There was no fraud in Notrebe; he told Woodfolk all that he himself knew about the incumbrance; the bill is a plain attempt to get a court of chancery to mend Woodfolk's bargain, and we see no better ground to assign for the application, than "that chancery ought to suffer no man to have an ill bargain."

A bill filed for compensation singly, cannot be maintained.

The jurisdiction of equity in cases of compensation, is only incidental and ancillary to that of giving relief by enforcing the performance of contracts for the sale of real property.

Newham v. *May*, 13 Price, 749.

The court will give it when title to a part of the property fails, and it decrees that the purchaser shall accept, or he agrees to accept, that to which there is a good title.

Besant v. *Richards*, 1 Taml. 509; *Pratt* v. *Law*, 9 Cranch. 458, etc.

Mr. **R. J. Meigs**, for appellee:

Since the covenant is to convey, that is to transfer and pass the fee, well and sufficiently, and the fee is not in Notrebe's heirs, but in the Real Estate Bank, it follows that they cannot perform the covenant. No one can dispute the proposition, that if a man agrees to sell me an estate in fee simple and cannot make a title to the fee simple, I can insist upon his giving me all the title he has.

Wood v. *Griffith*, Wils. Ch. 44; cited by Sug. Vend. ch. 7, § 1, part 33, 7th Am. ed.

Not only am I entitled in such a case to have performance from the vendor, so far as he is able, but I have a right to compensation on those points which do not admit of fulfilment.

Waters v. *Travis*, 9 Johns. 464; cases cited by Perkins in note, and Sug. ch. 7, § 1, par.

33, and cases cited by Hare and Wallace to White & Tudor's Lead. Cas. vol. II. part 2, p. 35.

These cases and many others show that the compensation is to be made by an abatement or reduction of the purchase money, when it has not been paid.

See Sugden, ch. 7, § 1, part 34; *Jopling* v. *Dooley*, 1 Yerg. 289-290.

The same principle governs the case of an incumbrance on the land, and even the case of an adverse title, which, when extinguished by the vendee, inures to the benefit of the vendor, he making an abatement in the purchase money equal to what it cost to clear the title.

Meadows v. *Hopkins*, Meigs, 181, 186; *Knox* v. *Thomas*, 5 Humph. 573; *Galloway* v. *Finley*, 12 Pet. 264; see *Searcy* v. *Kirkpatrick*, Cooke, 211; *Mitchell* v. *Barry*, 4 Hayw. 136, 143.

If, before the payment of the purchase money in this case, Woodfolk discovering the incumbrance of the $12,000, had paid it to the bank, he could have had an abatement of the purchase money *pro tanto*. If, after the payment of the purchase money, and being put in possession, he had then for the first time discovered the fact that the land was subject to the mortgage for the $12,000, it is clear that Notrebe would have been compelled to refund or extinguish the mortgage. But it is said that Woodfolk had notice of the mortgage for $30,000.

Counsel then reviewed the circumstances of the case on this subject, and contended that it could not be claimed that Woodfolk, in his purchase, intended to or did assume the risk of the incumbrance.

In this case we have a covenant on the part of Notrebe, to make Woodfolk a good and sufficient conveyance in fee simple with general warranty. Notrebe is to cause Woodfolk to have the land usefully against all persons.

Pothier on Sales, § 203.

The deed must transfer the fee simple against all claims whatsoever. This is implied in the word "conveyance."

See *Clute* v. *Robinson*, 2 Johns. 612; *Everson* v. *Kirtland*, 4 Paige, 638; *Carpenter* v. *Bailey*, 17 Wend. 244; *Traver* v. *Halsted*, 23 Wend. 66; *Pomeroy* v. *Drury*, 14 Barb. 424; and other cases cited in Rawle, Cov. 464, 566.

So far from there being in this case a stipulation "in express terms" or "broadly stated," that Woodfolk should take such title as Notrebe had, exactly the reverse is broadly expressed in the covenant, to make "a good and sufficient conveyance in fee simple." Sometimes, indeed, a purchaser has waived his right to object to the seller's title. Taking possession, however, is merely evidence of intention. If possession is authorized by the contract to be taken before a title is made, the fact of possession cannot by itself be used against the purchaser, for that would be contrary to the very terms of the contract.

Sugd. ch. 8, § 1, part 22-24, 33, 34, etc.

It is familiar law, that the general principles of the contract of sale, both in this country and in England, recognize and enforce, while it is still executory as in this case, the right of the purchaser to a title clear of defects and incumbrances.

Rawle, Cov. 566; *Burwell* v. *Jackson*, 9 N. Y. 535, *supra*.

But practically, how is this to be done in a case circumstanced as the one in hand? Before the payment of the purchase money, we have seen that it can be done by an abatement of the purchase money to an amount equal to the cost of removing the incumbrance. And the vendor must discharge an incumbrance not disclosed to the vendee, whether he has or has not agreed to covenant against incumbrances, before he can compel the payment of the purchase money.

Sugden, ch. 12, § 2, part 2.

Although the interest money has been paid and the conveyance is executed, yet, if the defect do not appear on the face of the title deed, and the vendor was aware of the defect and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud; and the purchaser may either bring his action on the case or file his bill in equity.

Sugden, ch. 2, § 2, part 17.

In *Sergeant Maynard's Case*, he was denied relief because he had parted with his money and taken a bond for repayment of it on a certain condition.

2 Freeman, 2.

In our case, Woodfolk took a bond to make him a good and sufficient conveyance in fee, and then paid the purchase money. And afterwards he discovers that the land is incumbered for more than its entire value, the incumbrance having been represented to him as of no validity or force, and its true nature sedulously concealed, and the deed not even shown.

Now, in these circumstances, he is entitled unquestionably to a conveyance in fee simple that shall be effectual.

If the court be of opinion that Woodfolk is entitled to "an operative conveyance — one that carries with it a good and sufficient title to the lands conveyed," as Kent said in *Clute* v. *Robinson*, 2 Johns. 612, already cited, there seems to be no practical way of effecting this, but by compelling Notrebe's heir and representatives to extinguish the mortgage, or to buy so many state bonds as shall be equal to the stock bond.

By one of the conditions of the mortgage, the land is to be discharged, if Notrebe and Cummins, or their heirs or assigns, shall well and truly pay, or cause to be paid, to whom it may be due, so much or such sum of the bonds of the state of Arkansas issued by said state in favor of the bank aforesaid, and the interest on said bonds of the state, or such part thereof as shall be equal to the stock allowed and granted to them, Notrebe and Cummins.

Now, this suggests the relief to which Woodfolk seems in reason and justice entitled. Let Notrebe's heirs and representatives buy $30,000 of the state bonds and deposit them in this court, and the land will be discharged.

Or, if it is less onerous, let them indemnify Woodfolk by granting him a mortgage upon some other property, which may enable him to protect his land in the event the mortgage of it is enforced in favor of the holders of the state bonds.

It is plain that the heir of Notrebe cannot make a good and sufficient conveyance in fee simple, without in some way releasing the estate from the mortgage, and it is equally plain, that there is no way of releasing the estate from the mortgage but by paying a sum equal to the stock. And Woodfolk might insist upon it; but if he is willing to take such title as can be decreed out of the heir, with an indemnity against the mortgage, that is a relief which is within the power of a court of chancery. The subject will be found pretty fully discussed in Sug. Vend. & P. ch. 10, § 2. And the weight of the cases there stated and commented on, cannot certainly be regarded as weakened in the least by what is reported to have been said by Lord Eldon in *Balmanno* v. *Lumley*, 1 Ves. & B. 225, cited by Sugden in ch. 7, § 2, part 36. The case, when examined, cannot possibly have the slightest weight, seeing that it is reported in so crude a manner as to leave us wholly in the dark as to its circumstances.

The indemnity which the heir of Notrebe seems bound to make will be as already suggested, the substitution of another estate instead of the lands sold to Woodfolk, to be held by a trustee, to save him harmless against the mortgage. When we ask this, we only ask that Notrebe's heir shall assume the burden of Notrebe's debt, and relieve the complainant against liability for it—a liability which, in his opinion, is not merely visionary, but is extremely likely to embarrass and harass him in 1861, only a year hence.

See *Halsey* v. *Grant*, 13 Ves. 73; *Horniblow* v. *Shirley*, 13 Ves. 81; *Cassamajor* v. *Strode*, Wils. Ch. 428; *Warren* v. *Bateman*, 1 Flan. & K. 443.

But if the court should see fit to refuse this relief, and should hold that complainant is obliged to take such title as is vested in Notrebe's heir, and that the bill must be dismissed as to the Real Estate Bank and its trustees, and the personal representatives of Notrebe; yet it is indispensably necessary as to the heir of Notrebe. She is an infant and a married woman, and it is quite impossible that the equity which is vested in her can be devested and vested in the complainant, but by a decree in equity.

325*] *Mr. Justice **Campbell** delivered the opinion of the court:

The appellee (Woodfolk) filed this bill in the circuit court against the executors and heirs of Frederick Notrebe, deceased, and the trustees of the Real Estate Bank of Arkansas.

He represents that, in 1845, he concluded an agreement with Notrebe for the purchase of fourteen hundred and seventy-eight acres of unimproved land in Arkansas, for $15,518, a portion payable in cash, and the remainder in instalments, secured by his notes and bond. Notrebe and his wife obligated themselves, when the payment should be completed, to convey to him the land in fee simple, "by a good and sufficient deed, with general warranty of title, duly executed, according to law."

The appellee has established a plantation upon the land, and has greatly improved its value. He completed the payment in 1850, when the executor of Notrebe offered a deed executed by his widow and heir at law, in which there was a covenant of warranty, in fulfilment of the agreement of his testator. The appellee declined to accept this, because the land had been mortgaged to the Real Estate Bank of Arkansas, in 1837, by Notrebe, to secure the payment of his note for $30,000, payable in October, 1861, with five per cent interest annually, which Notrebe had given for three hundred shares of the stock of that bank. The appellee charges that the existence of this mortgage was concealed from him until after the conclusion of his agreement, and that afterwards he was deceived by misrepresentations of the condition of the title, until he had paid the whole of the purchase money. He prays that the title be examined and that the defendants be required to remove the incumbrance, or to give him effectual indemnity against it, and that the distribution of the estate of Notrebe be restrained until this be done.

The defendants answered the bill, and have successfully repelled the imputations of fraud and misrepresentation, but admit the existence of the mortgage, and fail to impair its validity.

The circuit court, upon the pleadings and proofs, declare *that the "entire trans- [*326 action" between Notrebe and the appellee "was bona fide and free from fraud," and that the latter had notice of the mortgage as a subsisting and operative incumbrance upon the land before he concluded his contract; but that Notrebe had agreed to convey the land free of incumbrance and with warranty of title, and that the vendee is entitled to the performance of that contract; but that the debt of the decedent, not being at maturity, and of a character not to be ascertained before that time, all that could be done would be to provide an indemnity against the peril it created.

The court proceed to require of the executors to remove the incumbrance whenever it can be done, and then to convey the land by a deed with warranty, and with the relinquishment of dower by the widow; and meanwhile, that they should deposit with the clerk of the court bonds of the state of Arkansas, for the amount of Notrebe's note and the interest ($61,500), to be held and appropriated under the order of the court as indemnity, or that the executors might, in part or for the whole, convey to the clerk unincumbered real estate of the same value, for the same object and under the same conditions.

The Real Estate Bank was established on a loan, by the state of Arkansas, of its bonds, which the bank sold to form its capital. The principal and interest of these bonds were to be paid by the bank; and its means of doing so were afforded by the securities obtained from the loan of its capital and profits of business, and the bonds and mortgages of the stockholders, to the extent of their subscription of stock. Each stockholder having given a bond and mortgage to the bank corresponding to the *pro rata* amount of the state bonds issued to the bank, as compared with the stock, and which were pledged for the payment of the state bonds, the sum to be paid by any shareholder on this debt depends upon the degree of the insolvency of the bank. In case of the loss of its entire capital, the stockholder becomes liable to pay his entire debt.

The pleadings and proofs in this case show

that the bank has suffered a loss of a portion of its capital, but no *data* are afforded to ascertain the amount of the loss. The decree of 327*] *the circuit court assumes that the loss may be total; and the indemnity awarded was determined as if the fact would correspond with the possibility. This appeal was made to test the validity of this decree.

A court of chancery regards the transfer of real property in a contract of the sale and the payment of the price as correlative obligations. The one is the consideration of the other; and the one failing, leaves the other without a cause. In *Ogilvie* v. *Foljambe*, 3 Mer. 53, Sir William Grant says: "The right to a good title is a right not growing out of the agreement of the parties, but which is given by law. The purchaser insists on having a good title, not because it is stipulated for by agreement, but on the general right of a purchaser to require it."

Upon this principle, a vendor is allowed a lien or privilege for the price of the property against the vendee and his assigns; and the vendee is permitted to appropriate the purchase money, to exonerate his estate from a lien or incumbrance, and in some cases to compensate for original defects in the estate, as respect its quantity, quality, or extent of vendor's interest therein.

The cases cited on the part of the appellee support this doctrine, and confirm the argument that he was entitled, under his contract (having no reference to extrinsic circumstances), to the fee simple estate, without diminution. *Galloway* v. *Finley*, 12 Pet. 264; *Burwell* v. *Jackson*, 9 N. Y. 535; *Cullum* v. *Bank of Ala.* 4 Ala. 21.

But such circumstances may very materially modify the situation of the parties, and indispose that court to interfere between them, even in cases within the jurisdiction of the court. If the contract has been executed by the delivery of possession and the payment of the price, the grounds of interference are limited by the covenants of the deed, or to cases of fraud and misrepresentation. "The cases will show," say this court, "that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that in such 328*] a case he must *seek his remedy at law, on the covenants in his deed; that if there is no fraud and no covenants to secure the title, he is without remedy, as the vendor, selling in good faith, is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Patton* v. *Taylor*, 7 How. 132.

This rule, experience has shown, reconciles the claims of convenience with the duties of good faith. The purchaser is stimulated to employ vigilance and care in reference to the things as to which they will secure him from injustice, while it affords no shelter for bad faith on either part.

The intermediate cases—those in which the parties have advanced in the completion of their contract, and are still willing to abide by it, and there arises a real inability or a well-founded apprehension of danger, in that stage of their proceedings, to the completion of the contract —have created much embarrassment. Some of these cases have been settled upon terms of compensation, in which the court of chancery has exercised a doubtful jurisdiction, in modifying the conditions of the contract according to the supervening circumstances. *White* v. *Cuddon*, 8 Cl. & Fin. 766; *Thomas* v. *Dering*, 1 Keen, 729; Dart, Vend. and P. 499, *et seq.*

We have met with no case in which a vendee, in possession under a contract of purchase or a deed with covenants, has been permitted to reclaim the purchase money already paid, to be held as a security for the completion or protection of his title. The Roman law permitted the vendee to retain the purchase money in his hands, as security against an impending danger to the title; but denied a suit for restitution, after payment, for that cause. "We must not," says Troplong, "hastily break up a contract which the vendor may at last be able to fulfill. There is no analogy between the case in which the purchaser is allowed to retain the price as security, and that in which he would force the vendee to restore it for that purpose. Between the right of retention and that of restitution of the price, there is the distance between the *statu quo* and rescission. Trop. de Vente, No. 614; Dalloz. Juris. gen. tit. de Vente, § 1170.

The decree of the circuit court does not direct the restitution *of the purchase money [*329 to the vendee, nor its application by the vendor to assure the attainment of the object of the contract; but it sequestrates property of the vendor of four times the amount, to be held or disposed of by the court in its discretion, to assure the accomplishment of that object. In the case of *Milligan* v. *Cooke*, 16 Ves. 114, Lord Eldon made an order that the purchaser should be compensated for the difference in the value between the title contracted for and that exhibited; and if that difference could not be ascertained, the master was directed to settle the security to be given by the defendant as indemnity to the purchaser against disturbance or eviction; and a similar order was made in *Walker* v. *Barnes*, 3 Madd. 247. But there were conditions in the contract that authorized the order.

In *Balmanno* v. *Lumley*, 1 Ves. & B. 224, and *Paton* v. *Brebner*, 1 Bligh. P. C. 42, the cases in which such a relief could be granted appear to be limited to that class. In the latter case Lord Eldon said: "This suit is in substance or effect (allowing for dissimilarities between English and Scotch proceedings) in the nature of a suit in a court of equity in England for the specific performance of a contract. In such a suit, if it turns out that the defendant cannot make a title to that which he has agreed to convey, the court will not compel him to convey less, with indemnity against the risk of eviction. The purchaser is left to seek his remedy at law, in damages for the breach of the agreement."

In *Aylett* v. *Ashton*, 1 Myl. & C. 105, the master of the rolls, upon the authority of the cases cited, said: "Parties, no doubt, may contract for a covenant of indemnity; but if they do not, the court cannot compel a party to execute a conveyance and to give an indemnity." To the same effect is *Ridgway* v. *Gray*, 1 Macn. & G. 109.

The appellee does not seek to rescind this contract; nor does he disclose any imminent peril of disturbance or eviction, as the effect of

the existence of the mortgage. The record shows that the widow and heir of Notrebe, whose covenant of warranty has been offered to the appellee, are either of them able to respond to the damages that would be awarded upon 330*] *the breach of that covenant. The appellee had notice of this incumbrance when he made and performed his agreement of purchase, and did not stipulate for any additional indemnity to that resulting from the covenant of warranty. We must, therefore, conclude that he was willing to abide the settlement of the affairs of the Real Estate Bank, and to rely upon the protection afforded by the covenants in his deed. We have no reason to suppose that the vendor would have consented to deposit in the hands of a stranger four times the value of the property he sold, as a security for the fulfillment of his contract; nor can we superadd this to the other obligations he has assumed.

Our opinion is, that the decree of the district court is erroneous, and must be reversed.

The deeds tendered seem to be in conformity with the stipulation of the vendor in the agreement. The vendee may elect to take these, or he may retain the agreement.

In either case, his bill will be dismissed with costs; and for this purpose the cause is remanded.

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(See S. C. 22 How. 443-461.)

Recitals in Mexican grants, not evidence of preliminary requirements, where there is no record—unreasonable delay to perform conditions of grant, evidence of abandonment.

It will not be presumed that the governor of California had dispensed with the customary requirements for granting land, because there may be, in a paper said to be a grant, a declaration that they had been observed; particularly in a case where the archives to not show any record of such a grant.

The act of 1824, and the regulations of 1828, are limitations upon the power of the governor to make grants of land.

Where the petition, and the other requirements following it, have not been registered in the proper office with the grant itself, a presumption arises against its genuineness.

Slight testimony should not be allowed to remove the presumption.

In this case no evidence can be found on its record, to sustain the genuineness of the paper under which the land is claimed.

There is none to prove its registry, or to connect it with the book of records which was burned, or that any one of the precautionary requirements had been complied with, or that such a paper as that in question had been delivered to the claimant; and no such paper had been sent to the departmental assembly for its acquiescence.

Prerequisites for a grant of land should not be assumed to have been observed. on account of a recital in the paper or grant that they had been.

If none of the preliminary requirements of the act of the Mexican Congress of 1824, and of the regulations of 1828, are to be found in the archives, and it cannot be established by the proof that they were registered there, this court will not presume that they were preliminary to a grant, because the governor recites in the grant that they had been observed.

Opinion in Cambuston's case reaffirmed.

When it shall appear that none of the preliminary steps for granting land in California have been taken, this court will not confirm such a claim.

Where there was no proof of a survey or measurement of the land, or any performance of its conditions, it may be inferred that the grantee had abandoned his claim.

When a grantee allows years to pass, after the date of his grant, without any attempt to perform them, and without any explanation for not having done so, and then for the first time claims the land, after it had passed by treaty from the national jurisdiction which granted it to the United States, such a delay is unreasonable, and amounts to evidence that the claim to the land has been abandoned.

Argued Dec. 20, 1859. Decided Apr. 9, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by the appellant, for the confirmation of a claim to eleven leagues of land, situated in the county of Santa Clara.

The board of land commissioners entered a decree, rejecting the claim on the ground that there had been no survey or measurement of the land and no performance of the conditions by the grantee.

The district court, on appeal, having affirmed this decree, the petitioner took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **M. Blair** and **C. Benham**, for appellant:

1. The grant is valid and ought to be confirmed, notwithstanding there was no approval of the department assembly and no judicial measurement.

U. S. v. *Frémont*, 58 U. S. (17 How.) 560; *U. S.* v. *Reading*, 59 U. S. (18 How.) 8; *U. S.* v. *Cruz Cervantes*, 59 U. S. (18 How.) 553; *U. S.* v. *Vaca*. 59 U. S. (18 How.) 556; *U. S.* v. *Larkin*, 59 U. S. (18 How.) 563.

2. The grant was duly recorded, and on the faith of the grant, the original is ordered to be delivered to the grantee who now produces it.

3. The proof shows that it was written and recorded in 1843, when it is conceded Governor Micheltorena had full authority to grant lands.

4. The authenticity, date, and recording of the grant being clearly established, and the grant itself reciting that the grantee had petitioned for the land, and that all "the necessary steps and the precautionary proofs required by the laws and regulations" had been taken, the law will presume that the governor had performed his duty in these respects, and had not exceeded his powers.

U. S. v. *Peralta*, 60 U. S. (19 How.) 347; *U. S.* v. *Arredondo*, 6 Pet. 729; *Delassus* v. *U. S.* 9 Pet. 134; *Minter* v. *Crommelin*, 59 U. S. (18 How.) 88; *Bagnell* v. *Broderick*, 13 Pet. 448.

If it is to be assumed that no grant is valid unless the grantee can show affirmatively, and independently of the recitals in the grant, that all the preliminary steps required by the act of the Mexican Congress of August 18, 1824, and the regulation of November 21, 1828, have been strictly complied with, it may be safely asserted that out of eight hundred grants made in California, scarcely one would stand such a test. All the documents, except the original grant, remained in the custody of the governor or his subordinates. To require that the grantee shall be responsible for the safe keeping of those documents, or in case of their loss, to be pre-

pared with oral proof to establish, not only the fact of the loss or desruction of the papers, but their contents, would be to impose onerous conditions on the grantee, not only perilous to his rights, but fatal to the security of titles. When he produces a grant in due form and properly recorded, and which recites that all the preliminary steps have been performed, he may safely rest upon it as a sufficient muniment of title. He may justly claim that the government is estopped by the solemn act of its own agent from denying that those things were done which it was the duty of the governor to do, and which, under his hand and official seal, he admits were performed. Such have been regarded to be the well-considered doctrines of this court as established in a series of decisions, and no reason is perceived why this case should be deemed an exception to the general rule.

5. This grant has only the usual conditions; and they were all subsequent conditions, the nonperformance of which would not, *ipso facto*, avoid the grant.

6. The fact that the grantee was a minor, did not invalidate the grant. There is nothing in the act of 1824, or the regulations of 1828, restricting the power of the governor in this respect. Under the Mexican and civil law, the age of majority was twenty-five; and the policy of the colonization laws was not at variance with a grant of lands to a person under that age. The circuit judge, who delivered the opinion of the district court rejecting this claim, infers that the grantee must have imposed upon the governor by representing himself as an adult, able to fulfill the conditions of the grant. The reply to this argument is: (1) That it is wholly unwarranted by any fact appearing in the case; (2) fraud is never to be presumed, but must be proved; (3) there is not a particle of proof that the grantee was unable to fulfill the conditions; (4) there is no proof that he did not fulfill them; (5) every grant made to an old and infirm person, who might afterwards appear to have been unable to fulfill the conditions, would raise the same presumption of fraud.

7. If it be conceded that the conditions were not fulfilled, this fact can raise no presumption of abandonment in this case. In the *Frémont Case*, a failure to perform the conditions was excused because of the unsettled state of the country, and the danger arising from hostile Indians in that vicinity. In the case at bar, the country was not only in a revolutionary state from the date of the grant until about the period when the American forces took possession of the country, but the grantee was a minor, and so continued until the last-named period. We maintain that no presumption of abandonment will arise against a minor, under either the civil or common law.

Under the Spanish law in force in Mexico, the rights of minors are more fully protected than even at common law, as will appear by reference to 1 Dom. Civ. L. p. 529, book 4, tit. 6, § 2, where the law relating to minors is fully collated.

In the first subdivision of this section, the author says: "The law gives relief against all acts and deeds by which their minority may have engaged them in some damage."

Under the civil law, the term "abandonment" has a technical and definite meaning, to wit: "That if a man be dissatisfied with his unmovable estate, and abandon it immediately and depart from it corporeally, with an intention that it shall no longer be his, it will become the property of him who first enters thereon."

1 Partidas Law, 50, p. 365; Escriche, p. 5, tit. "*Abandono de Cosas;*" *Landes* v. *Perkins*, 12 Mo. 238.

In certain cases, the doctrine of abandonment is rigidly enforced under the Spanish laws, but these are special cases, and this is not one of them.

See Escriche, p. 6.

An intention to abandon his estate will not be presumed against a minor, nor will prescription run against him.

Escriche, p. 1230, tit. "*Menors;*" *Calvit* v. *Innis*, 10 Mart. La. 287; 9 La. 379; *Orso* v. *Orso*, 11 La. 62.

It is evident, therefore, that under the Spanish law of abandonment, the grantee in this case did not lose his land.

But in such cases, how is the fact of abandonment to be ascertained? The only effect of it is, not to forfeit the land to the sovereign, but to enable the first occupant to claim it as his. Before his right is established, it must be done by some judicial proceeding: and no other is known to the Spanish law, than the process of "denouncement." It is a judicial proceeding, conducted with much formality and after due notice.

Rockwell's Spanish and Mexican Law, 50–56.

It is not pretended that any "denouncement" of this land occurred; nor were any proceedings had to devest the title of the grantee; so that even if he were an adult, the Spanish law of abandonment would have no application to his case; but being a minor, his land was not subject to denouncement.

The court, before denying the confirmation, must be satisfied that the grantee actually intended to abandon his claim. It is a question of intention, to be deduced from all the circumstances of the case.

Bouv. Law Dic. tit. Abandonment; *Stephens* v. *Mansfield*, 11 Cal. 363.

8. The title of the grantee is a legal, and not an equitable one. His title is a patent, and conveys the legal estate which would maintain ejectment.

Ferris v. *Coover*, 10 Cal. 589.

In several cases before this court from California, grants similar to this have been deemed and held to be equivalent to patents. The claimant's application for a confirmation is not, therefore, addressed to the equity side of the court; but he invokes its judgment upon the question whether or not he has a valid legal title to the land; and if so, he asks that it be confirmed.

If the claimant had only an equitable title, and was appealing to a court to perfect it into a legal estate, the court might well examine into the equities, and decide whether or not it was incumbent upon a court of equity to grant a relief asked for; but if he already has the legal estate, and only asks the judgment of the court on that point, it would appear to preclude all inquiry into mere equities, unless it should appear that his legal title was fraudulently obtained, or for some reason ought to

be devested. In this case no such reason appears.

Mr. **J. S. Black,** Atty. Gen., for the appellees:

This claim is for a tract called Potrero, situated within the limits of the ex-mission of San Jose, bounded on the north by the Warm Springs, on the south by Pala, on the west by the *ranchos* of Higueria and Galinda, and on the east by mountains, containing 11 leagues.

The claimant, Fuentes, is a nephew of Micheltorena, and a mere lad at the date of the grant, who came to California with his uncle, went away with him and never returned again, except when he came back as a witness for Limantour. His relationship to the governor is mentioned in the Limantour documents. His minority is proved by his own witness, Abrego, and that he never saw the land, or went near it, is one of the facts mentioned by Judge McAllister in his opinion.

The board of land commissioners and the district court both decided against the claim. [The counsel then referred to and gave the dates of the several documents, and said:] I have set these dates carefully out, and called the special attention of the court to them, because they may become important in the discussion of the cause.

This grant is illegal, and contrary to the laws and customs of the government of Mexico, because,

1. The grantee was a minor at the time of its date, and incapable, for that reason, of performing the conditions annexed to it.

2. It is void, because it was made by a governor who was a near relative of the grantee.

3. There was no petition; no examination into the condition of the land or the character of the applicant; no map of the land, no reference to any magistrate or officer; no report upon the case, and therefore the governor had no authority, jurisdiction or power to make the concession, even if the grantee had been a stranger to his blood.

4. There is no *espediente* on file, and no note or record in any book among the archives of the department.

5. Besides all this, it is fraudulent and spurious, a base and impudent forgery. For this assertion I give the following reasons:

1. The fact that no trace of this grant is to be found upon the record, is of itself conclusive evidence against its genuineness.

2. The grantee never took possession of the land nor claimed title under it, nor produced the grant, until 1852.

3. The subscribing witness to the execution of the grant (Jimeno) was not called, and we must presume that he was not called because it was known that he would pronounce the paper to be fraudulent.

4. The testimony substituted in place of the best evidence was that of witnesses, who, at the very most, could prove nothing beyond their own belief. One of them does not prove even so much, but only that the signatures are like those of Micheltorena and Jimeno.

5. But these witnesses, no matter what they swear to, are unworthy of belief. They are professional witnesses. No court in California where Manuel Castro's achievements as a witness are known, would pronounce a judgment upon his testimony. Abrego was incontestably proved to be guilty of perjury in the *Limantour Case*, and the fact was so announced by the court.

Mr. Justice **Wayne** delivered the opinion of the court:

The appellant has come to this court asking for a confirmation of his claim to eleven leagues of land, called Potrero. The paper under which he claims the land purports to be a grant from Governor Micheltorena. It recites that the land is within the ex-mission of San Jose, bounded on the north by the locality called the Warm Springs; on the south by Palos; on the west by the peak of the hill of the *ranchos* Tulgencio Higuera and Chrysostom Galenda; and on the east by the adjoining mountains. It also recites that the governor had taken all the necessary steps and precautionary proofs which were required by the Mexican laws and regulations for granting lands, and that he had granted the land upon the following conditions to the appellant:

1. That he should inclose it without prejudice to the crossways, roads, and uses; that he shall have the exclusive enjoyment of it, and apply it to such use and culture as may best suit his views.

2. That he should apply to the proper judge for judicial possession of the same, by whom the boundaries shall be marked out, and along which landmarks should be placed to designate its limits, and that fruit and forest trees shall be planted on the land.

3. That the land given should contain eleven leagues for large cattle, as is designated by a map said to be attached to the *espediente*. The land is to be surveyed according to the Ordinance; and should there be an overplus, it was to inure to the benefit of the nation.

*The title is to be recorded in the prop- [*451
er book, and then to be delivered to the petitioner for the land, for his security. This paper bears date the 12th June, 1843, and has the name of Micheltorena to it, which is denied to be his signature.

The first inquiry, then, concerning it, should be into its genuineness. Was it executed by Governor Micheltorena? Has the party claiming proved it?

The testimony introduced in support of the genuineness of the paper is to be found in the depositions of Zamon De Zaldo, Jose Abrego, Manuel Castro, and Joseph L. Folsom. Zaldo declares himself to be chief clerk and interpreter to arrange and classify the Spanish and Mexican archives in the custody of the surveyor-general of California. He was not interrogated as to the signature of the paper, and says nothing about its having been executed by Micheltorena. He was asked what he knew of the book of land titles of the Mexican government for the year 1843. He answers that he knew that a book for the year 1843 was not in the office, though he did not know of his own personal knowledge that such a book ever existed, and that all that he did know about it had been learned from a correspondence in the office, that such a book belonging to the archives had been in the possession of John L. Folsom, United States quartermaster at the time, and that he had learned, in the same way, that it was destroyed with Folsom's papers by

the fire in San Francisco of 1851. Folsom states that a book of records, containing grants of land in Upper California, had been put into his possession in the spring of 1851, to be used as evidence in the suit of *Leese and Vallejo* v. *Clark*, then pending in the superior court of the city of San Francisco. It was in the Spanish language, and came from the archives of the Mexican government of California, then in the possession of the commanding general at Benicia, and was delivered to him as an officer of the army, for safe keeping. He adds: After the book was used as evidence, it was returned to me, and was deposited in my office in the city of San Francisco; and whilst there, the great fire of the 3d and 4th May, 1851, occurred, by which my office and its contents, including the said book, were destroyed. And he 452*] then concludes *his deposition, saying: "I am not positive as to the date of the grants contained in the said book, but from my best recollection, my impression is that they were for the years 1843 and 1844." The purpose for which Zaldo and Folsom were made witnesses for the claimant was to connect the book which Zaldo said was not among the archives with the book which Folsom said had been burned, that it might be inferred, from the date of the paper upon which Fuentes rests his claim, that it had been recorded in that book. It is stated in the petition that the grant was issued and delivered in due form of law on the 12th June, 1843; that it was recorded at the time it was issued; that it was not found in the archives; and that he believes that the copy of the grant was burned, and on that account could not be produced. It is further stated, that the grant had been approved by the territorial legislature, and was in all respects formally completed according to law, but that the records of the legislature for the year 1843 were in like manner destroyed by fire at the same time with the record of the grant, and that the claimant could not produce any evidence of the approval of the grant by the legislature. In this recital from the petition we find a very exact anticipation of what the evidence ought to be, to prove that such a grant had been issued, and that it had been duly recorded, but none such was introduced. Zaldo believes, from a correspondence in the office, that a book belonging to it had been burned while it had been in the safe keeping of Folsom. Folsom says a book from the archives was burned, but that he cannot be positive as to the date of the grants in it, but that from his best recollection, his impression was, the grants in it were for the years 1843 and 1844; and Zaldo declares that he had no personal knowledge that such a book ever existed, but adds, that there is wanting in the office a book for the year 1843. This falls far short of the evidence which was necessary to connect the alleged grant with the archives of the office. There is no other evidence in the record to supply such deficiency. And it is admitted now that the paper was never sent to the departmental assembly.

In truth, between the burned book and the 453*] Fuentes paper, *the testimony in the record makes no connection whatever. The mere declaration that it was dated in 1843 cannot do so. Nor can any implication of the kind be raised from the testimony of Abrego and Castro. Neither of these witnesses were interrogated concerning the burned book, nor was any attempt made to prove that any of the records of the departmental assembly, especially its approval of this grant, had been burned at the same time. What has been said of the insufficiency of the evidence to prove the record of the paper, applies with equal force to the certificate which is alleged to have been given by Jimeno, that the paper set out in the petition as a grant had been recorded in the proper book, which is used in the archives of the secretary's office.

The case, then, stands altogether disconnected from the archives, and exclusively upon the paper in the possession of Fuentes. It has no connection with the preliminary steps required by the act of Mexico of the 18th August, 1824. or with the regulations of November 28, 1828. It is deficient in every particular—unlike every other case which has been brought to this court from California. There was no petition for the land; no examination into its condition, whether grantable or otherwise; none into the character and national status of the applicant to receive a grant of land; no order for a survey of it; no reference of any petition for it to any magistrate or other officer, for a report upon the case; no transmission of the grant—supposing it to be such—to the departmental assembly or territorial legislature, for its acquiescence; nor was any *expediente* on file in relation to it, according to the usage in such cases.

All of the foregoing were customary requirements for granting lands. Where they had not been complied with, the title was not deemed to be complete for registration in the archives, nor in a condition to be sent to the departmental assembly, for its action upon the grant. The governor could not dispense with them with official propriety; nor shall it be presumed that he has done so, because there may be, in a paper said to be a grant, a declaration that they had been observed, *particularly in a [*454 case where the archives do not show any record of such a grant.

The act of 1824 and the regulations of 1828 are limitations upon the power of the governor to make grants of land. They are, and were also considered to be, directions to petitioners for land, before they could get titles. Where the petition and the other requirements following it, have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course; nor should slight testimony be allowed to remove the presumption. Both the kind and *quantum* of evidence must be regarded. We proceed to state what they are in the record.

None can be found to establish with a reasonable probability the genuineness of the paper upon which the claimant relies. The only testimony bearing upon the genuineness of the paper is that of Abrego and Castro. Both speak of the signature of Micheltorena, and no further. Abrego says that he knew the governor; that he had frequently seen him write, and that he had examined the signature to the document presented to him, and that he knows it to be the signature of Governor Micheltorena.

Castro is more particular, but not so positive; and he gives a narrative of the origin of the

paper, which is certainly peculiar, and from which a reasonable suspicion may be indulged against his own disinterestedness. He says: "An instrument in writing is now shown to me, purporting to be a grant to Jose Maria Fuentes dated June 12, 1843, and it is attached to the deposition of Jose Abrego, heretofore taken in this case, and marked H. J. T., No. 1. I know the paper; it is my handwriting. I was at the time secretary in the prefect's office in Monterey, and being on terms of friendship with Secretary Jimeno and Mr. Arce, a clerk in his office, I frequently assisted them in their official duties at their request, and in that manner I wrote the body of this grant. It was written in June, 1843, at the time of its date. I know the signature of Micheltorena; and the signature purporting to be his, appears 455*] *like his; and the signature of Jimeno on said paper also appears like his." The words of the witness have been given.

The signature of Jimeno, of which Castro speaks, purports to be a certificate from Jimeno that the grant had been recorded, the day after its date, in the proper book of the archives of the secretary's department. It is upon the same paper with the title, and purports to have been put upon it by the order of the governor, "that the title might be delivered to the party interested, for his security and ulterior ends."

Abrego, in a second deposition, says he knew Fuentes and his family, and that he was not of age, but was a minor, on the 7th July, 1846—more than three years after the date of the grant.

Such is all the testimony in this record to prove the genuineness of the signature of Micheltorena, unless it be the notarial certificate, given under the seal of the National College in the city of Mexico; which, as it is presented in this case, is not evidence, and of no account at all.

We will now show that the testimony of Abrego to the signature of Micheltorena is insufficient to establish that fact, and that Castro's deposition gives to it no aid. In truth, the whole case has no other evidence in support of the genuineness of the signature of the governor than what Abrego has said. In showing this, we shall have no occasion to impeach his character as a man, or his truthfulness as a witness, as there is nothing in this record, whatever there may be in others, to justify such an attack. The case must be decided upon what its own record contains, and upon nothing else.

Abrego's deposition has not that foundation which the rules of evidence require a witness to have, and enable him to prove the genuineness of an official signature to a public document, or a signature to a private writing. The document in this instance purports to be genuine; but whether so or not, it discloses the fact that there is upon it an official witness of its execution and record, who should have been called to prove it, if he was living, and if absent beyond the jurisdiction of the court, whose signature should have been proved by a witness who was familiar with his signature and handwriting, 456*] before *secondary evidence could be received of his own signature, or that of the official who is said to have executed the paper.

It was the duty of Jimeno to record all grants which were made by the governor, and to give attestations of that fact, and which it is said Jimeno did give to the paper in this instance. Why was not Jimeno called? It seems that he was overlooked or not thought of.

The simplest and best proof of handwriting is the testimony of one who saw the signature actually written; and inferior evidence as to his handwriting is not competent, until it has been shown that this testimony to the execution of the paper could not have been procured. And when a document, either public or private, is without a witness, the best evidence to disprove the signature, and to prove it forged, is the testimony of the supposed writer, if he be not incompetent from interest, and can be produced. In the latter case, the next best evidence is the information of persons who have seen him write, or been in correspondence with him.

Such, however, is not this case, though it was acted upon in the court below as if it was so.

Abrego here, then, is in the attitude of an incompetent witness, who was called and permitted to testify before the party by whom he was introduced, and laid a foundation for the next best evidence, when the paper submitted to him showed the fact that the better could have been had, either primarily or secondarily in the manner we have already indicated. Abrego swears that he knew Micheltorena; that he had frequently seen him write, that he had examined the signature to the document presented to him, and that he knew it to be the signature of Governor Micheltorena. But had Secretary Jimeno been called as a witness, as it was his official duty to test the signature of the governor to grants, his would have been the best testimony to prove its genuineness in this instance, and that the grant had been transferred to him officially, for delivery to the grantee.

Castro's deposition is in the same predicament with that of Abrego, but with an aggravation of its insufficiency to prove the signature of Micheltorena, and of his incompetency as a *witness. He was asked if he knew [*457 Micheltorena, or was familiar with his handwriting or with his signature, or if he had ever seen him write. He only says: "I know the signature of Micheltorena, and the signature to the paper appears like his, and the signature of Jimeno appears like his." He does not say how he had became qualified, by comparison or otherwise, to swear to the signature of Micheltorena; and notwithstanding his declared friendship with Jimeno—so much so that he was frequently asked to assist him in the duties of his office, and particularly asked to write out in his own hand the paper in question—he has left it to be inferred that he only knew enough of Jimeno's handwriting to enable him to say that the signature to the grant which he wrote out in his own hand appears like Jimeno's signature.

If such was the way of doing business in the secretary's office, which we have no cause for believing, it must have been an easy matter to get it from such a paper as that now in question, and not at all difficult to have been accomplished by one who had such familiar access to the office as Castro represents himself to have had, especially if all of the prerequisites of a grant enjoined by the act of 1824 and the regulations of 1828 were allowed to be disregarded.

This narrative of De Castro, instead of bring-

ing the mind to any conclusion in favor of the genuineness of the signatures of Micheltorena and Jimeno, rather suggests caution in receiving it, and that it ought to be corroborated by other witnesses before that shall be done. It seems to us, too, somewhat remarkable that this witness, familiar as he was with the origin and object of this paper prepared by himself, should not have been questioned concerning its delivery to Fuentes, then a minor, to whom it was delivered for him, or what was done with it at the time of its date, or in whose possession it was from that time until it was presented to the land commissioners for confirmation, in 1852.

There is entire absence of all proof of its having been delivered to Fuentes himself, or to anyone for him; but it seems to have found its way to the city of Mexico, as the record shows, and reappears in California years after 458*] its cession to *the United States, and more than eight years after it is said to have been executed. The assertion in the paper itself, that the governor had directed it to be delivered, can be no proof of that fact, until its genuineness shall have been ascertained. If the minority, too, of Fuentes is considered. in connection with the conditions upon which this grant is said to have been made, it may well be inferred that it was not delivered to the grantee, as he was not then in a situation to carry out the conditions of the grant, without the intervention of a tutor or guardian, and nothing was done to perform those conditions at any time afterward.

We do not speak now of such non-performance as a cause sufficient for denying a right claimed under a genuine grant; but only as a fact in this case accounting for the non-performance of the conditions of the grant, and making it probable that Fuentes did not receive this paper, until some time after its date, from Micheltorena, and not until after the cession of California to the United States. A delivery after the latter event, by a former governor of California, would not give a grantee a right to claim the land by any obligation imposed upon the United States by the treaty of Guadaloupe Hidalgo.

We have given to this case a very careful examination, and have concluded that no evidence can be found on its record to sustain the genuineness of the paper under which the land is claimed. That there is none to prove its registry in the archives of the secretary's office, at the time of its date or afterwards. That no reliable proof has been given to connect it with the book of records, which had been committed to the care of the witness, Folsom, and was burned in his office. That it does not appear that anyone of the precautionary requirements, before a grant of land could be made by a governor of California, had been complied with in this case. That there is no proof whatever that such a paper as that in question had been delivered to the claimant at any time before the power of Mexico in California had ceased; and it was admitted, in the argument of the case here, that no such paper had been sent to the Departmental Assembly for its acquiescence, as a grant from the governor.

459*] *It was, however, urged in the argument, that such prerequisites for a grant of land should be assumed to have been observed, on account of a recital in the paper or grant that they had been. Several cases from the reports of this court were cited, being supposed by counsel to support the position. None of them do so. We have not been able to find a case reported from this court, either under the Louisiana or Florida cession, that does. *U. S.* v. *Peralta*, in 19 How. 343, does not do so. The decision there is, that when a claimant of land in California produced documentary evidence in his favor, copied from the archives in the office of the Surveyor General, and other original grants by Spanish officers, the presumption is in favor of the power of those officers to make the grants. There, the authenticity of the documents was admitted, and the validity of the petitioner's title was not denied, on the ground of any want of authority of the officers who made the grant. This court then said, that the public acts of public officers, importing to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified.

In the case of *Minter* v. *Crommelin*, 18 How. 88, it was ruled that when a patent for land has been issued by the officers of the United States, the presumption is in favor of its validity, and passes the legal title, but that it might be rebutted by proof that the officers had no authority to issue it, on account of the land not being subject to entry and grant. In *Delassus* v. *U. S.* 9 Pet. 117, 133, the inquiry was, whether the concession was legally made by the proper authority; but the concession, being in regular form, carried *prima facie* evidence that it was within the power of the officer to make it, and that no excess or departure from instructions should be presumed, and that he who alleges that an officer intrusted with an important duty has violated it, must show it. But there was no question in that case about the genuineness of the concession. That was admitted. The genuineness of the grant in *U. S.* v. *Arredondo*, 9 Pet. 691, was not questioned. Nor was the genuineness of the patent in *Bagnell* v. *Broderick*, 13 Pet. *437, a subject of controver- [*460 sy. This court ruled in that case, that a patent for land from the United States was conclusive in an action at law, and those who claim against it must do so on the equity side of the court. It is not, however, to be supposed that no title in California can be valid, which has not all of the preliminary requirements of the Act of the Mexican Congress of 1824, and of the Regulations of 1828. But if none of them are to be found in the archives, and it cannot be established by the proof that they were registered there, this court will not presume that they were preliminary to a grant, because the governor recites in the grant that they had been observed. In what we have said upon this point, we are reaffirming this court's opinion in *U. S.* v. *Cambuston*, 20 How. 59. And we now take this occasion to repeat, and when it shall appear that none of the preliminary steps for granting land in California have been taken, this court will not confirm such a claim. For the reasons already given, we shall affirm the decree of the district court in this case.

But we also concur with that court in its rejection of this claim, supposing it to be genu-

ine, upon the ground that there was no proof of a survey or measurement of this land, or any performance of its conditions, from which it may be inferred that the grantee had abandoned his claim. It is said that these were conditions subsequent, the nonperformance of which does not necessarily avoid the grant. This is the case as to some of them; but even as to such, when a grantee allows years to pass after the date of his grant without any attempt to perform them, and without any explanation for not having done so, and then for the first time claims the land, after it had passed by treaty from the national jurisdiction which granted it to the United States, such a delay is unreasonable, and amounts to evidence that the claim to the land has been abandoned, and that a party under such circumstances, seeking to resume his ownership, is actuated by some consideration or expectation of advantage, unconnected with the conditions of the grant, which he had not in view when he petitioned for the land, and when it was granted. The language just used was suggested in *Frémont* v. *U. S.* 17 How. 542. The 461*] *occasion has arisen in this case, when it becomes necessary to affirm it as a rule, to guide us in all other cases hereafter which may be circumstanced as this is.

The decree of the District Court in this case is affirmed.

299*] *THE UNITED STATES, *Plff. in Err.*,
v.
JOHN J. WALKER;

THE UNITED STATES, *Plff. in Err.*,
v.
ARTHUR F. HOPKINS;

and

THE UNITED STATES, *Appt.*,
v.
RICHARD LEE FEARN.

(See S. C. 22 How. 299–315.)

Acts respecting pay of collectors of ports—repeal by implication not favored—repugnancy must be clear—acts in pari materia construed together—construction of act of March 3, 1841—additional compensation—amounts of salaries.

The 10th section of the act of May 7, 1822, is not repealed by any subsequent act.

By the act of May 7, 1822, $3,000 was the maximum which could be allowed to the office held by the defendant.

Under that act, collectors of seven enumerated ports might receive an annual compensation of $4,000, provided their respective offices produced that amount from all sources of emolument recognised and prescribed by the existing laws, after deducting the necessary expenses incident to the offices.

On the same principles, and subject to the same conditions, the collectors of the nonenumerated ports might receive an annual compensation of $3,000.

Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case.

Where such repeal would operate to reopen accounts at the treasury department long since settled and closed, the supposed repugnancy ought to be clear and controlling, before it can be held to have that effect.

Wood v. U. S. 16 Pet. reaffirmed.

All of these additional compensation acts are *in pari materia* with the several acts prescribing the sources of emolument, and the whole must be construed together.

When they are so considered, there is no repugnancy. By the true construction of the act of March 3, 1841, every collector is required to include in his quarter-yearly account, all sums received by him for rent and storage of goods, wares, and merchandise, stored in the public stores, for which rent is paid beyond the rents paid by him as collector; and if, from such accounting, the aggregate sums received from that source exceed $2,000, he is directed and required to pay the excess into the treasury, as part and parcel of the public money.

When the sums so received from that source in any year do not in the aggregate exceed $2,000, he may retain the whole to his own use; and in no case is he obliged to pay into the treasury anything but the excess beyond $2,000.

Collectors of the enumerated ports may receive $4,000, from the sources of emolument recognized in the act of the 7th of May, 1822, and they may also receive $2,000 from rents and storage.

But there is nothing in the act to show that the prior act is repealed, so far as it is applicable to the collectors of the nonenumerated ports. No new maximum is fixed to their compensation, and there is nothing in the new provision, inconsistent with the 10th section of the prior act.

Collectors of the nonenumerated ports may receive, as an annual compensation, $3,000 from the sources of emolument recognized and prescribed by the act of the 7th of May, 1822, provided their respective offices yield that amount from those sources, after deducting the necessary expenses incident to the office; and in addition thereto, they are also entitled to whatever sum or sums they may receive for rent and storage, provided the amount does not exceed $2,000.

Argued Feb. 23, and Mar. 19, 1860. Decided Apr. 16, 1860.

ERRORS to the Circuit Court of the United States for the Southern District of Alabama.

The complaints in these cases were filed in the court below, by the plaintiffs in error, upon the official bond of Walker, as collector of the customs for the district, and inspector of the revenue of the port of Mobile.

The trials below having resulted in verdicts and judgments in favor of the defendants, the United States sued out these writs of error.

The cases were heard together in this court.

A further statement of the cases appears in the opinion of the court.

Messrs. **J. S. Black** and **J. M. Campbell**, for plaintiffs in error:

The only question is as to the true construction of the act of 1841, and its effect upon the act of 1822.

1. The purpose of the act of 1841 was plainly not to increase, but to limit the compensation of collectors. All over $2,000 per annum received from the sources specified in the commencement of the 5th section, was to be part and parcel of the public money, and paid over as such, and no collector was to retain for himself, by the latter part of the section, under any pretense, more than $6,000 per annum, including every possible item of charge or claim. Congress might have aggregated into one, all the sources from which collectors could derive compensation, and then limited the amount to

NOTE.—*Repeal of statutes by implication*—see note to 20 L. ed. U. S. 235, and note to 38 C. C. A. 136.

be enjoyed from the whole; but it has not done so.

2. The true construction of the act of 1841 being ascertained, its operation on the act of 1822 appears at once.

By the 9th section of that act (3 Stat. at L. 694), the maximum compensation of collectors at Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, is fixed at $4,000 per annum, and by the 10th section, of all other collectors at $3,000 per annum, payable, as this court ruled in *Hoyt's Case*, out of the fees and commissions allowed by the act of 1802.

10 How. 135.

The mention, therefore, in the act of 1841, of a maximum of $6,000 from all sources, is explained by the fact, that while it limited a maximum of $2,000 as regarded certain particulars, the act of 1822, in regard to the sources of emolument with which it dealt, had already prescribed a maximum of $4,000 for the collectors of the seven ports enumerated in it. But no construction can possibly stand, which makes the denial of more than $6,000 per annum to the collectors of ports of the first class, amount to an increase of the compensation of those officers in other ports. The act of 1822 still operates in putting a limit to the collector's compensation, as regards the items which it contemplated, and fixes that limit at $4,000 per annum for the collectors of the seven ports mentioned in it, and to $3,000 per annum for all other collectors, including the collector of Mobile; while the act of 1841, limits all of whatever class to a maximum of $2,000 per annum from the items specified by it.

Mr. **R. H. Smith** for defendants in error.

Mr. Justice **Clifford** delivered the opinion of the court:

This case comes before the court upon a writ of error to the circuit court of the United States for the southern district of Alabama. It was an action of debt brought by the United States upon the official bond of the defendant as collector of the customs for the district and inspector of the revenue for the port of Mobile. He gave the bond, with sureties, on the 7th day of September, 1850, conditioned that he had truly and faithfully executed and discharged, and that he would continue truly and faithfully to execute and discharge, all the duties of the office according to law. Neglect and refusal on the part of the defendant to pay to the plaintiffs certain sums of money received by him as such collector before the commencement of the suit, beyond what he was entitled to retain as compensation for discharging the duties of the office, constituted the breaches of the condition of the bond, as assigned in the declaration.

Those balances, as claimed by the plaintiffs, amounted to the sum of $13,184.42; and the charge was, as alleged in the declaration, that the defendant had wholly failed and refused to pay the same. As appears by the transcript, the defendant pleaded the general issue, and that he had fully performed the conditions of the writing obligatory set forth in the declaration.

To maintain the issue on their part, the plaintiffs introduced a certified copy of the bond given by the defendant, and two duly certified copies of transcripts from the treasury department, showing that the official accounts of the defendant had been examined and adjusted by the accounting officers of that department. According to those transcripts, the respective balances claimed by the plaintiffs, as the accounts are there *stated, had not been paid by the [*304 defendant and remained due and payable at the time the suit was commenced.

No evidence was adduced by the defendant. He was charged in the account against him, as collector of the customs, with the sums collected from duties on merchandise, tonnage duties, hospital money, and for all sums received for rent and storage of goods, wares, and merchandise, stored in the public storehouses, for which a rent was paid beyond the rents paid by the collector. On the other side, he was credited, in the account of official emoluments with the sum of $3,000 as the maximum rate of the annual salary or compensation allowed to the collector of that port. Further details of those accounts are omitted, for the reason that the charge for rent and storage in the account of customs, and the credit for salary in the account of official emoluments, are the only two items which come in review at the present time.

Reference to the 9th section of the act of the 7th of May, 1822 (3 Stat. at L. 695), will show that Mobile is not one of the seven ports enumerated in that provision, and consequently that the maximum rate of annual compensation or salary allowed to the office under that law was $3,000, as limited by the 10th section, which includes all the ports not enumerated in the previous provision. All of the accounts of the defendant were adjusted at the treasury department upon the principle that the act of the 7th of May, 1822 (3 Stat. at L. 695), was still in force, and that the maximum rate of compensation belonging to the collector was $3,000, as therein prescribed. It was insisted by the defendant that the provision in question had been repealed by subsequent acts upon the same subject, and that the maximum compensation allowed by law to the office was $6,000.

Assuming that the theory of the defendant was correct, then his accounts had been improperly adjusted, and there was nothing due to the plaintiffs. On the other hand, if the charge for rent and storage in his customs account was properly made, and the maximum rate of compensation belonging to the office was only $3,000, then he was *justly indebted to the [*305 plaintiffs for the whole amount of the respective balances as stated in the transcripts.

After argument, the court instructed the jury, among other things, that "the act of 3d March, 1841 (5 Stat. at L. 432), was the last and controlling law as to the amount of compensation which collectors are allowed annually to retain; and that, under that enactment, the collector of this port was entitled to a compensation of $6,000 per annum, provided the same was yielded from the office from commissions for duties and fees for storage, and fees and emoluments, and any other commissions and salaries now allowed and limited by law, or so much from those sources, not exceeding $6,000, as the office yielded."

That instruction affirmed the right of the defendant, under the act of the 3d of March, 1841

(5 Stat. at L. 432), to a compensation of $6,000 per annum, or so much thereof, not exceeding that sum, as the office yielded from commissions of every description, fees and emoluments, including rents and storage, and salaries, as allowed and limited by law. Beyond question, it assumed that the 10th section of the act of the 7th of May, 1822 (3 Stat. at L. 695), was repealed. Prayers for instruction were then presented by the district attorney, who was counsel for the plaintiffs. He requested the court to instruct the jury to the effect that the provisions of the act of the 7th of May, 1822 (3 Stat. at L. 695), respecting the maximum compensation allowed to collectors of the customs, were not repealed by the act of the 3d of March, 1841 (5 Stat. at L. 432), or by any other act, but that the same were in full force; that the only effect the act of the 3d of March, 1841 (5 Stat. at L. 432), had upon the former act, in so far as the same applied to a case like the present, was to create a new and additional source of emolument to such collectors, allowing them to retain not exceeding $2,000 for rent and storage of goods, wares and merchandise, stored in the public stores, and for which a rent was paid beyond the rents paid by such collectors. Each of these prayers was separately presented, and separately refused by the court.

Another prayer for instruction was then presented by the district attorney. It affirmed, in 306*] effect, that it was the duty *of the defendant, as collector, whenever his emoluments in any one year exceeded $3,000, after deducting the necessary expenses incident to the office, to pay the excess into the Treasury, and that the plaintiffs were entitled to recover for all such balances, thus ascertained, as were shown to be due from the evidence. Apply the first and third requested instructions to the facts of the case, and it will be seen that they affirmed the principles adopted by the accounting officers of the Treasury, in restating the accounts of the defendant; and if correct, then the whole amount as the respective balances, as stated in the transcript, was due to the plaintiffs.

Taken together, they assume that the 10th section of the act of the 7th of May, 1822 (3 Stat. at L. 695), is in full force, and that the defendant had no right, under the act of the 3d of March, 1841 (5 Stat. at L. 432), to retain any portion of the amount received for rent and storage. Those prayers for instructions having been refused, the district attorney then prayed the court to instruct the jury as follows:

"That under those acts, it was the duty of the defendant, as collector of the customs, whenever his emoluments exceeded $3,000 in any one year, after deducting the necessary expenses incident to his office, to pay the excess, if any, into the Treasury, and the plaintiffs are entitled to recover the amount of any such surplus or surpluses, if any, as may be shown by the evidence; but, in ascertaining the amount of the defendant's emoluments as such collector, the jury must exclude all moneys derived by him from fines, penalties and forfeitures, and also all moneys derived by him from rent and storage of goods, wares, and merchandise, which may have been stored in the public storehouses, and for which a rent was paid beyond the rents paid by him as collector, unless the proceeds of such rents and storage exceed $2,000; in which event, the excess over and above that sum must be taken into account by them, in computing the value of the annual emoluments."

That prayer was also refused by the court. To understand its precise effect, it is necessary that it should be read in connection with the first and second prayers, which had previously *been presented and refused. When con- [*307 sidered together, those three prayers disclose the second theory of the plaintiffs, as assumed at the trial.

Like the one assumed in the third prayer, it affirmed that the 10th section of the act of the 7th of May, 1822 (3 Stat. at L. 695), was unrepealed, but conceded that the defendant had a right to retain to his own use the moneys received for rent and storage, to an amount not exceeding $2,000. Under the instruction of the court the jury returned their verdict for the defendant; and the plaintiffs excepted to the charge, and to the several refusals of the court to give the requested instructions. Three questions are presented in the case for decision, which will be briefly and separately considered:

1. Whether the 10th section of the act of the 7th of May, 1822 (3 Stat. at L. 695), is repealed by any subsequent act; and if not, then,

2. What is the true construction of the act of the 3d of March, 1841, so far as the same applies to the present case?

3. Whether, by the true construction of the two acts, the defendant had a right to retain to his own use the moneys received from rent and storage, to an amount not exceeding $2,000.

1. It is insisted by the defendant that the maximum prescribed by the 10th section of the act of the 7th of May, 1822 (3 Stat. at L. 695), is repealed, and that, under the law regulating his compensation, the legal capacity of the office he held was $6,000, subject to the condition that $2,000 only could be received from rent and storage. Six thousand dollars, he maintains, is the maximum under the law of the 3d of March, 1841 (5 Stat. at L. 432), applicable to every collector, and that the compensation of each, within that limit, and subject to the before-named condition, is regulated solely by the amount of labor performed.

To show that the 10th section of the act of the 7th of May, 1822 (3 Stat. at L. 695), is repealed, his counsel at the argument, referred to various acts of Congress, passed subsequently to the tariff act of the 14th of July, 1832 (4 Stat. at L. 583), entitled "An Act to Alter and Amend the Several Acts Imposing Duties on Imports."

They are as follows: 1833, 4 Stat. 629; 1834, 4 Stat. 698; *1836, 4 Stat. 771; 1836, 5 [*308 Stat. 113; 1837, 5 Stat. 175; 1838, 5 Stat. 264; 1840, 6 Stat. 815, private act; 1841, 5 Stat. 431, § 2.

By the first of those acts, usually called additional compensation acts, the Secretary of the Treasury was authorized, among other things, to pay to the collectors, out of any money in the Treasury not otherwise appropriated, such sums as would give those officers respectively the same compensation in that year, according to the importations of the year, as they would have been entitled to receive if the tariff act of the

preceding year had not gone into effect. That provision, with certain additions and modifications, which will presently be noticed, was annually re-enacted to the year 1840, when it was made permanent. For the most part, it was inserted in some one of the annual appropriation acts, and was designed to accomplish the precise object which its language describes, and nothing more.

Compensation to collectors, from the organization of the government to the present time, has been derived chiefly from certain enumerated fees, commissions, and allowances, to which has been added a prescribed sum, called salary, and which is much less than the compensation to which the officer is entitled. Provision for such fees, commissions, and allowances was first made by the act of the 31st of July, 1789, which also allowed to collectors certain proportions of fines, penalties, and forfeitures. 1 Stat. at L. 64.

More permanent provision, however, was made by the act of the 18th of February, 1793, by the act to regulate the collection of duties on imports and tonnage, passed on the 2d of March, 1799, and by the compensation act passed on the same day. 1 Stat. 316, 627, 786.

By these several acts, certain enumerated fees and commissions are made payable to collectors. They are also entitled to certain proportions of fines, penalties, and forfeitures. Accurate accounts were required to be kept by them of all fees and efficient emoluments by them received and of all expenses for rent, fuel, stationery, and clerk hire, which they were required annually to transmit to the comptroller [*309] of the Treasury; *but they were allowed to retain to their own use the whole amount of emolument derived from that source, without any limitation. Maximum rate of compensation was first prescribed by the act of the 30th of April, 1802 (2 Stat. at L. 172). That limit was $5,000, and it was applicable to all collectors.

By that act it was provided that, whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than $5,000, the surplus should be accounted for and paid into the treasury. 2 Stat. at L. 172.

Further regulations, as to fees, commissions, other emoluments, and salaries, were made by the act of the 7th of May, 1822, as therein prescribed.

One of those regulations was, that whenever the emoluments of any collector, for seven enumerated ports, after deducting the necessary expenses incident to the office, should exceed $4,000, the excess should be paid into the Treasury for the use of the United States. By the 10th section it was also provided that, whenever the emoluments of any other collector of the customs should exceed $3,000, after deducting such expenses, the excess should be paid into the Treasury for the same purpose. They were also required to account to the Treasury for all emoluments and for all expenses incident to their offices, and those accounts were to be rendered upon oath. Neither of the two last-mentioned acts extended to fines, penalties, and forfeitures. 3 Stat. 695. Under that act, $3,000 was the maximum which could be allowed to the office held by the defendant; and it is conceded by his counsel that it remained in full force to the time when the additional compensation acts before mentioned were passed. Large additions had been made to the free list by the tariff act of the 14th of July, 1832, and the rate of duties on imports so far reduced that the sources of emolument to collectors would not yield sufficient to give them an adequate compensation. To supply that deficiency, those additional compensation acts were passed. Much reliance is placed by the counsel of the defendant upon *the last [*310] proviso, which appears in nearly the same form in several of the acts. Take, for example, the one in the act of the 7th of July, 1838, which is the act that was subsequently made permanent. It provides that no collector shall receive more than $4,000. That sum is the maximum rate of compensation allowed to collectors of the enumerated ports in the act of the 7th of May, 1822; and inasmuch as the limit of $3,000, therein prescribed as applicable to the nonenumerated ports, was not reproduced in the new provision, it is insisted it was repealed, so that every collector, whether of the enumerated or nonenumerated ports, may now claim to receive an annual compensation of $6,000 from the sources of emolument recognized by that act, provided his office yields that amount, after deducting the necessary expenses incident to the office. To that proposition we cannot assent. On the contrary, when we look at the language of the new provision in connection with that of the prior law, and consider the mischief that existed, the remedy provided, and the true reason of the remedy, we are necessarily led to a different conclusion. Commercial ports, where the revenue is collected, were divided by the prior law, so far as respects the compensation of collectors, into two classes, enumerated and nonenumerated. Collectors of the seven enumerated ports might receive an annual compensation of $4,000, provided their respective offices produced that amount, after deducting the necessary expenses incident to the offices, from all the sources of emolument recognized and prescribed by the existing laws.

On the same principles, and subject to the same conditions, the collectors of the nonenumerated ports might receive an annual compensation of $3,000. No one could receive more than that sum, and his lawful claim might be much less.

Ten years' experience under that law, prior to the passage of the tariff act of the 14th of July, 1832, had witnessed but few complaints respecting the classification of the ports, or the standard of compensation to collectors of customs, and had called for no important alteration in the laws upon that subject. *Throughout that period the rates of du- [*311] ties on imports were high, and nearly every article of consumption imported from other countries was taxed. Change of policy in that behalf, as carried out in the legislation of the succeeding year, affected the emoluments of collectors, and reduced the amount of net income from the sources of their emolument below the standard of a reasonable compensation. To remedy that mischief, and restore their compensation to what it would have been if no

change had taken place, was the purpose for which those additional compensation acts were passed. They had the effect to change the basis of computation, so as to augment the estimated net income from the authorized sources of emolument to what it would have been if the tariff act had not passed; but they were not intended to make any change, either in the sources from which the emoluments were derived, or the maximum rate of compensation. Mention was made of the largest maximum prescribed in the prior law, not with any view to repeal or modify the other, which was applicable to the non-enumerated ports, but to exclude the conclusion that it was the intention of the provision to increase the compensation of the collectors of the principal ports beyond what it would have been if the free list had not been augmented, and there had been no diminution in the rates of duties on imports.

Suppose there was nothing in the language of the act to qualify the provision, and nothing in the history of the legislation upon the subject to aid in the exposition; still we would not think it so clearly inconsistent with the prior law as to operate as a repeal. Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case; but where such repeal would operate to reopen accounts at the Treasury Department long since settled and closed, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect. Such was the doctrine substantially laid down by this court in *Wood* v. *United States*, 16 Pet. 363; and we have no hesitation in reaffirming it as applicable to the present case. *Aldridge et al.* 312*] v. *Williams*, 3 How. 23; *United *States* v. *Packages of Dry Goods*, 17 How. 93; 2 Dwarris on Stat. 533.

All of these additional compensation acts are *in pari materia* with the several acts prescribing the sources of emolument, and the whole must be construed together. When they are so considered, there is no such repugnancy as is supposed by the defendant. Collectors, as before, were still required to render an account; and the new provision expressly provides that no officer shall receive, under that law, a greater annual salary or compensation than was paid to him for the year the before-mentioned tariff act was passed.

2. Having disposed of the proposition chiefly relied on by the defendant, we come now to consider the second question presented for decision. That question cannot be understood without referring to previous legislation upon the subject, and the practice that had grown up under it. Importers were allowed by the act of the 14th day of July, 1832, to place certain goods in the public stores, under bond, at their own risk, without paying the duties. Duties on goods so stored were required to be paid one half in three months, and the other half in six months; but while the goods remained in the public stores, they were subject to customary storage and charges, and to the payment of interest at the rate of six per cent. Goods thus deposited might be withdrawn at any time, in whole or in part, by paying the duties on what were so recalled, together with customary storage and charges and the interest. Public stores were accordingly rented; and as the business increased, the storage received by the collector from the importers exceeded the amount paid to the owner of the stores, and there was no law requiring collectors to account for the excess, which was retained by the collectors to their own use, and went to swell the amount of their compensation.

To correct that supposed abuse, the act of the 3d of March, 1841, was passed. By that act, every collector was required to render a quarter-yearly account in addition to the account previously directed by law. That additional account as prescribed in the act, was to include all sums collected or received from fines, penalties, or forfeitures; or for seizure of *goods, wares, and merchandise; or upon [*313 compromises made upon seizures; or on account of suits instituted for frauds against the revenue; or for rent and storage of goods, wares, and merchandise, which were stored in the public stores, and for which a rent was paid beyond the rents paid by the collector. As originally framed, the provision required the collector, in case the sums received by him from all those sources exceeded $2,000, to pay the excess into the Treasury as part and parcel of the public money. After it was introduced, however, it was so amended and changed in its passage that, while it still directs the account to be rendered, it requires no part of the money derived from those sources to be paid into the Treasury except what is received for rent and storage as aforesaid, and for "fees and emoluments." Every collector was required to account for fees and emoluments by previous laws; and as the account to be rendered under this act is expressly declared to be one "in addition to the account now required," there is nothing left for that part of the section directing the payment of the excess into the Treasury to operate upon, except the sums received for rent and storage.

By the true construction of the act, therefore, every collector is required to include in his quarter-yearly account, as directed in the first part of the section, all sums received by him for rent and storage of goods, wares, and merchandise, stored in the public stores, for which rent is paid beyond the rents paid by him as collector; and if, from such accounting, the aggregate sums received from that source exceed two thousand dollars, he is directed and required to pay the excess into the Treasury, as part and parcel of the public money. When the sums so received from that source in any year do not in the aggregate exceed $2,000, he may retain the whole to his own use; and in no case is he obliged to pay into the Treasury anything but the excess beyond the $2,000.

It is insisted, in one of the printed arguments filed in this case, that the act now under consideration has the effect to repeal the maximum prescribed in the prior act, and that every collector, under this act, is entitled to $6,000 as *an annual compensation, provided the [*314 office yields that sum from all the sources of emolument, including rent and storage. Collectors of the enumerated ports undoubtedly

may receive $4,000 from the sources of emolument recognized in the act of the 7th of May, 1822, and they may also receive $2,000 from rents and storage. Those two sums are equal to the new maximum rate created by the act under consideration, which provides that no collector, under any pretense whatever, shall receive, hold, or retain, more than $6,000 per year, including all commissions for duties, and all fees for storage, or fees, or emoluments, or any other commissions or salaries which are now allowed and directed by law. But it is quite clear that there is nothing in the act having the slightest tendency to show that the prior act is repealed, so far as it is applicable to the collectors of the nonenumerated ports. No new maximum is fixed to their compensation, and there is not a word in the new provision inconsistent with the 10th section of the prior act.

To suppose that the new maximum applies to the collectors of the nonenumerated ports would be to impute an absurdity to the act, for the reason that under no possible state of things can such collectors lawfully retain, hold, or receive more than $5,000 as their annual salary or compensation, from all the sources of emolument recognized and prescribed by the two acts. It may be $5,000 or it may be much less than $3,000, according to the state of the importations and the amount received from rent and storage.

3. It only remains to apply the principles already ascertained, in order to determine the third question presented for decision. Collectors of the nonenumerated ports may receive, as an annual compensation for their services, the sum of $3,000 from the sources of emolument recognized and prescribed by the act of the 7th of May, 1822, provided their respective offices yield that amount from those sources, after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto they are also entitled to whatever sum or 315*] sums they may receive for rent and *storage, provided the amount does not exceed $2,000; but the excess beyond that sum they are expressly required to pay into the Treasury, as part and parcel of the public money.

Charges against the defendant for rent and storage must be settled in accordance with these principles. It follows that the instruction given by the presiding justice was erroneous; and we also think that the first, second, and fourth prayers for instruction ought to have been given to the jury.

Suits were also instituted against the sureties of the defendant. Judgment was entered in the court below for the respective defendants in those suits, and the causes were removed into this court by writs of error, sued out by the plaintiffs. Those causes were submitted at the same time with the one just decided. They depend upon the same principles, and must be disposed of in the same way.

The judgment of the Circuit Court is, therefore, reversed in each of the three cases, and the respective cases are remanded, with directions to issue new venires.

EMMA B. C. THOMPSON and William G. W. White, *Plffs. in Err.*,
v.
RICHARD ROE, *ex dem.* Jane Carroll, Maria C. Fitzhugh, Anne C. Carroll, Sarah Nicholson, Rebecca Carroll, Henry May Brent, Dan'l H. Fitzhugh and Catharine D., his Wife, Devisees of Dan'l Carroll, of Duddington, Deceased.

(See S. C. 22 How. 422-435.)

Sale of lands for taxes in Washington city—not necessary to exhaust personal property first—laches—power to sell is from Congress—ordinances.

By the charter of 1820, of Washington city, as amended by the act of 1824, it is not a condition to the validity of the sale of unimproved lands for taxes, that the personal estate of the owner should have been previously exhausted by distress.

In this case, the owners of the tax title have had the possession, paid the taxes, built and made valuable improvements on the lot, in the presence of the former owners, for near twenty years.

Under such circumstances, a court of justice should be unwilling to exercise any judicial ingenuity to forfeit even a tax title, where the former owners have been so slow to question its validity.

The power to sell the lands for taxes is to be found in the acts of Congress, not in the ordinances of the corporation.

The latter can neither increase nor vary it, nor impose any terms or conditions, which can effect the validity of a sale made within the authority conferred by the statute.

The purchaser of a tax title is not bound to inquire further than to know that the sale has been made according to the provisions of the statute which authorized it.

The instructions or directions given by the corporation to its officers cannot have the effect of conditions to affect the validity of the title.

Argued Mar. 30, 1860. Decided Apr. 16, 1860.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

This is an action of ejectment brought in the court below in the name of the devisees of Daniel Carroll, as lessors of the plaintiff, to recover a certain lot in the city of Washington.

The jury found for the plaintiff. Judgment was rendered on their verdict for him, subject to the defendant's exceptions to the instructions of the court.

The point at issue here is stated in the opinion of the court.

Messrs. **Geo. E. Badger** and **J. M. Carlisle**, for the plaintiff in error:

The principal question in the case is whether, upon the true construction of the charter of 1820, amended by the charter of 1824, it was a condition to the validity of the sale of unimproved land for taxes, that the personal estate of the owner should have been exhausted by distress.

1. The construction of the charter upon the question above stated.

a. By the 10th section of the charter of 1820 (3 Stat. 589), "real property, whether improved or unimproved, might be sold for taxes." The only restriction was in the proviso (p. 590), "that no sale shall be made in pursuance

NOTE.—*Sale of lands for taxes; strict compliance with the statute, necessary*—see note to Williams v. Peyton, 4 L. ed. U. S. 518.

of this section, of any improved property whereon there is personal property of sufficient value to pay the said taxes."

By the 12th section (p. 590), power is given to collect taxes by "distress and sale of the goods and chattels of the person chargeable therewith."

Both these sections contemplated that the property should be assessed to the true owner. The 10th section distinguished the term of notice required between resident and nonresident owners. The 12th section subjected to the payment of taxes, the "goods and chattels of the person chargeable therewith."

No person could be "chargeable" with the taxes except by their being assessed to him. The corporation charged by assessment.

These provisions were found to be practically inefficient for the collection of taxes. It was absolutely necessary that the corporation should be relieved from the duty of ascertaining the true owner, and assessing the land to him. Accordingly, the act of Congress of 1824 (4 Stat. 75), supplementary and amendatory to the act of 1820. was passed.

By its 1st section, the provisions of the act of 1820, so far as "inconsistent with the provisions of this act," are repealed.

By its 2d section, it is provided that "no sale of real property for taxes hereafter made, shall be impaired or made void by reason of such property not being assessed or advertised in the name or names of the lawful owner or owners thereof."

The same section abolished the distinction between residents and nonresidents in respect to the advertisement, and prescribed a uniform term in all cases, irrespective of ownership.

The provisions of the act of 1820, requiring the corporation to ascertain the person chargeable with the taxes, was inconsistent with the provision of the act of 1824, which made it unnecessary to assess the property of the "lawful owner or owners thereof;" and therefore the former were repealed.

The effect of the act of 1824 was to authorize the corporation to proceed *in rem*, the tax being assessable directly and exclusively upon the lands, and not to any person.

This is understood to be the construction upon which this court proceeded in *Holroyd* v. *Pumphrey*, 59 U. S. (18 How.) 69, where this court declared, in effect, that under the charter of 1824 it was immaterial to what person, or whether to any existing person, the land was assessed.

It would seem to be hardly defensible to assert that there being but one assessment, and that being sufficient to pass the land irrespective of the true ownership, there is, nevertheless, to be included to the corporation another assessment ascertaining "the person chargeable with the taxes, so as to compel a resort to the personalty, or otherwise to avoid the sale.

In our apprehension the changes in the amended charter of 1824 are conclusive of the matter, even if, by the true construction of the charter of 1820, it was imperative that recourse should be first had to the goods and chattels of the first owner.

But was such preliminary recourse required by the act of 1820 itself? It is submitted that it was not. Nor, in the multitude of tax titles which have been tried in the court below, was the point ever suggested, until the present case in 1857.

The whole argument in its support depends upon the assumption that the language of the 12th section, declaring that "the person or persons appointed to collect," etc., "shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith," if mandatory upon the corporation, requiring a distress in all instances. This is assumed because of the well-settled law that in certain cases the word "may" and other equivalent expressions will be construed "must," in order to give effect to the intention of the legislature; as in *Mason* v. *Fearson*, 9 How. 248.

But is this such a case?

In *Mason* v. *Fearson*, 9 How. 248, the charter had provided for the sale of one lot, to pay the taxes on all; and this court held that the corporation was bound to exercise the power so conferred; and that, the first two lots having produced more than enough to pay the taxes on the whole, the subsequent sales were void. This is not at all analogous to the present case, which is that of the express grant of co-ordinate remedies to be exercised optionally. The sale of one lot for the taxes due on all those owned by the same person, instead of unnecessarily selling them all, each for its own taxes, is manifestly for the benefit of the owner; but is it manifestly for his benefit that the summary remedy of a distress warrant shall be applied to his household furniture, rather than that a vacant lot lying in commons shall be sold?

This precise matter has been adjudicated by the supreme court of New Jersey, in the case of *Martin* v. *Carron*, 2 Dutch. 230. There the clauses in the charter of Newark were identical with those in this charter of 1820. This same objection was taken. But the court held that "the remedies are co-ordinate. It is not necessary that the goods and chattels of the owner or occupant of the lot be exhausted before proceeding against the land."

[Points 2 and 3 of the counsel for the plaintiff in error related to the construction of the ordinance of the corporation; but as the court held that these ordinances could not affect the power to sell the land for taxes, they are omitted as immaterial.]

Messrs. **J. Marbury, W. Redin, Sam. Tyler,** and **R. J. Brent,** for the defendant in error:

After citing and quoting from the sections of the acts of Congress, and the ordinances of the corporation bearing upon the question at issue, the counsel said: Was, then, the instruction so given by the court below, and excepted to by the defendants, right?

It was urged by the defendants that it was discretionary with the corporation and their officers to take and sell, either unimproved real property or the personal property of the owner, for the taxes; on the contrary, the plaintiff urges, and now submits, that under the 10th and 12th sections of the charter of 1820, there is no discretion in the corporation or collector: but

that it is mandatory upon them, under the provisions of that act, first to take the personal property of the owner possessed by him within the corporation for the taxes claimed, before resorting to his real estate.

The 10th and 12th sections of the charter of 1820 relate to the same subject, and must be taken together. The 10th section (which authorizes the sale of real property) is not independent, but must be construed in connection with the 12th section, which provides for the seizure and sale of the goods of the owner; and thus taken and construed, the two sections mean that if the owner of the real property has personal property upon the premises, or anywhere else in his possession within the corporate limits, sufficient to pay the taxes claimed, it shall be taken for them, and the real property, whether improved or unimproved, saved from sale therefor. The taxes to be collected were those which should be "imposed by virtue of the powers granted by the act." The taxes which the act authorized to be imposed were taxes on unimproved as well as improved lots. And all the taxes so imposed on all descriptions of property were, by the terms of the act, to be collected out of the goods of the persons chargeable with the tax. The person appointed to collect any tax, by virtue of the powers granted by this act, shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith. If he had goods upon the property on which the tax was imposed, they were to be taken there. If he had no goods thereon, but possessed them elsewhere within the corporate limits, it was not meant that the real property upon which the tax was imposed should be sold, but that goods should be taken wherever they were found in his possession within the jurisdiction of the corporation. It is the same as to both descriptions of property, improved and unimproved—taxes are imposed equally upon both, "by virtue of the same act," and are, as to both, to be alike collected in the same way out of the goods of the person chargeable with the tax. The real property might be resorted to, in the contingency of there being no personal property; but not "until all the other means of collection prescribed in the act" had been tried and failed. The 12th section may be read as a further proviso to the previous 10th section. And the 2d proviso of the 10th section, as to improved property, may be considered to have been inserted merely from abundance of caution as to that particular description of property, and not as any restriction upon the duty required in the 12th section, *viz.*, to take goods for all taxes imposed by virtue of the act, wherever the party possessed them within the corporate limits. The 12th section of itself was sufficient to protect both descriptions of property, improved as well as unimproved. This construction produces harmony and protects all the real property from sale, where the owner possessed personal property sufficient for the taxes claimed within the corporation, which the collector could find; and which, when taken, would be protected from replevin by the last clause of the 12th section. It effects, it is submitted, the intent, and secures the rights of all parties, the corporation as well as the citizen; whereas, a contrary construction, limiting the protection from sale to the improved property only, would leave the unimproved exposed, although the owner might have abundant personal property for all the taxes claimed, and would violate the intent.

Similar sections of the act of Congress of the 14th of July, 1798, to lay and collect a direct tax, were thus placed together and construed by this court in the case of *Parker* v. *Rule's Lessee*, 9 Cranch, 67.

The policy of the law has ever been to make the personal estate the primary fund for the payment of debt, and especially of incumbrances and charges for taxes. The authorities are numerous; but in addition to *Parker* v. *Rule's Lessee*, and the act of Congress of 1798, reference is merely made to Blackwell on Tax Titles, pp. 205, 209–213; *Scales* v. *Avlis*, 12 Ala. 617; the tax acts of Maryland, 1785, ch. 83, § 8, 1797, ch. 90, § 1, and *Mayor of Baltimore* v. *Chase*, 2 Gill & J. 376; all going to establish that personal property must be resorted to before the real estate. In the case at bar, the lot was unimproved, and the owner, at the time of the sale, and at all times, possessed abundant personal property. The fact that he had such was known to the corporation and its officers; quantity, value, and description, and the particular locality where to be found, being all entered upon their own books. The fact that he possessed such, and that the collector could have taken it, is found by the jury.

"Taking the whole statute together," therefore, and "looking to the policy required," the duty to take such personal property and abstain from sale of the unimproved real property was imperative and mandatory upon the corporation and collector under the provisions of this charter of 1820.

Mason v. *Fearson*, 9 How. 248, is a direct authority in support of the view that it was mandatory. The duty, if not precisely the same, was of the same character in both cases, and the words are equivalent.

Upon these §§ 10 and 12, then, of the charter of 1820, alone, and independent of the corporation ordinance of July, 1824, we submit that it was imperative first to take the personal property possessed by Mr. Carroll at the time of the sale; and that there was no discretion in corporation or collector first to resort to the unimproved real estate.

But if there was any discretion under the charter of 1820, the ordinance of July 3, 1824, taken in connection with those sections, places the matter beyond all doubt as to the duty of the collector. By that ordinance the corporation, if there was any discretion, made their election and exercised it.

[Counsel further discussed the effect of this ordinance of July 3d, and the claim of the defendants, that Carroll gave consent to the creditors to resort to his real estate rather than his personal.]

There can be no presumption to support a tax title, or in favor of a collector's proceedings. There is no estoppel, legal or equitable, in its favor against the true owner. All the substantial and essential requisites, as fixed by law, must be proved.

Especially is this so where the transaction is

recent, and the possession of the purchaser under the tax deed has scarcely exceeded, as in the case at bar, 12 or 13 years.

Early v. *Doe*, 16 How. 615; *Williams* v. *Peyton*, 4 Wheat. 77; *Thatcher* v. *Powell*, 6 Wheat. 119; *Porter* v. *Whitney*, 1 Me. 306.

Some remark was made below on the expression in the charter of 1820, § 10, in relation to the tax deed. The proper explanation of this is given in *Lyon* v. *Hunt*, 11 Ala. 315.

The general principle is that titles derived under tax sales, depend on a strict execution of a naked power, uncoupled with an interest.

Hubbell v. *Welden*, H. & D. Sup. 139; *Williams* v. *Peyton*, 4 Wheat. 77; *Early* v. *Doe*, 16 How. 618.

The act of 1820, ch. 104, § 10 (3 Stat. at L. p. 589), gives the corporation of Washington no power to sell real estate until after two years' taxes are due and in arrear; but no such limitation is found in regard to the liability of personal property for taxes, which may be distrained on and sold the moment they are assessed, and upon ten days' notice, according to the 12th section of this act.

The 7th section of the act of 1820 authorizes the corporation "to lay and collect taxes upon the real and personal property within the city."

It is therefore clear that Congress looked to the personal property of the debtor as the primary fund for the immediate and available revenues of the city, and to the realty as only secondarily or ultimately chargeable.

The power to collect taxes by distress on the goods, etc., is compulsory, and not optional, on the part of the city.

Mason v. *Fearson*, 9 How. 248; *Parker* v. *Rule*, 9 Cranch, 67.

The only difficulty is occasioned by the 3d proviso of the 10th section of the act of 1820, which forbids a sale of improved property whereon there is personal property sufficient to pay the taxes.

An argument is based on this proviso, to the effect that recourse need not be had to personal property primarily, except where it is found on improved real estate; but we consider this proviso as merely designed to subject primarily all personal property on the real estate, irrespective of its ownership.

The corporation of Washington had the right of pursuing, at its election, either the remedy by distress, or by sale of unimproved real estate, and this is held on the authority of the adverse case cited on the other side.

Martin v. *Carron*, 2 Dutch. 228.

The ordinance of July 3, 1824 (Rothwell's Laws, p. 169), is a conclusive election by the city, to require the collector to exhaust the personal effects of debtors, before selling the real estate.

Mr. Justice Grier delivered the opinion of the court:

The lessors of the plaintiffs below claim to recover a lot of ground in the city of Washington, the title to which was admitted to have been in their ancestor in 1835. In that year it was sold for taxes by the corporate authorities. The plaintiffs in error claim through *mesne* conveyances of the tax title.

432*] *The lot in question was assessed as vacant and unimproved; but the owner, Mr. Carroll, resided in Washington city. He owned a large number of unimproved lots, the taxes on which amounted to $5,690. He had personal property in and about his house, estimated at between five and six thousand dollars.

On the trial but a single defect was alleged against the tax title, which raised the question. "Whether upon the true construction of the charter of 1820, as amended by the charter of 1824, it was a condition to the validity of the sale of unimproved lands for taxes, that the personal estate of the owner should have been previously exhausted by distress."

The court instructed the jury: "That if Carroll resided within the limits of the corporation of Washington, and had in his possession personal property sufficient to pay all taxes due by him, which might have been seized and subjected to distress and sale, it was the duty of the corporation, through their collector, to resort first to such personal property; which not being done, the sale of the lot in question was illegal and void."

The correctness of this instruction is the only question presented by the record for our consideration.

The authority granted to the city and the mode of its exercise is to be found in the 10th section of the act "to incorporate the city of Washington," passed on the 15th of May, 1820 (2 Stat. at L. 583). It provides "that real property, whether improved or unimproved, on which two or more years' taxes shall have remained unpaid, may be sold at public sale, to satisfy the corporation therefor:" with this proviso, that no sale "shall be made in pursuance of this section of any improved property whereon there is personal property of sufficient value to pay the taxes," etc.

It is the obvious intent of this law that the thing or property shall be held liable for the tax assessed upon it, and that the tax is a lien *in rem*, which may be sold to satisfy it. It seems to assume, also, that the property should be assessed to some person as owner, for it provides for a longer or shorter notice by advertisement, according to the residence of the owner, whether in or out of the district or of the United States. Where *the owner is out [*433 of the jurisdiction of the corporation, the assessment can impose no personal liability on him. But where he resides in the city, he may be considered as personally liable for the taxes assessed against his property and "charged to him;" and though not liable to an action of debt, the 12th section of the act provides an additional remedy for the corporation. Besides that of proceedings *in rem*, under the provisions of the 10th section, it enacts that "the person or persons appointed to collect any tax imposed by virtue of the powers granted by this act shall have authority to collect the same by distress and sale of the goods and chattels of the person chargeable therewith," etc.

The act of May 26, 1824 (4 Stat. at L. 75), which modifies and changes some of the provisions of this act, provides, among other things, "that no sale for taxes shall be void by reason of such property not being assessed or advertised in the name of the lawful owner."

Without inquiring whether this act repeals

the 12th section of the previous act by implication, it shows plainly that the property assessed is considered as primarily liable for the tax, without regard to ownership. But assuming that the owner, residing in Washington, is still personally liable for taxes assessed on his unimproved lots, there is nothing to be found in this law that, by any fair construction, requires that the remedy against the person must be exhausted before that against the property charged with the tax can be resorted to. It is not necessary to the validity of the assessment and sale of the property taxed that the name of the true owner be ascertained. The collector, therefore, cannot be bound to search for him, or to distrain the personal property of one who may or may not be the owner, even when named as such in his assessment list.

The remedy given by the 12th section to the corporation is co-ordinate or cumulative, but is not imperative as a condition precedent to the exercise of the authority to sell the property assessed. It is a power conferred on the officer, to be used at his discretion—not a favor to the owner. If he is unable to pay the taxes as-
434*] sessed on his property, it may not *be a very desirable measure for him to have his household furniture distrained and sold on ten days' notice, when the remedy against his land cannot be pursued till two years' taxes are due and unpaid; and the owner has then two years more to redeem his land after the sale. A construction of this act which made it the imperative duty of the collector to distrain the personal property, might be ruinous to the proprietor, and deprive him of an important privilege.

The city of Washington was laid out on an immense scale. But a very small portion of the lots and squares were improved or productive. Their value to the owners was, in a great measure, prospective, while the present burden of taxes, to those who owned large numbers of them, was oppressive. As we see in the present case, if the collector had levied on the personal property of the owner for the taxes charged on his vacant and unproductive lots, it would have left him without furniture in his house or servant to wait on him. Hence, a four years' delay was to him a valuable privilege. It demonstrates, too, the evident policy of the act of Congress in not compelling a sale of the owner's personal property before the lands charged could be sold. In Georgetown and Alexandria, old settled towns, where the lots were nearly all improved, and yielding profit to the owners, the statute adopted a different policy. By the proviso to the 8th section of the act of 1824. which applies exclusively to those towns, the collector is not permitted to sell real property where the owner charged with the tax has sufficient personal estate, out of which to enforce the collection of the debt due.

The case of *Mason* v. *Fearson*, 9 How. 248, has been urged in the argument as an example of the construction of this statute, which should be followed in this case, and where the word "may" is construed to mean "must." But that case has no analogy to the present. It is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of a statute. But there is nothing in the letter, spirit, or policy of this act which requires us to put a forced construction on its language, or interpolate a provision not to be found therein.

*In this case, the owners of the tax [*435 title have had the possession, paid the taxes, built and made valuable improvements on the lot, in the presence of the former owners, for near twenty years. That which was of comparatively small value at first, has now become valuable. Under such circumstances, a court of justice should be unwilling to exercise any judicial ingenuity to forfeit even a tax title, where the former owners have been so slow to question its validity.

The counsel for the appellees have endeavored to support this instruction of the court, by reference to certain ordinances of the corporation, which, among other things, direct the collector to levy first on the personal property of the person charged with the tax, unless such person shall give consent in writing to the contrary. This direction to the collector is a very proper one. It leaves the election of this remedy to the person charged, and not to the officer. But the power to sell the lands for taxes is to be found in the acts of Congress, not in the ordinances of the corporation. They can neither increase nor vary it, nor impose any terms or conditions (such as evidence of the owner's election), which can affect the validity of a sale made within the authority conferred by the statute.

The purchaser of a tax title is not bound to inquire further than to know that the sale has been made according to the provisions of the statute which authorized it. The instructions or directions given by the corporation to their officers may be right and proper, and may justly be presumed to have been followed; but the observance or nonobservance of them cannot have the effect of conditions to affect the validity of the title.

The question argued by the counsel of appellees, again bringing up the endless controversy as to the *terminus a quo*, in the computation of time, and which was noticed by this court in the case of *Griffith* v. *Bogert*, 18 How. 162, is not in the case as presented by the record, and we cannot anticipate its decision.

Judgment reversed and venire de novo.

JOHN HOWLAND, Saml. Meeker, John Chadwick, and Oliver S. Halstead, Jr., Claimants of the Bark Griffin, her Tackle, etc., *Appts.*

v.

JOHN GREENWAY and George C. Dickson, *Libts.*

(See S. C. 22 How. 491-503.)

Master of vessel must acquaint himself with the laws of the country with which he is trading —appellants responsible for miscarriage of their master and agent—delivery of cargo into custom-house not sufficient delivery.

It is the duty of the master of a vessel to acquaint himself with the laws of the country with which he is trading, and to conform his conduct to those laws.

He cannot defend himself under asserted ignorance, or erroneous information on the subject.

It is the habit of every nation to construe and apply their revenue and navigation laws with exactness; and every ship master engaged in a foreign trade, must take notice of them.

In this case the master was informed of his duties upon his arrival at the port of destination, by the officers of the customs, and his embarrassment and loss can be attributed to nothing but his inattention.

Appellants are responsible for the miscarriage of their master and agent. Their contract is an absolute one, to deliver the cargo safely; the perils of the sea, only, excepted.

Under such a contract, nothing will excuse them for a nonperformance, except they have been prevented by some one of those perils, the act of libelants, or the law of the country.

No exception of a private nature, not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its nonperformance.

It was for the libelees to furnish the evidence to discharge themselves for the failure to perform their contract.

The delivery of the cargo into the custom-house, under the order of the officers, and the payment of the duties by the consignees, was not a right delivery, and the consignees are not responsible for their safety afterwards.

Where the delivery contemplated by the contract was a transfer of the property into the power and possession of the consignees, the surrender of possession by the master must be attended with no fact to impair the title, or affect the peaceful enjoyment of the property.

Argued Mar. 21, 1860. Decided Apr. 16, 1860.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was led in the district court of the United States for the southern district of New York, by the appellees, on a contract of affreightment.

The district court entered a decree in favor of the libelants. This decree having been affirmed, on appeal, by the circuit court, the claimants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **O. S. Halstead** and **O. S. Halstead, Jr.**, for appellants:

The bark arrived at Rio, January 23, 1853. She had a manifest, authenticated by the Brazilian consul at New York, open, in the hands of the master, and a duplicate one, sealed up by the Brazilian consul at the port of sailing, and directed to the inspectors of the custom house at Rio. She was boarded by the custom house officer immediately on her arrival. Greenway & Co. were immediately, and before giving entry, applied to by the master to act as consignees of the bark, and agreed and assumed the duties of such consignees.

Greenway & Co., by their shipping clerk Magalhaer, when giving entry, received the open manifest from the visiting officers, for the purpose of completing the necessary formalities. He examined that manifest, and says there was no entry in it of 132 boxes. He says it was two or three days after her arrival that the bark commenced discharging at the custom-house wharf. Greenway & Co. had the open manifest some two days, at least, before the bark commenced discharging. We submit that the testimony shows that Greenway & Co. then learned that the boxes were omitted in the manifest.

The testimony shows that the omission of the boxes, in the open manifest, was observed by Greenway & Co., in time to supply the omission and avoid all difficulty; and (so far as it may have any bearing upon a view of the whole case) that the same is true in reference to Abranches & Co. The consignees failed to notify the master of the omission. It could then have been supplied by the master, and all difficulty avoided. The supplying it then would be the same, in effect, as if it had been supplied by the master before delivering the manifests to the custom-house officers. On this open manifest, the master could then have supplied the omission. It was on this only that he could have ever before supplied it. The omission by the consignees, after discovering the error in time to have it corrected, to notify the master of it, was a gross failure of duty as consignees, and is proof of intended fraud.

We are nowhere told when and how the omission first came to the knowledge of the custom-house, nor when the goods were seized nor when they were sold.

What could more strongly give the character of fraud to the omission of the consignees to notify the master of the omission, at the time when it could have been supplied by him?

We submit that this testimony of the value was insufficient. It was, in the nature of things, impossible for us to give any proof whatever of the value. The chairs and furniture were inclosed in boxes; how many boxes contained chairs, and what kind of chairs; and how many contained tables, and what kind; and how many other furniture, and what kind, it is impossible for us to show. The boxes contained 2,613 cubic feet, freight fifteen cents per foot. A space eighteen feet square by eight feet high would contain two thousand five hundred cubic feet, within twenty-one feet of the cubic feet in these boxes. How could chairs and furniture that could be in these boxes be worth $5,000 or $6,000? There is no evidence that the chairs and furniture contained in the boxes were worth that.

As to damages. This libel is in a cause of contract, and the libel prays damages for the non-delivery of the goods. The actual damage to the libelants, is the measure of damages to be awarded.

The court, we trust, will not permit these consignees to make a speculation out of a case such as the testimony shows this to be, and where no fraud could have been intended, the boxes and every article of cargo being actually delivered into the custom-house.

Again; the charge in the libel, that the boxes or goods were confiscated by the Brazilian government to its use, is wholly unsustained. There is no evidence that they were subject to such confiscation, and if they were so subject, there is no proper evidence of any act of confiscation by the said government.

"The laws of the port of Rio do not authorize the seizure of goods after they have been discharged into the custom-house, for omission of entry in the manifest."

Messrs. **H. G. De Forest** and **G. Gifford**, for appellees:

1. The ship was bound by the bill of lading, to deliver the goods to the consignees.

The general rule is, that the delivery must be to the consignee in person, and this rule is always applicable, unless some other mode of

delivery is sanctioned by the usage of trade or express contract.

Ang. Carr. §§ 297, 298; 1 Pars. Mar. Law, 153; *Price* v. *Powell*, 3 N. Y. 325, and cases cited; *Gibson* v. *Culver*, 17 Wend. 305.

2. In the case of sea-going vessels, the usages of most ports make a delivery on the wharf, with reasonable notice to the consignee, a sufficient delivery. If the consignee cannot be found, or declines to receive the property, the carrier is not justified in leaving it on the wharf, even after notice. It is his duty, in such a case, to place it in a proper and safe place, where the consignee can obtain it.

Ostrander v. *Brown*, 15 Johns. 42; *Fisk* v. *Newton*, 1 Den. 45; Ang. Carr. § 300; 1 Pars. Mar. Law, 155, note.

3. In the present case, the goods were never delivered to the consignees.

It does not appear that Greenway & Co. ever received notice from the master that the goods were being discharged, or that they were ever invited to receive them. On the contrary the testimony shows that the goods were landed on the custom-house wharf, and deposited in the custom-house, and were there seized before any attempt was made by the master to make delivery, and while they were still in the custody of the officers.

4. The clause in the bill of lading, stating that the goods were "to be delivered at the ship's tackles," does not vary the obligation of the carrier to make such a delivery as shall give to the consignee the actual possession of the property.

5. The nondelivery of the goods not having been occasioned by the accepted perils, the ship and owners are clearly liable for their value.

Even if the seizure had been the arbitrary and merely capricious act of the Brazilian government, the failure to deliver would not have been excused.

Gosling v. *Higgins*, 1 Camp. 451; *Spence* v. *Chodwick*, 16 Q. B. 517; S. C. 10 Ad. & E. N. S.; *Evans* v. *Hatton*, 4 Man. & G. 954.

But the seizure was directly occasioned by the culpable neglect and omission of the master.

6. Even if the goods had come into the possession of Greenway & Co., the ship would not have discharged herself. Her duty was to deliver possession clear of all claims and liens incurred by the fault of her master and owners. Anything short of this would not have been the delivery contracted for under the bill of lading.

7. The commissioner did not err in his computation of damages.

The value of the property at Rio was sworn by Abranches to be $6,000, and the invoice value at New York was stated by Magalhaer to be between $5,000 and $6,000, which, with the addition of freight, etc., harmonize the testimony. The claimants had the opportunity of cross-examining Mr. Davison, who purchased the goods in New York; but they deliberately refrained from doing so.

8. This court will not, on this hearing, consider any exception as to the admissibility of any of the depositions or exhibits.

The depositions were filed and opened, and notice thereof given to the claimant's proctors, January 13, 1855.

See the 113th rule of the district court, southern district of New York.

Rule 33, of the supreme court, however, disposes of this question, providing that where an exception to the admissibility of a deposition, etc., does not appear on the record, it will be disregarded.

Rule 33, Feb. term, 1824, re-enacted as rule 13, Dec. term, 1858.

9. The decree of the circuit court should be affirmed with costs.

Mr. Justice **Campbell** delivered the opinion of the court:

This was a libel in the district court of the United States for the southern district of New York, against the bark Griffin and her owners, on a contract of affreightment by the appellees. The libel stated, that in November, 1852, at New York, there was shipped on that barque, of which the appellants are owners, one hundred and thirty-two boxes of chairs and furniture, to be delivered at the ship's tackles at the port of Rio de Janeiro, to the appellees, according to the terms of a bill of lading. That the regulations of the port of Rio de Janeiro re- [*500 quire the owner or master of a vessel arriving there, to submit to the officers of the customs a manifest of the cargo on board; and that cargo not mentioned in the manifest cannot be passed through the custom-house, but is liable to seizure and confiscation for that omission.

That the master of the barque omitted to enter the said consignment on the manifest rendered by him on his arrival, and in consequence the boxes were seized and confiscated, and so were lost to the consignees. The libelees answer that the goods referred to in the libel were discharged in accordance to the bill of lading, under the laws and regulations of the port, and under the order of the proper government officers, and went into the custom house under the direction of the libelants, they paying the duties thereon.

That after the delivery at the ship's tackles of the said shipment, the consignees became responsible for their safety; and that they were not confiscated or forfeited to the government, nor abandoned by the consignees to the owners of the ship. Upon the pleadings and proofs, a decree was rendered against the libelees in the district court, which was affirmed in the circuit court, on appeal.

It appears from the testimony that it is the duty of a master of a foreign vessel, upon her arrival at the port of Rio de Janeiro, to deliver to the proper officer (Guarda Mor), upon his visit to the vessel, his passport, manifest, and list of passengers. He is required, "at the end of the manifest," to make such "declarations or statement for his security by adding any packages that may be omitted or exceeded in his manifest, giving his reasons for such omissions; no excuse will afterwards be admitted for any omissions or error."

That, "when it is proved that the vessel brought more goods than are specified or contained in the manifest, and not declared by the master, such goods will be seized, and divided among the seizors, the master also paying into the National Treasury a fine of one half their value, besides the customary duties thereon." It further appears, that The Griffin reached the port of Rio de Janeiro in January, 1853, and

that her master rendered her passport, manifest, 501*] and list of passengers, *and was required to make any statement or declaration in addition, and informed that no other opportunity would be afforded to him. The master answered, that he had no addition to make or declaration to record. The goods were discharged according to the custom of the port, under the direction and orders of the revenue officers, into the custom-house, and while there, and before the entry had been completed, they were seized and confiscated under the regulation before stated. In a petition by the master to the Brazilian government for a remission of the forfeiture and penalty he had incurred, he says: "That on the last voyage of the vessel a seizure was made of one hundred and thirty-two packages of furniture, more or less, on the ground that they were not entered in the manifest, and, although the petitioner acknowledges that the custom-house officers have acted according to the instructions of the department, still there are reasons of equity which render this seizure contrary to law."

These reasons were, that the Brazilian consul at New York was a novice in his office, and had failed to give him accurate information, and had approved of a manifest full of mistakes; and that the master had acted in good faith, and was obviously free from any suspicion of a design to defraud the revenue. This petition was referred to the director-general of the revenue, who returned for answer: "That taking into consideration the quantity of the packages seized (130 cases), and the quality of the goods therein contained (furniture), and more particularly the circumstances which occurred before the seizure thereof (the packages having been landed, and the duties paid), there is no plausible reason to ascribe to fraud or bad faith the omissions of the said packages in the manifest of the vessel in which they were imported; but, on the other hand, the circumstance of the proof of fraud, or even of its presumption, is not essential in order to render the seizure a legal one in the present hypothesis. It is expressed in the case before mentioned, in the articles 155, 156, of the general regulations of the 22d June, 1836, that the simple fact of finding either more or less packages is punishable with the penalties therein decreed; and the 502*] seizure to which the petition *refers, having been made and adjudged in conformity with the provisions of the said article 155, I am of the opinion that the decision of the custom-house ought to be confirmed." The decree was entered accordingly. The testimony shows that the packages were sold by the inspector of the customs as forfeited, and that the consignees sustained a total loss. There is no testimony to show that they contributed to produce this result. It was the duty of the master of the barque to acquaint himself with the laws of the country with which he was trading, and to conform his conduct to those laws. He cannot defend himself under asserted ignorance, or erroneous information on the subject. It is the habit of every nation to construe and apply their revenue and navigation laws with exactness, and without much consideration for the hardship of individual cases. The magnitude and variety of the interests depending upon their efficient administration compel to this, and every ship master engaged in a foreign trade must take notice of them.

The Vixen, 1 Dod. 145; *The Adams*, Edw. Adm. 310.

In the case before us the master was informed of his duties upon his arrival at the port of destination by the officers of the customs, and his embarrassment and loss can be attributed to nothing but his inattention. The question arises, whether the appellants are responsible for the miscarriage of their master and agent. Their contract is an absolute one to deliver the cargo safely, the perils of the sea only excepted. Under such a contract, nothing will excuse them for a nonperformance, except they have been prevented by some one of those perils, the act of the libelants, or the law of their country. No exception of a private nature, which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for nonperformance. *Atkinson* v. *Ritchie*, 10 East, 533. In *Spence* v. *Chodwick*, 10 Q. B. 516, the defendants pleaded, "that the ship, in the course of her voyage to London, called at Cadiz; and while there, the goods were lawfully taken out of the ship by the officers of the customs on a charge of being contraband under the laws of Spain, without default on the part of the officers of the ship. The *court affirm the rule, [*503 that when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." It was for the libelees to furnish the evidence to discharge themselves for the failure to perform their contract.

They insist that the delivery of the cargo into the custom-house under the order of the officers, and the payment of the duties by the consignees, was a right delivery, and that the consignees are responsible for their safety afterward. We do not concur in this opinion. The delivery contemplated by the contract was a transfer of the property into the power and possession of the consignees. The surrender of possession by the master must be attended with no fact to impair the title or affect the peaceful enjoyment of the property. The failure to enter the property on the manifest was a cause of confiscation from the event, and rendered nugatory every effort subsequently to discharge the liability of the ship and owners.

The appellants complain that the proof does not support the decree in respect of the damage assessed. One witness testifies to the market value of the packages in Rio de Janeiro, and another approximates their costs in New York, and upon this testimony the assessment was made. It was competent to the appellants to introduce testimony in the circuit court, or in this court, upon that subject, but none has been submitted.

We should not be justified in concluding the decree to be erroneous under the circumstances.

Decree affirmed.

436*] *HENRY DALTON, *Appt.*,
v.
THE UNITED STATES.

(See S. C. 22 How. 436–443.)

Evidence of alienage of grantee of Mexican title —loose conversations—presumptions from grant.

In this case, it is held that there is not sufficient evidence to establish the fact of alienage of the grantee of a Mexican title, against the strong presumption of the contrary arising from the face of the *espediente* and definitive title.

In all cases, the testimony of admissions or loose conversations, should be cautiously received, if received at all.

Such testimony ought not to be received, to outweigh the prima facie (if not conclusive) presumptions arising from the *espediente* and definitive title.

Argued Dec. 6, 1859. Decided Apr. 23, 1860.

APPEAL from the District Court of the United States for the Southern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by the appellant, for the confirmation to him of a claim to a certain tract of land.

The board of land commissioners entered a decree confirming the claim. On appeal, by the United States to the district court, this decree was reversed; whereupon the petitioner took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **R. J. Brent**, for appellants:

1. Pio Pico, as governor *ad interim*, had the general power to grant. His official character cannot be questioned. Every presumption of law is in his favor, nor can he be styled a revolutionary governor. The court will judicially notice the history and laws of California, under the Mexican government, as much as the laws of the state of the Union.

Frémont v. *U. S.* 58 U. S. (17 How.) 557.

When Governor Micheltorena left the department, driven out, it is true, by a revolutionary party, the office of governor devolved by law upon the senior member of the departmental assembly (art. 20, law of March 20, 1837; Arrillaga's collection of decrees, Jan. to Dec. 1837); so that Pico became governor *de jure* as well as *de facto*. He made this grant as governor *ad interim*.

Arredondo's Case, 6 Pet. 727.

The Supreme Court have already recognized the power of Governor Pico, and it would be strange that after recognizing his official character, it should now hold that the presumption is not in favor, but against the authenticity of his acts.

U. S. v. *Vaca*, 59 U. S. (18 How.) 556; *U. S.* v. *Sutherland*, 60 U. S. (19 How.) 363.

This case is totally different from that of *The U. S.* v. *Cambuston*, for here there can be no doubt about the bona fides of the grant.

2. It is submitted that there is no sufficient evidence in the record to show that he was an alien to Mexico.

None of the declarations of Dalton are in a positive form. They were made to third parties under circumstances not affecting this litigation, and they are not sufficient to rebut the presumption that he was a Mexican citizen. If the court deem that a material presumption to sustain this grant against these loose declarations of his, we have the positive patent of the Mexican authorities, not issued improvidently by the governor, but after nearly two months' consideration, and after due report from the municipal authorities, that there was no impropriety in the grant.

3. But if the court should be satisfied that the fact of the alienage of Dalton is sufficiently proved, then it is submitted that this fact does not constitute, by the Mexican law, an absolute incapacity on his part to take lands in California.

Phillips v. *Rogers*, 5 Mart. 700–745; 1 White's New Recop. 588; article 1 of law of 1824, 1 Rockwell, 451; and regulations of 1828, art. 1, p. 453.

Mr. **J. S. Black**, *Atty-Gen.*, for the appellee:

After stating the evidence, and the proceedings under which the land in this case was alleged to have been granted, the counsel proceed:

I object to the allowance of this claim because:

1. The execution of the grant by the governor, and its delivery to the grantee, are unsatisfactory and illegal. To sustain the first objection, there needs but a reference to that fundamental principle of evidence, which forbids the admission of any evidence which is not the best that the nature of the case will admit of.

2. The certificate of approval by the departmental assembly is fraudulent, and voids the whole title.

3. Henry Dalton, being a British subject, never naturalized under the laws of either Mexico or the United States, as is shown by the evidence, was, and is, incapable of receiving or holding a title to the property in controversy.

Constitutional law of Mexico, Dec. 15, 1835, art. 13; decree of March 1842, 1 Rockwell, 611; colonization law of 1824, 2 White's Recop. pp. 59, 62; *Arguello's Case*, 59 U. S. (18 How.) 547.

4. Pio Pico, at the date of this grant, had no power to devest the nation of its title in the public domain, and bestow it upon any individual.

Upon this point the counsel reviewed the order of the events connected with the expulsion of Micheltorena and the accession of Pico.

5. The grant was coupled with the condition to pay $500, which has never been complied with.

Mr. Justice **Grier** delivered the opinion of the court:

The title of Dalton is found in the archives, and its authenticity is not disputed. The *espediente* exhibits:

1st. A petition of Henry Dalton, dated March 12th, 1845, at Los Angeles, setting forth that he is a resident of that city; that he is endeavoring to increase the number of cattle on the premises which he possessed, called Azusa, but that he lacked more land for that purpose; that the mission of San Gabriel *owned a [*440 large plain adjoining his tract of Azusa, which was useless to them. It was accompanied with a *diseno* or map of the land. The quantity desired was two *sitios*.

On the 13th of March, Pio Pico, acting governor, makes the usual marginal order for information, referring the petition to Father Thomas Estinega, minister to the mission of San Gabriel, to report.

March 26th. Estinega reports, that the tract solicited is one of those which the mission cannot cultivate, because it is deficient in water; and considering that Dalton offers to deliver him, as a gift for the Indians, $500, he consents that a grant of the land be made to Dalton.

This petition was referred also to the municipal counsel of Los Angeles, who reported in favor of the grant, and on the 14th of April certified their approval to the governor.

On the 26th of May, 1845. Governor Pico orders a grant to be made out for two *sitios*, and sent to the departmental assembly for their approval.

June 9th, 1845. The departmental assembly, upon report of the committee on waste lands, to whom the *espediente* had been referred, approve the grant in conformity with the law of August 18th, 1824, and the regulations of 21st of November, 1828.

In pursuance of this grant. judicial possession was delivered to Dalton, February 14, 1846, in due form, with a regular survey of the boundaries.

The only objection urged in this court to this title, as justifying its rejection, is, that Henry Dalton was a foreigner, and had not been naturalized, and was, therefore, incapable of taking a grant of land.

The counsel for the plaintiff in error deny both the law and the fact, as assumed in this objection.

1st. They contend that it was no part of the policy of Spanish or Mexican government to exclude foreigners from holding lands; and that the colonization law of 1824 invites foreigners to "come and establish themselves within the Mexican territory, and gives them privileges against taxation," etc., etc.; and provides that, until after 1840, the General Congress 441*] *shall not prohibit any foreigner as a colonist, unless imperious circumstances should require it with respect to individuals of a particular nation.

2d. They contend, also, that the regulations of 1828 require the governor to obtain the necessary information as to whether the petitioner is a person within the conditions required to receive a grant; that the *espediente* found in the record shows a full compliance with the law; that the definitive title, which is a valid patent, recites that the petitioner was "in the actual possession, by just title, of a *rancho*" known by the name of Azusa; that this is a legislative adjudication of the fact of the grantee's capacity to hold land, and *per se* a naturalization, if he had previously been an alien; that, at least, it affords a prima facie, if not a conclusive presumption, of the grantee's capacity to receive a further grant of land.

3. They contend, also, that any legislation repugnant to this policy of the government of Mexico since that time originated in, perhaps, a just jealousy of their American neighbors, and was aimed wholly at them, and intended to apply only to the colonies bounding on the United States; that this is apparent from the edict of Santa Anna of 1842, which permits foreigners not citizens, residing in the republic, to acquire and hold lands, and excepts only the departments "upon the frontier and bordering upon other nations;" that California was never treated as within this category, as the colonized and settled portion of it is separated a thousand miles from the frontier or border of any nation, and was at that time almost a *terra incognita* to the rest of the world.

4th. They contend that, by the Spanish as well as by the common law, a foreigner is not incapable of taking a grant of land, but holds it subject to be denounced in the one case, and forfeited by an inquest of escheat in the other; that the grant in this case being complete, neither the United States land commissioners, nor the courts authorized to adjudicate the Mexican title under the treaty, can exercise the functions either of denouncers or escheators.

5th. And lastly. It is contended, that even if the court considered itself bound to declare this grant void by reason *of the alleged in- [*442 capacity of the grantee to take or hold, yet that there is no sufficient evidence to establish the fact of alienage against the strong presumption of the contrary, arising from the face of the *espediente* and definitive title.

The court does not intend to express any opinion upon the first four of these propositions, as the last suggests a sufficient reason for the confirmation of this grant.

In all cases, the testimony of admissions or loose conversations should be cautiously received, if received at all. They are incapable of contradiction. They are seldom anything more than the vague impressions of a witness of what he thinks he has heard another say—stated in his own language, without the qualifications or restrictions, the tone, manner, or circumstances, which attended their original expression. If a complete record title, with ten years' possession, could be devested by such testimony, its tenure would be very precarious, especially where the owner is surrounded by a population of settlers interested in defeating it. All the evidence on the record on the subject of alienage, besides that of a brother who proved himself an alien, is in the deposition of two witnesses. One states that Dalton, in order to avoid serving as a juryman, said "he did not claim to be an American or Mexican citizen." He might well have been a citizen, although he was not desirous of setting up such a claim on that occasion. The other states that in 184[illegible], during the war, when the country was occupied by the American forces, he said "he was not a Mexican, and never intended to become an American citizen." At such a time, he may have had many motives prompting him to make such a representation. The Mexican government had ceased to protect him, and the treaty of Guadaloupe Hidalgo had not then made him an American citizen.

Now, assuming that these witnesses have remembered and reported the precise words used by the claimant in these loose conversations, they contain no positive assertion that he had never been naturalized, or was born out of Mexico. Such testimony ought not to be received to outweigh the prima facie (if not conclusive) presumptions arising from the *expediente* and definitive title.

*In this respect, this case closely re- [*443 sembles the case of *United States* v. *Reading*, 18 How. 1.

The decree of the District Court is reversed, and the title of the claimants to the land in question is hereby confirmed.

THE NEW YORK AND BALTIMORE TRANSPORTATION COMPANY, *Appts.*,

v.

THE PHILADELPHIA AND SAVANNAH STEAM NAVIGATION COMPANY, Owners of the Steamship Keystone State.

(See S. C. 22 How. 461–473.)

What are sufficient lookouts on vessels—steamers meeting sailing vessels must keep out of their way—propellers not governed by rule of sailing vessels—rule of steamers meeting each other.

Collision between a steamer and a barge, in tow of the propellor, on the river Delaware.

Lookouts stationed in positions where the view forward, or on the side of the vessel, is obstructed by the lights, or any part of the vessel, do not constitute a compliance with the requirements of law.

To constitute such a compliance, they must be persons of suitable experience, properly stationed on the vessel, and actively and vigilantly employed in the performance of duty.

Steamers are required to keep out of the way of sailing vessels upon the ground that their power and speed are greater than vessels of the latter class, and those in charge of them can more readily and effectually command that power and speed, so as to avoid a collision, when it would be impossible for a sailing vessel to keep out of the way.

None of the reasons on which the rule is founded, as applied to sailing vessels, exist in case of propellers, which have nearly the same speed as side-wheel steamers, and quite as much power.

If they take other craft in tow, those in charge of them ought to augment their vigilance, in proportion to the embarrassments they have to encounter, especially when they do not see fit to slacken their speed.

The law is well settled, that steamers approaching each other from opposite directions, are respectively bound to port their helms and pass each other on the larboard side.

Where both vessels, as they approached each other, were near mid-channel, and the propeller starboarded her helm, and attempted to cross the bows of the steamer, that movement of the propeller was a direct violation of the rules of navigation, and was entirely without excuse.

Argued Mar. 26, 1860. Decided Apr. 23, 1860.

APPEAL from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The libel in this case was filed in the district court of the United States for the eastern district of Pennsylvania, by the appellants, to recover damages resulting from a collision.

The district court entered a decree dismissing the libel. This decree having been affirmed, on appeal, by the circuit court, the libelant took an appeal to this court.

A further statement of the case appears in the opinion of this court.

Messrs. **Wm. Schley** and **G. M. Wharton**, for appellant:

1. The Artisan and her tow were not on an equality with The Keystone State; and the rules, whether statutory or judicial, applicable to vessels on an equality with respect to the capacity of selfmanagement, are not applicable to the former.

The act of Congress of Aug. 30, 1852, (10 Stat. at L. 61–72), applies only to passenger steamers.

See § 42.

So, also, the rules of the inspectors under the authority of the 29th section, in the matter of vessels passing each other, signal lights, etc., embrace only the same class of steamboats, and are intended to avoid collisions between such vessels.

Those rules were, however, obligatory on The Keystone State.

The 5th rule of the supervising inspectors, adopted Oct, 29, 1852, provides that it shall not be lawful for an ascending boat to cross a channel, when a descending boat is so near that it would be possible for a collision to ensue therefrom.

This rule was violated by the steamer.

Although not bound by the statute, the propeller did adopt the dictates of prudence and good seamanship, by keeping in to the Jersey side of the channel, and leaving the center of it free.

A tug with a tow in charge, is at least as helpless, in comparison with a steamer, as a sailing vessel; and with respect to the latter, the rule is well settled, that the steamer meeting such an one must give way.

See *Fashion* v. *Wards*, 6 McLean, 153; *New York and Liverpool Mail Steamship Co.* v. *Rumball*, 62 U. S. (21 How.) 372; *The Oregon* v. *Rocca*, 59 U. S. (18 How.) 570; *St. John* v. *Paine*, 10 How. 583; *The Genesee Chief*, 12 How. 451.

There is nothing in our case to make it an exceptional one, or subject it to other rules of navigation.

The Keystone State could have avoided the collision; and by the law of 1852 and the decisions of this court, she was bound to avoid the collision if possible.

2. It being night, and the steamer approaching the harbor, it was her duty to proceed slowly and with caution; not having done so, she is responsible for the consequences.

Culbertson v. *Shaw*, 59 U. S. (18 How.) 584; *The Louisiana* v. *Fisher*, 62 U. S. (21 How.) 1; *Peck* v. *Sanderson*, 58 U. S. (17 How.) 178; *The James Watt*, 2 W. Rob. 271; *The Birkenhead*, 3 W. Rob. 75; *The New York* v. *Rea*, 59 U. S. (18 How.) 228.

3. Even if the libelants committed any fault (which is, however, denied), a small exertion on the part of the respondents being sufficient to have prevented a collision, they were bound to make it.

The Genesee Chief, 12 How. 461; *St. John* v. *Paine*, 10 How. 557; *Newton* v. *Stebbins*, 10 How. 586.

4. If both vessels were in fault, it was an error to throw the whole loss on the libelants; the damages should have been divided.

The James Gray v. *The John Fraser*, 62 U. S. (21 How.) 184; *The Catharine* v. *Dickinson*, 58 U. S. (17 How.) 170; *Chamberlain* v. *Ward*, 62 U. S. (21 How.) 548.

The barge followed the course of The Artisan, and obeyed her movements. She was entirely under her control. There is no evidence of any fault imputable to the barge; her being, therefore, the thing which actually came in collision with the steamer, makes no difference.

The James Gray, 62 U. S. (21 How.) 194.

Messrs. **Charles S. Keyser**, **St. George T. Campbell**, and **P. McCall**, for appellees:

1. The act of Congress of 1852 (10 Stat. at

NOTE.—*Collision — rules for avoiding — steamer meeting steamer*—see notes to 14 L. ed. U. S. 68; 33 L. ed. U. S. 453; 30 C. C. A. 630.

L. 661-672), and the rules of the supervising inspector appointed under the same, were applicable to The Keystone State as a passenger steamer, and to the propeller also, if carrying passengers as set forth in the libel, so far as respects lights and movements.

2. The Admiralty rules are imperative—they are obligatory upon vessels approaching each other, from the time necessity for precaution begins, and continue so long as they advance.

N. Y. & L. & U. S. S. Co. v. *Rumball*, 62 U. S. (21 How.) 383.

3. The rule laid down is, that when two steam vessels are approaching each other, each shall port and go to the right, passing each other larboard and larboard.

This rule is imperative in English courts of Admiralty, and fully adopted by the United States courts.

The Duke of Sussex, 1 Wm. Rob. 275; *The Gazelle*, 1 Wm. Rob. 471; *The Watt*, 2 Wm. Rob. 71; *St. John* v. *Paine*, 10 How. 558; *Oregon* v. *The Rocca*, 59 U. S. (18 How.) 572; *Wheeler* v. *The Eastern State*, 2 Curt. C. C. 142.

4. A propeller, whether carrying passengers or engaged and used only for towing, and when having a tow in charge, is still a steamer, subject to all the general rules applicable to steamers. And the rule of law makes no such distinction as would require them to be considered, with respect to other steamers, as sailing vessels; on the contrary, a steamer with a tow in charge, is bound to adopt the same rules with regard to a sailing vessel as a passenger steamer—no distinction is recognized between them. *The New York* v. *Rea*, 59 U. S. (18 How.) 223. They are required also to have a lookout, charged specially with the duty.

Chamberlain v. *Ward*, 62 U. S. (21 How.) 571.

5. It was the duty of the propeller to have a competent and vigilant lookout stationed at the forward part of the steamer, actually and vigilantly employed in the performance of that duty.

St. John v. *Paine*, 10 How. 557; *Chamberlain* v. *Ward*, 62 U. S. (21 How.) 548; *The James Gray* v. *The John Fraser*, 62 U. S. (21 How.) 192.

6. No such condition of things existed at the time and place of the collision, as required the speed of the steamer to be reduced more than that stated in the evidence. The distance from the port of Philadelphia was twenty miles, and there were no vessels at anchor or otherwise, to interfere with the full use of the whole channel.

The New York v. *Rea*, 59 U. S. (18 How.) 223; *Culbertson* v. *Shaw*, 59 U. S. (18 How.) 584; *The James Gray* v. *The John Fraser*, 62 U. S. (21 How.) 185.

7. The 5th rule of the supervising inspectors, adopted October 29, 1852, cited in appellant's brief, refers exclusively to boats navigating the rivers falling into the Gulf of Mexico and their tributaries.

Mr. Justice **Clifford** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the eastern district of Pennsylvania, in a cause of collision, civil and maritime.

It was a suit *in rem* against the steamship The Keystone State, brought by the appellants as the owners of the barge known as The A. Groves, Jr., to recover damages on account of a collision which took place on the 18th day of August, 1857, between the steamer and the barge on the river Delaware, whereby the barge was sunk in the river, and her cargo was greatly damaged.

At the time of the disaster the barge was in tow of a propellor, called The Artisan, which was also owned by the appellants, and to which the barge was attached by a hawser, about one hundred and seventy feet in length. It occurred between one and two o'clock in the morning, about twenty miles below the city of Philadelphia, to which port the steamer was bound on her return trip from Savannah, in the state of Georgia.

According to the case made in the libel, the propeller, with *the barge in tow, was [*469 on her way from the city of New York to the city of Baltimore, with her usual complement of freight. She was proceeding down the river, on the eastern side of the channel, and the steamer was coming up the river, on the opposite side of the channel, with ample room to have kept clear of the barge.

To show that neither the propeller nor the barge was in fault, it is alleged by the libelants that both those vessels had proper lights, and that the propeller had sufficient lookouts properly stationed on the vessel, and that they were vigilantly employed in the performance of their duties. They also allege that the steamer, when about three quarters of a mile distant from the propeller, changed her course more out into the stream of the river, heading diagonally across the channel, in the direction of the descending vessels, and ran with great force and violence against the barge, striking her on the starboard side, near the after gangway, and cutting her down to such an extent that she immediately sunk in the river. In this connection they also allege that the barge, at the time of the collision, was laden with a cargo of merchandise, valued at $70,000, and that the goods were damaged by the disaster to an amount equal to half their estimated value.

It is denied by the respondents that the circumstances attending the collision are truly stated in the libel. On the contrary, they aver that it was occasioned wholly through the fault and gross negligence of those in charge of the descending vessels. To lay the foundation for that theory, they allege that while the steamer was proceeding up the river at mid-channel, in the regular course of her voyage, and when about four miles below Marcus Hook, the second mate, pilot, and lookout of the steamer, discovered lights directly ahead, which appeared to be about three miles distant; that the steamer continued her course up the channel, keeping the lights on her larboard bow, but as near ahead as was practicable; that after continuing that course for some time, and when about a mile distant from the lights, they were found to be the lights of the propeller, and appeared to be at mid-channel. *Orders were then [*470 given by the pilot of the steamer to port her helm, so as to bring the lights of the propeller a point on the larboard bow of the steamer; and the order was forthwith obeyed. At that time the steamer, as alleged in the answer.

was heading northeast by east; and she continued on that course, keeping the lights of the propeller one point on her larboard bow. until she approached within three hundred yards of the lights, when the propeller suddenly starboarded her helm, and attempted to cross the bows of the steamer. On seeing the propeller change her course in that direction, the pilot of the steamer gave the signal to slow and stop in immediate succession, and the orders, as alleged, were promptly obeyed. Those orders were so far carried into effect that the propeller passed on her course without injury, but the barge was dragged by the hawser directly against the bows of the steamer, and thereby received the damage, as alleged in the libel.

Such is the substance of the pleadings, respecting the circumstances attending the collision, so far as it is necessary to examine them at the present time.

After the hearing in the district court, a decree was entered for the respondents, dismissing the libel; and on appeal to the circuit court, that decree was affirmed—whereupon the libelants appealed to this court.

As appears by the proofs, the steamer, at the time of the collision, was well manned and equipped, and was in charge of a branch pilot, fully qualified to conduct and manage steam vessels on that river. She was a side-wheel steamer, of fifteen hundred tons burden, engaged in carrying freight and passengers, and had proper lights and sufficient and vigilant lookouts. They discovered the lights of the propeller when she was three miles distant, and continued to watch the lights till the collision occurred. On the other hand, the propeller was a vessel of one hundred and twenty-two tons burden, and the tonnage of the barge was about the same.

Three men, the master, the wheelsman, and one of the watchmen, were on the deck of the propeller at the time of the collision. All of the other hands, including the pilot, were below. Of those on deck, the master was stand-
471*] ing *forward of the pilot house, but the watchman was standing aft the house, which he admits was higher than his head, so that he could not see over it. His position for a lookout was clearly an improper one, as the view forward was entirely obstructed by the house of the vessel. *Chamberlain* v. *Ward*, 21 How. 570. Lookouts stationed in positions where the view forward, or on the side of the vessel to which they are assigned, is obstructed by the lights or any part of the vessel, do not constitute a compliance with the requirement of the law.

To constitute such a compliance, they must be persons of suitable experience, properly stationed on the vessel, and actively and vigilantly employed in the performance of that duty.

In this case, however, it appears that the steamer was actually seen by the master, who was in charge of the deck, in season to have adopted every necessary precaution to have avoided the disaster, but he admits that he did not pay much attention to the approaching vessel. When he first saw her, he says she was proceeding right up the river, but adds, that in the course of five minutes she changed her course, and ran from the western towards the eastern shore, which is the theory set up in the libel. According to the evidence, the speed of the steamer was nine or ten miles an hour, and that of the propeller was seven or eight miles an hour, with an ebb tide. At the place where the collision occurred, the channel of the river is about three fourths of a mile wide, and the evidence shows that there is a cove or bend in the river below, so that a vessel coming up the river in the night time would appear to an inattentive or casual observer, standing on the deck of a descending vessel, as being near the western shore, when in point of fact she was at mid-channel. Witnesses on both sides were examined as to the character of the night, and they generally agree, that while it was somewhat cloudy, there were intervening stars, and that it was not unusually dark.

Two propositions were chiefly relied on by the libelants. In the first place it was insisted in their behalf, that the propeller, with the barge in tow, ought to be regarded in the *same light as a sailing vessel, and that [*472 it was the duty of the steamer to keep out of the way. No authority was cited in support of the proposition, and we are not aware of any decided case that favors that view of the law. Steamers are required to keep out of the way of sailing vessels, upon the ground that their power and speed are far greater than vessels of the latter class, and because those in charge of them can more readily and effectually command and appropriate that power and speed so as to avoid a collision, when it would be impossible for the sailing vessel to keep out of the way. St. John v. *Paine*. 10 How. 583; *The Genesee Chief* v. *Fitzhugh*, 12 How. 463; *Steamship Co.* v. *Rumball*, 21 How. 384. None of the reasons on which the rule is founded, as applied to sailing vessels, exist in a case like the present. Propellers have nearly the same speed as side-wheel steamers, and quite as much power. Whether they obey the helm as readily or not, may admit of a question, but there is not sufficient difference in that behalf to justify any discrimination whatever in the application of the rules of navigation. If they take other craft in tow, those in charge of them ought to augment their vigilance in proportion to the embarrassments they have to encounter, especially when they do not see fit to slacken their speed.

It is insisted, in the second place, that the collision was occasioned through the fault of the steamer; that she changed her course and attempted to pass the bows of the propeller, as is alleged in the libel.

On the part of the respondents, this proposition of facts is denied, and they insist that the fault was committed by the propeller, in omitting to port her helm and go to the right. Beyond question, the law is well settled that steamers approaching each other from opposite directions are respectively bound to port their helms and pass each other on the larboard side.

No attempt was made at the argument to controvert the proposition, and it is too firmly established by decided cases to require any argument in its support.

The Duke of Sussex, 1 Wm. Rob. 285; *The Gazelle*, 1 Wm. Rob. 471; *The James Watt*, 2 Wm. Rob. 271; *St. John* v. *Paine*, 10 How. 558; *The Oregon* v. *Rocca*, 18 How. 572; *Wheeler* v. *The *Eastern State*, 2 Curt. C. C. 142. [*473

Much testimony was introduced on the o:

side and the other upon this point, and it is somewhat conflicting. All that can be done under the circumstances with any possible advantage to either party will be to state our conclusions upon the evidence. After a careful examination of the depositions, we think it is clearly proved that both vessels as they approached each other were near mid-channel. Most of the witnesses on board the steamer expressly affirm that she was near mid-channel when the lights of the propeller were first discovered, and they all agree that her helm was not changed, except for the purpose of bringing the lights of the propeller one point on her

larboard bow, until the propeller starboarded her helm, and attempted to cross the bows of the steamer. That movement of the propeller was a direct violation of the rules of navigation, and was entirely without any excuse. Her master may have been deceived as to the course of the steamer, by the slight bend in the river; but if so, it is the misfortune of those who employed him that he was not better acquainted with the navigation, or more attentive to his duty.

The decree of the Circuit Court is, therefore, affirmed, with costs.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

DECEMBER TERM, 1859.

REUBEN MIDDLETON, *Plff. in Err.*,
v.
WILLIAM McGREW.

(See S. C. 23 How. 45–49.)

Aliens could not inherit in Mexico or Texas.

By the laws of Mexico, heirs, being aliens, could not inherit an estate.

This law of descent is applicable to the landed property of Texas.

Argued Dec. 7, 1859. Decided Dec. 19, 1859.

IN ERROR to the District Court of the United States for the Eastern District of Texas.

This action was brought in the court below, by the plaintiff in error, to recover a certain tract of land. The trial having resulted in a verdict and judgment for defendant, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **Robert Hughes**, for plaintiff in error.

The question for the consideration of this court is, Could an alien, or to speak more properly in the language of the Mexican law, was a foreigner, not domiciliated in Mexico, in the year 1835, capable of taking real estate as an heir from a Mexican domiciliated in Mexico?

To this question we think there is but one answer, and that in the affirmative. The grant in question purports to be to Joshua Davis, a "Mexican by law;" in other words, a naturalized foreigner, as to whom the supreme court of Texas has determined that he was a competent to acquire by purchase under the 24th article of the colonization law of the 24th of March, 1825, as a native Mexican.

Ruis v. *Chambers*, 15 Tex. 586.

It follows that the grantee had capacity to constitute an heir by testament, for he stood in the position of a native. The only question, then, is as to the capacity of the heirs being foreigners; upon this question the counsel entered into a lengthy discussion of, and quotations from, the Mexican authorities.

2. But it is supposed that the question raised here has been settled in four adjudged cases, recited by brief of defendant's counsel.

Holliman v. *Peebles*, 1 Tex. 709; *Yates* v. *Iams*, 10 Tex. 168; *Hornsby* v. *Bacon*, 20 Tex. 556; *Blythe* v. *Easterling*, 20 Tex. 565.

[Counsel examined these cases at considerable length.]

We think we have shown grave and important differences between foreigners and Mexicans as contained in the colonization laws of March 24, 1825, and that they did not come within the rule of the colonization established by that law, and as a consequence were not subject to the extraordinary penalty of the 30th article. Again; in the court below it was contended that, granting that all the colonization laws which were ever in force in Coahuila and Texas had been repealed, yet the national colonization law of August 18, 1825, was in full force and effect, and that the 15th article of that law declares, that "no person who, by virtue of this law, acquires a title to lands, shall hold them, if he is domiciliated in a foreign country."

1 White's Recop. 602.

The supreme court of Texas has solemnly determined that everything in relation to the right to a disposition and grant of the vacant lands in the state of Coahuila and Texas, and the other states of the Confederation only, properly belonged to the states, and that as a consequence, art. 12, which purports to limit the quantity of land which might be granted to each individual, had no operation within the limits of Coahuila and Texas; and so in regard to the 15th art. That was a matter in regard to which the states only had power to act; but even were this not so, the law contained in the 15th art. could not operate in Texas, because the title to the land in question was not acquired by virtue of that law, but only by virtue of the colonization law of March 24, 1824, under which the grant of it was made. And besides, the general colonization law was made in August, 1824; and afterwards, in 1828, another Congress of the republic established a general naturalization law, one provision of which was in conflict with the former law.

NOTE.—*Alienage; effect of, as to title to real estate*—see note to Governeur v. Robertson, 6 L. ed. U. S. 489. *Title and transfer of lands governed by lex loci rei sitæ*—see note to Clark v. Graham, 5 L. ed. U. S. 334; note to Elmendorf v. Taylor, 6 L. ed. U. S. 289; note to Darby v. Mayer, 6 L. ed. U. S. 367; and note to Jackson v. Chew, 6 L. ed. U. S. 583. *Alien's right to inherit*—see note to Easton v. Huott, 31 L. R. A. 177.

We think we have established:

1. That by the laws of Spain and by the Indias, a foreigner domiciliated in a foreign country in all times past, at least from the time of Allonso L. Sabeo, in the 13th century, during whose reign the *Siete Partidas* was compiled, could take as an heir to a person dying in Spain.

2. That this rule is not limited or changed by reason of anything in the colonization laws of Coahuila and Texas, or in the judgments of the courts of Texas; whence, it follows that—

3. The plaintiff ought to have recovered in the court below, having derived his title from the brothers and heirs of the grantee, Joshua Davis.

All of which proves that the court below erred in the instructions given to the jury, and the judgment should be reversed.

Mr. **W. P. Ballinger,** for the defendant in error:

No principle is more conclusively settled in the law of Texas, than that aliens prior to the adoption of the Constitution, in 1836, could not take lands by descent.

Holliman v. *Peebles*, 1 Tex. 673; *Yates* v. *Iams*, 10 Tex. 168; *Hornsby* v. *Bacon*, 20 Tex. 556; *Blythe* v. *Easterling*, 20 Tex. 565.

Art. 15, law of 1824, provided that "no person who, by virtue of this law, acquires a title to lands, should hold them if he is domiciliated out of the republic. This general law remained in force, and has always been recognized as the basis of the power to grant lands by the state government, and as imposing imperative restraints on that power.

Republic v. *Thorn*, 3 Tex. 608; *Blount* v. *Webster*, 16 Tex. 618, 619.

This law was repealed before the grant to Davis; but no change was to be made on the concession to the purchasers under the former law, and purchasers were required to enter into possession of the land granted them, within 18 months.

See art. 16, Laws of 1832, art. 30, Laws of 1834; *Jenkins* v. *Chambers*, 9 Tex. 234.

The grant to Davis, on its face, issued under the law of 1825, and requires of the grantee compliance with its provisions.

But the state law of 1832, and of 1834, arts. 8 and 9, are equally stringent in requiring Mexican domiciliation in order to acquire lands, and there is no single provision, throughout the entire Colonization Laws, departing from this fundamental policy.

Horton v. *Brown*, 2 Tex. 78; *Hornsby* v. *Bacon*, 20 Tex. 556.

Mr. Justice **Campbell** delivered the opinion of the court:

This action was instituted for the recovery of land in the colony of Power and Hewetson, in Texas, in the possession of the defendant, and claimed by the plaintiff through a conveyance by the brothers of Joshua Davis, deceased, a colonist, who died in June, 1835, intestate, and without issue. These brothers were citizens of the United States, and assumed to be the heirs at law of the decedent. The only question presented for the examination of this court is, whether the brothers were capable of taking by inheritance real property within the limits of Mexico, or were they disabled by their condition as aliens. The solution of this question must be found in the jurisprudence of Mexico, as it is understood and applied to cases as they have arisen within the state of Texas. If there is found, in the decisions of the supreme court of that state, clear and consistent testimony to the existence of a rule of descent, under such circumstances the duty of this court will be performed in ascertaining and enforcing that rule in this case.

The defendant has referred the court to a series of decisions as containing such testimony.

The case of *Holliman* v. *Peebles*, 1 Tex. 673, was that of heirs claiming the land of a colonist in the settlement of Austin, who, after his location, had returned to the United States and died, leaving heirs who were citizens of them. The court intimate, that by the laws of Spain, as adopted in Mexico, these heirs had no heritable blood, and proceed to say: "Whatever may be the true construction of the laws of Spain or of colonization on the subject-matter, there can be *no doubt that the capacity [*48 of aliens to hold lands in the republic of Mexico, if it ever existed under the laws of Spain, was extinguished by the decree of the 12th March, 1828." 4 Vol. *Ordenes y Decretos*, p. 155. The 6th article of this decree is expressed in the following terms, *viz.:*

"Foreigners introduced and established in conformity with the regulations now prescribed, or which shall be hereafter prescribed, are under the protection of the laws, and enjoy the civil rights conferred by them upon Mexicans, with the exception of acquiring landed rural property, which, by the existing laws, those not naturalized cannot obtain. . . . This provision covers all acquisitions of real property, whether by purchase or inheritance, and is so understood by the Mexican editor of Murillos de Testamentos."

The case of *Yates* v. *Iams*, 10 Tex. 168, was that of a citizen of the United States claiming through an ancestor who had died in 1827 in Texas, holding land by a head right acquired in 1824. The court announce their conclusion, "that, upon general principles pervading the law of 1823, under which this grant was made, and upon the general policy of the government in relation to the right of property in lands (granted for the purpose of colonization) at the time of the death of the intestate, as heir domiciliated out of the republic of Mexico could acquire no right, by inheritance, to lands of persons dying in the Province of Texas."

The case of *Hornsby* v. *Bacon*, 20 Tex. 556, was that of citizens of the United States claiming to share as heirs in real property of a citizen of Texas, who died in 1835, with other relations of the same degree, who were citizens of Texas. The court says: "The right of the plaintiff's vendors (the alien heirs) to claim this land by inheritance must be tested by laws anterior to the Constitution of the Republic; and by them, as appears from our previous decisions, such right cannot be sustained. The plaintiff claims nothing through them by his conveyance."

The case of *Blythe* v. *Easterling*, 20 Tex. 565, is that of heirs claiming the landed estate of an immigrant to Texas, who died in November, 1833, they being aliens and nonresidents. *The court decides: "That it is too well [*49

settled by repeated decisions of this court to be longer regarded as an open question, that at the period of the death of the decedent, his heirs, being aliens, could not inherit his estate."

We understand these decisions to declare a law of descent applicable to the landed property of Texas generally, and not to lands in a particular colony, or settled under a particular act of colonization. The case before the court falls within the control of these decisions.

The judgment of the District Court is affirmed.

CHARLES FLOWERS, Survivor of Alice Flowers, *Plff. in Err.*,
v.
FRANCIS FOREMAN, Surviving Partner of Christian Keller.

(See S. C. 23 How. 132-149.)

Maryland statute of limitations—eviction, what is—seisin of executor in Louisiana—when right of action passes to heirs.

The statute of Maryland of the years of 1715, ch. 23, and 1818, ch. 216, constituted a bar to a recovery by the plaintiffs, as more than three years had elapsed after their right of action had accrued, before the plaintiffs brought their suit.

Where one had been judicially declared not to be entitled to land, by the decree of the Supreme Court, that, of itself, was an eviction under the law of Louisiana, though the court postponed giving a writ of possession.

In that state, it is not necessary to constitute an eviction, that the purchaser of land should be actually dispossessed.

An eviction may take place when the vendee continues to hold the property under a different title from that transferred to him by his vendor.

The Civil Code of Louisiana provides that a testator may give the seisin of the whole or of a part of his estate to his executor. The seisin usually continues for a year and a day, but may be prolonged by an act of the court.

The seisin of the executor is distinct from and paramount to the seisin which the law vested in the heir, immediately on the death of his ancestor; and the heir can only deprive the executor of it by providing security for the performance of his obligations.

When the testamentary executor submitted to the title of others, and paid them for it, that was an eviction, which gave to him a right of action in behalf of the succession against the warrantors of his testators.

His right of action passed to the heirs when he delivered the succession to them, or whenever it came to their hands by due course of law.

Where the heirs seek, by this suit in *assumpsit*, to recover damages for the failure of their warranty, the suit having been commenced between eight and nine years after the right of action had accrued; held, that the statute of limitations of Maryland prevents a recovery.

Argued Dec. 12, 1859. Decided Dec. 27, 1859.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action of assumpsit brought in the court below, by the plaintiff in error, to recover damages alleged to have been sustained by a breach of warranty, contained in a deed of certain lands in Louisiana.

The trial having resulted in a verdict and judgment in favor of the defendant, the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Robert J. Brent** and **Charles E. Phelps**, for the plaintiff in error:

We contend:

I. That a valid contract of warranty was made binding upon Keller & Foreman, the warrantors. The letter of attorney from the defendant and his deceased copartner must be construed according to the law of Louisiana, the place where the authority was to be executed.

Owings v. *Hull*, 9 Pet. 627.

The law of Louisiana implies a general warranty against eviction, as a necessary incident to every sale.

Civil Code La. 2450, 2477, 2479, 2482; *Preston* v. *Keene*, 14 Pet. 133.

It follows that Keller & Forman were bound by the contract made by them, through their agent, Armstrong, it being no more than the *lex loci* would have implied, had no such contract been expressed.

Le Roy v. *Beard*, 8 How. 451.

II. That said contract was broken, giving a right of action to the plaintiff.

III. (Upon the defense of limitations.) That such action accrued within three years prior to the institution of the suit.

These two points will be considered together.

The contract was concerning land situated in Louisiana. It was made in Louisiana, and there it was to be performed. The inquiry, therefore, is, what, by the *lex loci*, was necessary to constitute a breach of the contract?

By the civil law, the remedy upon the obligation of warranty is two-fold, and each remedy has respect to a distinct and independent cause of action.

The more usual remedy in the French and Louisiana practice is the one which was originally resorted to in the present case, while pending in the Louisiana court. By it the warrantor is formally vouched or cited in to defend his vendee's title, as soon as proceedings are commenced against the latter. If the seller thus called in cannot defend, "the judge condemns him to indemnify the defendant, by the same sentence by which he pronounces in favor of the original plaintiff."

In this form of proceeding, the cause of action may be said to arise as soon as the vendee is troubled in his possession by a suit, for at that moment his right to call in his vendor in warranty accrues.

Pothier des Ventes, part 2, ch. 1, § 2, art. 5, § 2; Domat. lib. 1, tit. 2 § 10.

The other remedy is the one now being prosecuted, and which was rendered necessary by the fact that the first was ineffectual—the court which gave judgment not having jurisdiction over the absent parties.

In substance, this remedy corresponds to the ordinary common law action of covenant, and like it is not available until final sentence is pronounced, and cannot be brought before the vendee has sustained an eviction, either actual or constructive.

Pothier des Ventes, part, 2, ch. 1, § 2, art. 5, § 2; Domat. lib. 1, tit, 2, § 10.

In the present case, therefore, the cause of action did not accrue until eviction was consummated.

"Eviction" is defined to be "the loss suf

NOTE.—*Limitations, what statute governs. Lex fori and not lex loci governs, when*—see note to 13 L. ed. U. S. 194; note to 48 L. R. A. 625, and note to 58 C. C. A. 186

fered by the buyer of the totality of the thing sold, or a part thereof, occasioned by the right or claim of a third person."

Civil Code, art. 2476.

It is decided that this text does not require actual dispossession. Any holding by the vendee of a title different from that acquired from his warrantor, falls within its terms.

Pothier des Ventes, No. 96; *Landry* v. *Gamet*, 1 Rob. 362; *Thomas* v. *Clement*, 11 Rob. 397.

If the instruction given below can be supported upon the facts disclosed by the record evidence, consisting alone of the certified transcript of proceedings of the district court of Rapides parish, in the suit of *Calvit* v. *Mulhollan*, we concede that it is unobjectionable in point of form. If, however, it is predicated in any, the least degree, upon the parol testimony, it is fatally defective, and for this plain reason, that it takes the testimony from the jury who are the sole judges of its credibility, by a peremptory charge that the statute of limitations constituted a bar.

The law should have been given to the jury hypothetically, leaving them to find the facts.

Budd v. *Brooke*, 3 Gill. 198; *Calvert* v. *Coxe*, 1 Gill, 95; *Charleston Ins. Co.* v. *Corner*, 2 Gill, 410; *Ragan* v. *Gaither*, 11 Gill & J. 472.

In an action for breach of warranty, the record of the suit in which the title paramount was litigated, is conclusive evidence of the eviction in cases where the warrantor had notice and an opportunity to defend his vendor's title. Where no such title was given, the record is still prima facie evidence, not only of the validity of the paramount claim, but of its extent, etc.

Civ. Code, arts, 2493, 2494; *Clark* v. *Carrington*, 7 Cranch, 308.

It may well be argued that in the present case the defendant had such notice.

Field v. *Gibbs*, Pet. C. C. 155; *Roberts* v. *Caldwell*, 5 Dana, 512; *Wernwag* v. *Pawling*, 5 G. & J. 500.

But whether notice or not, the record is properly in evidence.

Hanson v. *Buckner*, 4 Dana, 251; *Owings* v. *Hull*, 9 Pet. 627.

Now, first examine the facts of this case as they appear from the record evidence (the record in the suit of Calvit v. Mulhollan), independent of the parol testimony, to determine whether these facts alone do not give the plaintiff a right of action to which the statute of limitations is not a bar.

The litigation upon the paramount title commences in 1838. In 1843 the district court renders an adverse judgment, and the defeated claimants appeal. In 1845 the appellate court affirms this judgment as to two of the claimants, but reverses it as to the two youngest, and decides that they are each entitled to recover an undivided eighth.

This decree, even if it had been in terms a final judgment, would not, by the law of Louisiana, have *per se* amounted to an eviction.

Murray v. *Bacon*, 7 Mart. N. S. 271.

The decision of the appellate tribunal was not a final decree, but on the contrary, preliminary and prospective merely, contemplating future proceedings and prescribing future action, as a condition precedent to a complete eviction.

So far, then, there is no eviction; therefore no breach of warranty; therefore no right of action; and hence we may safely assume that down to November 1845, limitations have not commenced to run against us.

From the time the decree of the appellate tribunal was filed in the district court, in Nov., 1845, nothing appears which has the remotest relation to an eviction, until 1853.

On May 30, 1853, the present plaintiff, with his now deceased co-plaintiff, for the first time appear in the cause, make themselves parties in their capacity as "heirs and universal legatees" of the original defendant, adopt his answers and defenses, and ask for judgment over against the warrantors, in case judgment be rendered in favor of plaintiffs.

And on the next day (31st May) there is an entry of what purports to be a final judgment of the district court, reciting the decree of the court above, and also reciting the fact which for the first time appears, that "the legal representatives of Charles Mulhollan have purchased the claims of said Calvits for the sum of $2,400."

Within the principles laid down, this recital furnishes at once a state of facts such as, by the *lex loci*, amounts to an eviction, and gives a right of action upon the warranty.

See cases before cited, 1 Rob. 362, and 11 R. 397.

The record, however, does not furnish the date at which the purchase was made. That it does not do this expressly is certain. That it does not fix the exact date by implication, is equally clear.

It is not for us to supply the omission caused by the silence of the record with respect to time. It is for the defendant, who relies upon limitations, to show that we are barred. It is enough for us to show that at all events on May 31, 1853, we had a cause of action, without being required to prove how long before we might have had it.

If, then, it appears by the record alone that upon the 31st May, 1853, the litigation upon the paramount title was brought to a close by final judgment, and that upon that day we stood as purchasers of the paramount claims, with nothing in the record to show that we were such purchasers long anterior to that time, we submit that the instruction given by the court below that we were barred by limitations was erroneous, inasmuch as we commenced one suit within less than three years from said date, to wit, on November 3, 1855.

We now proceed to consider the case, as it may be modified by parol testimony.

The depositions of J. A. Calvit and Judge Ogden disclose the fact that the relinquishment of the paramount claims was made November 14, 1846, and that the purchase was made by Thos. O. Moore, the acting executor of Mulhollan.

Upon this evidence, the attempt is made to set up the bar of limitations against the heirs, by dating their right of action back to the time when a voluntary payment was made by the executor.

Until adopted by the heirs, the purchase of Calvit's claims by Moore, although doubtless made in "good faith," and as the "best arrangement that could be made for the estate," yet, not being within the scope of his execu-

torial powers, was no more the act of the heirs than if made by an entire stranger for purposes of speculation.

Brush v. *Ware*, 15 Pet. 93-111; Code La. art. 1652; *Anderson's Executors* v. *Anderson's Heirs*, 10 La. 35.

The doctrine is well settled, that an action upon warranty may be brought by the executors, provided the breach be during the lifetime of the testator; but if the breach occur after his death, the action can only be maintained by the heirs.

1 Pars. Cont. 109; *Rawlings* v. *Adams*, 7 Md. 49.

It is plain, therefore, that no right of action accrued upon this contract of warranty, until May 31, 1853. The executors could not have sued: (1) Because the payment by them did not constitute an eviction at all, they not being authorized to represent the land; and (2) because, even if such payment did constitute an eviction, the breach was not until after the death of Mulhollan, the warrantee, in which case the heirs alone could maintain an action.

Nor could the heirs have sued, for they had not then ratified the voluntary and gratuitous act of the executors, and made the payment their own.

There being no parties competent to sue, limitations could not run.

Fishwick v. *Sewall*, 4 Harr. & J. 393.

But if the preceding views be erroneous, and it should be held that the breach of warranty occurred November 14, 1846, by the executor's purchase of the paramount claims, it still by no means follows, of necessity, that limitations commenced to run from that time.

The circumstances of this case are peculiar. The paramount claim was in process of litigation from 1838 to 1853. During the whole of these fifteen years the rights of all parties were held in suspense. The decision of the Supreme Court in 1845 was in no sense a final determination of the controversy. On the contrary, it was in terms merely prospective and interlocutory.

That such decree was not final, see *Perkins* v. *Fourniquet*, 6 How. 208.

That it was preparatory only, see *Thompson* v. *Mylne*, 4 La. Ann. 211.

During all the intervening time up to May 31, 1853, the paramount claims were exposed to the contingent and unliquidated offsets and abatements indicated by the decision of the appellate court.

During all this time, also, that the suit remained open, it was not only the right, but it was the duty of Keller & Foreman to have intervened, either in proper person or by attorney, for the protection of the threatened title which it was within the scope of their obligation, not merely to "warrant," but also actively to "defend."

These facts, we submit, clearly bring this case within the principle laid down by this court in *Montgomery* v. *Hernandez*, 12 Wheat. 129, affirming the judgment of the supreme court of Louisiana in 2 New Ser. 422.

See, also, *Salisbury* v. *Black*, 6 H. & J. 293; *Walker* v. *Bradley*, 3 Pick. 261; *Franklin* v. *Depriest*, 13 Grat, 257; *King* v. *Baker*, 29 Pa. 200; *Martin* v. *Ihmsen*, 62 U. S. (21 How.) 394. 23 How.

Messrs. **George W. Brown** and **F. W. Brown, Jr.**, for the defendant in error:

The power of attorney, which is the cause of action in this case, is a simple contract under seal. It does not, in terms, authorize the attorney to execute a deed with the general warranty, and was not intended to do so by the constituents, but that question is not now before this court. The defendant in error will contend that the instruction of the circuit court was correct.

I. The cause of action of the plaintiff in error, if any he had, accrued, and limitations began to run November 14, 1846, when payment was made by the executor of Mulhollan in behalf of the estate. More than three years had elapsed before the bringing of this action, November 3, 1855, and the claim is barred by the acts of limitation of the state of Maryland of 1715, ch. 23, § 2, and 1818, ch. 216, § 1.

Beatty's Admrs. v. *Burnes' Admrs.* 8 Cranch, 98; *Murdock* v. *Winter*, 1 H. & G. 471; *Frey* v. *Kirk*, 4 Gill & J. 509; *Sprague* v. *Baker*, 17 Mass. 291; *Lomis* v. *Bedel*, 11 N. H. 74; *Day* v. *Chism*, 10 Wheat. 452; 2 Greenl. Ev. § 244; *Foote* v. *Burnet*, 10 Ohio, 330.

II. The judgment of the district court of the state of Louisiana, in favor of Charles H. Flower and Alice Flower against Christopher Keller and Francis Foreman for $850, with interest from November 14, 1846, the date of the payment by Mulhollan's executor, is void, the court below having no jurisdiction in the case, the defendants never having been served with process, and never having had notice or knowledge of the case. The judgment against Keller is by a wrong name. His true name was, Christian, not Christopher, Keller, and he was in fact, dead at the time when it was rendered, although that fact does not appear by the record. But the plaintiff in error does not sue on this judgment nor claim thereunder. If the judgment were valid, his cause of action would be merged therein, and suit would have to be brought on the judgment, and the form of action would be debt, not *assumpsit*.

Harris v. *Hardeman*, 14 How. 339.

Mr. Justice Wayne delivered the opinion of the court:

We shall cite such facts in this record as are necessary to show the relations and obligations of the parties to it, under the laws of the state of Louisiana, and in that of the circuit court of the United States for the district of Maryland, from which it has been brought here by writ of error.

The plaintiffs are the heirs and universal legatees of Charles Mulhollan, to whom Keller & Foreman sold a tract of land, with an obligation of warranty. On the same day that the conveyance was executed to Mulhollan, he conveyed by deed a part of the land to Reuben Carnal, with a like clause of general warranty.

Afterwards, William J. Cavit, Elizabeth G. Calvit, James A. Calvit, and Coleman W. Calvit, filed their petition in the district court for the parish of Rapides, alleging that they were the heirs of their mother, the lawful wife of their father, Anthony Calvit, and that they were entitled to half of the land, as it had been purchased by their father during their mother's

coverture with him, which superinduced between them a community of acquests or gains —there having been by them no stipulation to the contrary. And they allege, also, that their father, as their natural tutor, had sold the land, for a part of which they petitioned, while they were minors, in violation of their rights.

They further state, that Charles Mulhollan and Reuben Carnal were in possession of the land, and ask that one half of it might be adjudged to them, as the heirs of their mother.

Being thus brought into court, Mulhollan and 144*] Carnal filed *their answers. Each deny the allegations of the plaintiffs—Carnal citing Mulhollan into court as his warrantor; and Mulhollan alleges in his answer, that he had purchased the land from Keller and Foreman, with a general warranty. He asks that they might be cited, to defend him in his title and possession; and that, as they were absentees from the state of Louisiana, he prayed for the appointment of curators *ad hoc*, to represent them in the case.

George K. Waters was designated by the court as their curator; and, upon being summoned, appeared in that relation, and, assuming to be the attorney of Keller & Foreman, filed an answer for them. Keller & Foreman, however, never had any knowledge of the suit nor any notice of the appointment of Waters as curator.

Waters, in his answer, cited in warranty the legal representatives of A. J. Davis, deceased, from whom Keller & Foreman had bought the land.

The legal representatives of Davis appeared, by George Purvis, their curator, and in their turn cite in warranty Anthony Calvit, their ancestor's vendor, who was the father of the plaintiff, by whom the land had been sold to Davis. Anthony Calvit appeared by attorney, denying the petitioner's allegations.

After several continuances, the case was brought to trial in the district court, and judgment was entered for the defendants. The plaintiff carried it by appeal to the supreme court of Louisiana. The judgment of the court below was reversed, on the 26th November, 1845. That court decided that the two youngest petitioners, James and Coleman Calvit, were each entitled to one undivided eighth of the land in controversy, but that William J. Calvit and Elizabeth G. Calvit were excluded from recovering, on account of the prescription of ten and twenty years, which Mulhollan had pleaded in his answer. The court then remanded the cause to the district court, for further proceedings on the question of improvements, costs, and profits, and of damages between the warrantors.

Afterwards, on a rehearing, the supreme court directed a further inquiry to be made, for the 145*] purpose of ascertaining *whether the price received for the land by the father and tutor of the plaintiff, had been applied to the payment of the debts of the community of their father and mother; "and it ordered, if any of it had been, that James and Coleman Calvit should contribute in proportion to their rights in the land; and that, in the mean time, no writ of possession should issue until they had paid the amount which the court below might determine to be due by them."

After the rendition of the supreme court's decree, Charles Mulhollan died. His will was admitted to probate on the 11th July, 1846. On the same day his death was suggested, and an order was passed to renew the suit in the names of his legal representatives. Three days afterwards, Thomas O. Moore, the executor of Mulhollan, paid to James and Coleman Calvit $2,400 for a relinquishmnt of their claims to the land in controversy, and all of their rights in the judgment which had been rendered in their favor.

No further proceedings were had in the suit from the 11th November, 1846, to the 30th May, 1853, when the plaintiffs in this suit made themselves parties, as heirs and universal legatees of their uncle, Charles Mulhollan, the original defendant. They adopted his answers and defenses, and ask for judgment against his warrantors, Keller & Foreman, which was given on the following day, in the district court, to which the cause had been remanded, for those purposes only heretofore stated.

Such have been the relations of the parties named in the record, in the district and supreme court of the state of Louisiana. Whatever was the liability of Keller & Foreman, as warrantors of Mulhollan, they never were subjected to the jurisdiction of the district court by any valid proceeding from it, to enable that court to carry that liability into a judgment in favor of Mulhollan, their vendee, or in favor of his representatives, Charles and Alice Flowers.

When Mulhollan answered the petition of the Calvits, and asked that Keller & Foreman should be cited into court as his warrantors, no citation for that purpose was served upon them to do so. One was issued for and served upon Waters, to represent them as curator *ad hoc;* but that was insufficient *to give to the [*146 district court jurisdiction to pronounce judgment against them, though that court did do so. Hence it is that this action of assumpsit was instituted to recover damages alleged to have been sustained upon a breach of the warranty of Keller & Foreman to Mulhollan.

In the declaration in this action, it is recited that Keller & Foreman had conveyed to Mulhollan a tract of land, with warranty, and that the supreme court had adjudged that James and Coleman Calvit were each entitled to an undivided eighth of the same. They were declared to have entered into the same, and evicted Mulhollan from it; in consequence of which, Mulhollan, to regain his possession, had paid to James and Coleman Calvit $2,400 for the relinquishment of their claims to the land. To this action, the defendant pleaded non assumpsit; and it was agreed in writing, by the counsel in the cause, that, under such issue, all errors in pleading should be mutually waived, and that the defendant was to be permitted, under it, to rely upon the statute of limitations.

Upon the trial of the case, that point was urged. The statutes of Maryland of the years 1715, ch. 23, and 1816, ch. 216, entitled, "Acts to Avoid Suits at Law," were insisted upon, as constituting a bar to the recovery of the plaintiffs. Such was the instruction given by the court.

There is no error in the instruction. More than three years had elapsed after their right

of action had accrued, before the plaintiffs brought their suit. Their uncle had been judicially declared not to be entitled to a part of the land by the decree of the supreme court. That of itself was an eviction under the law of Louisiana, though the court postponed giving a writ of possession to the parties in whose favor its decree was made, for the purpose of having certain points ascertained in which all the parties to the cause were interested—no one of them more so than Mulhollan himself. The date of the supreme court's decree in favor of the two Calvits, is 26th November, 1845, shortly after Mulhollan died. The district court had not then adjudged those points for which the case had been remanded to it.

147*] *Before that was done by the court, and soon after Mulhollan's death, his acting executor, Moore, on the 14th November, 1846, bought from the two Calvits their claim to that part of the land which had been decreed to them by the supreme court. This itself was an eviction, though the supreme court, in deciding upon these rights to the land, had withheld from the Calvits a writ of possession. It is not necessary to constitute an eviction, that the purchaser of land should be actually dispossessed. 11 Rob. La. 397. It was also ruled, in the same case, that an eviction may take place when the vendee continues to hold the property under a different title from that transferred to him by his vendee. In this instance, Mulhollan's representatives held the title to a part of the land, originally bought by him from Davis as a whole, by the purchase of James and Coleman Calvit's undivided eighth.

The same conclusions had been previously ruled by the same court in *Landry* v. *Gamet*, 1 Rob. La. 362. The court's language is: "It is true that, by the authorities to which we have been referred, the doctrine is well established, that, in order to constitute an eviction, it is not absolutely necessary that the purchaser should be actually dispossessed. That eviction takes place, although the purchaser continues to hold the property, if it be under a title which is not that transferred to him by his vendor, as if he should extend the property, or should acquire it by purchase from the true owner." Pothier, Vente, No. 96; Troplong, Vente, No. 415; Touiller, vol. XVI., continuation by Duvergier, vol. I. Nos. 309, 313. Other cases in the Louisiana Reports have the same conclusions, but we do not think it necessary to cite them. The rulings in 1 and 11 Robinson announce it to be the uncontested doctrine in the Louisiana courts, that actual dispossession is not necessary to constitute an eviction, and that, if the purchaser holds under another title than that of his vendee, an eviction may take place. Those decisions cover the case in hand in both particulars, and they show that the purchaser of the land had suffered an eviction by the decree of the supreme court, in the meaning of that term in the law of Louisiana, though a writ 148*] of possession had not been issued. *But if that was doubtful, it is certain that the eviction was accomplished when the executor of Mulhollan bought, for the benefit of his testator's estate, the claim to the land which James and Coleman Calvit had acquired.

Mulhollan, by his will, granted to his executors, immediately on his death, full and entire seisin and possession of all his estate, to hold and manage the same until all the legacies given by him were paid over and fully discharged. The signification of a delivery of seisin to an executor will be found in articles 1652, 1664, 1666, 1667, of the Civil Code, and in 35 of Revised Statutes, 3. These articles provide that a testator may give the seisin of the whole or of a part of his estate to his executor, accordingly as he may express himself. The seisin usually continues for a year and a day, but may be prolonged by an act of the court, and may be terminated whenever the heirs shall deliver to the executor a sum sufficient to pay the movable legacies. The seisin of the executor is distinct from and paramount to the seisin which the law vested in the heir, immediately on the death of his ancestor, and the heir can only deprive the executor of it by providing security for the performance of his obligations. The executor represented the reception, in so far as respects creditors and legatee. *Bird* v. *Jones*, 5 La. Ann. 645. When the testamentary executor submitted to the title of the Calvits, and paid them for it, that was an eviction, which gave to him a right of action in behalf of the succession against the warrantors of his testator. His right of action passed to the heirs of Mulhollan when he delivered the succession to them, or whenever it came to their hands by due course of law. It was delivered to them, and the executor's seisin terminated in the year 1847, though the precise day does not appear in the record. The heirs, upon its termination, were reinstated in all the rights which had been temporarily administered by the executor. Those rights will be found in articles 934-936, of the Code. One of the effects of those rights is to authorize the heir to institute all the actions which the testator could have done, to prosecute to a conclusion such as had been commenced by the testamentary executor, and to commence all *actions which he [*149 had failed to institute belonging to the succession. 15 La. 527; 7 Rob. La. 183; 2 La. Ann. 339; 7 La. Ann. 367. In such a suit by the heirs, the same defenses may be made which could have been applied if the executor's seisin had been continued. But in this instance, neither the executor nor the heirs, the plaintiffs in the suit, took any legal step to carry to a judgment Mulhollan's citation of Keller & Foreman in warranty in the district court of the parish of Rapides, until the 30th May, 1853, more than fourteen years after the eviction of Mulhollan had occurred, and after the rights of the Calvits had been bought. The heirs now, however, seek by this suit in assumpsit in the circuit court of the United States for the district of Maryland to recover damages from Foreman, the survivor of his partner, Keller, for the failure of their warranty to Mulhollan, the suit having been commenced between eight and nine years after their right of action had accrued. The defendant relies upon the statutes of limitation of Maryland as his defense to prevent a recovery. We think it must prevail, and that the court below, in giving to the jury such an instruction, committed no error.

We therefore direct its judgment to be affirmed.

DAVID OGDEN, *Appt.*,
v.
JOTHAM PARSONS, John A. McGraw, Joshua Atkins, Edwin Atkins, and Joshua Atkins, Jr.

(See S. C. 23 How. 167-170.)

What is a full cargo—how determined

Where the charter-party covenants for no specific amount to be received, what was "a full cargo," under all the circumstances, was a question which could be solved only by experienced ship masters.

At least three competent witnesses of this character testify that the ship was loaded as deep as prudence would permit, and both the district and circuit courts were of the same opinion, and this court does not find that they have erred.

Submitted Dec. 21, 1859. Decided Jan. 3, 1860.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the district court of the United States for the southern district of New York, by the appellees, against the appellant, *in personam*, to recover damages for an alleged breach of a charter-party of the ship Hemisphere, which was hired by the appellant.

The libel claimed $4,950, including $700 for demurrage and interest. The district court entered a decree for the libelants for the whole amount of the charter money, less certain allowances, but excluding anything for demurrage. The final decree was for $5,159.34, with costs.

On appeal by the respondents to the circuit court, this decree was reduced $1,200, and affirmed as to the remainder; whereupon the respondent took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Owen** and **Vose** for appellant.

Messrs. **S. M. Parson** and **C. Donohue**, for appellees:

An interested witness is incompetent in admiralty.

The Independence, 2 Curt. C. C. 350.

Where a witness is called who appears on the record to be interested, and he is objected to, he cannot be sworn until that interest is revoked.

Evans v. *Gray*, 1 Mart. N. S. 709; *Mott* v. *Hicks*, 1 Cow. 513; 1 Aik. Vt. 71; 4 Phil. Ev. 160; 1 Mood. & M. §§ 319, 320.

Mr. Justice Grier delivered the opinion of the court:

The libelants let the ship Hemisphere by charter-party to David Ogden on a voyage from Liverpool to New York. The covenants which are the subject of this litigation are, briefly, as follows: "Ogden, to furnish a full cargo of general merchandise, and not exceeding 513 passengers, to pay £1,500 for the use of the ship, to have fifteen running lay days, and for every day's detention beyond that to pay $100."

The libel demands $700 as demurrage for seven days, and for a balance yet due on the contract.

The answer denies any liability for demurrage, admits that *the whole amount of [*169 £1,500 has not been paid, and charges libelants with breaches of their charter-party, and damages in consequence thereof, exceeding the balance claimed by them.

1st. "Because that they carelessly, wrongfully, and contrary to usage, stowed portions of the cargo where it ought not to have been stowed," and thereby deprived respondent "of the full and lawful use of the ship," by having room for only 350 passengers instead of 513.

2d. That libelants would not take and receive "a full cargo of general merchandise."

The district court decided against the charge for demurrage, but allowed the respondent no damages for the alleged breaches of the charter-party by libelants.

On appeal by respondent to the circuit court, the sum of $1,200 was allowed him by that court for the breach first mentioned with regard to the number of passengers received.

From this decree the respondent has appealed to this court.

As the libelants have not appealed from the decree of either the district or circuit court, the only question now to be considered is, whether the respondent has shown himself entitled to more damages than were allowed him by the circuit court.

The judge of the circuit court being of opinion, from the evidence, that the cargo might and ought to have been stowed so as to admit the full number of passengers (513) made a calculation from admitted *data* of the damage to respondent on that account, without referring the case again to a master, and deducted the sum of $1,200 from the amount of the decree of the district court. Of this the appellant does not complain, but insists that the owners had refused to receive a "full cargo of merchandise."

The registered tonnage of the ship was 1,030 tons; the cargo of general merchandise received was 1,297 tons.

The charter-party covenants for no specific amount to be received. What was "a full cargo" under all the circumstances, and whether the ship could have been loaded to a greater depth than 18 feet 10 inches with safety to the lives of the passengers, was a question which could be solved only by experienced ship masters. Where experts are introduced to testify *as to opinions on matters peculiar to [*170 their art or trade, there is usually some conflict in their testimony. What was a full cargo for this ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill and judgment in such matters. At least three competent witnesses of this character testify that the ship was loaded as deep as prudence would permit, under all the circumstances. Both the district and circuit court were of the same opinion, and we do not find in the evidence anything to convince us that they have erred.

Let the decree of the Circuit Court be affirmed, with costs.

RUEL C. GRIDLEY, Clarissa H. Beebe, Sarah P. Snyder, and Charles Snyder *et al.*, *Appts.*,
v.
DAVID WYNANT.

(See S. C. 23 How. 500-503.)

Married woman as trustee—may execute a power without her husband—independent equity, when not affected by prior transactions.

There is no incapacity in a married woman to become a trustee, and to exercise the legal judgment and discretion belonging to that character.

A married woman may execute a power without the co-operation of her husband.

Within the scope of her authority, a court of equity will sustain her acts, and require those whose co-operation is necessary to confirm them.

Where a person has an independent equity, arising from his purchase from persons holding the relation of trustee and *cestui que trust*, in order to enforce his right, there is no need for any inquiry into the consideration or motives that operated upon such parties, to assume their relation of trustee and *cestui que trust*. In such case, equity does not refuse to lend its assistance. McBlair v. Gibbes, 58 U. S. (17 How.) 232, affirmed.

Submitted Dec. 19, 1859. Decided Jan. 3, 1860.

APPEAL from the District Court of the United States for the Northern District of Iowa.

The bill in this case was filed in the court below, by the appellee, to enjoin an action at law which was pending in said court against him.

The court below decreed a perpetual injunction in favor of the complainant, and that the defendants convey the premises in dispute to him, whereupon the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **James Grant** for appellants.

Mr. **Platt Smith** for appellee.

The argument of counsel, being largely devoted to the facts, is not here given.

Mr. Justice Campbell delivered the opinion of the court:

The appellee filed this bill to enjoin the appellants from prosecuting a suit to recover a parcel of land in his possession, and to quiet his title against their claim as heirs at law of Sarah A. Blakely, deceased. He charges in his bill that he purchased the land from William B. Beebe, and paid to him the purchase money and that Mrs. Blakely made him a deed at the request of Beebe, who was her son-in-law, and for whose use and benefit it had been conveyed to her with her consent. At the time of her conveyance she was a married woman, and the bill avers that by error, ignorance, or oversight, her husband failed to join in her deed.

The defendants admit that they claim as heirs at law of Mrs. Blakely, and insist that she was under a disability to convey land without the consent of her husband.

They deny that she held the land in trust for Beebe, but insist that even if that were the case 502*] the trust was illegal, for *that Beebe was an insolvent debtor, and the sole design of such a conveyance was to defraud and delay his creditors.

They object that Beebe is a necessary party in the cause. The district court granted relief according to the prayer of the bill. The testimony sufficiently establishes the case made by the bill. It appears that Beebe purchased the land from the tenants in fee simple, and that it was conveyed to Mrs. Blakely by his directions, and that this was done because he was in debt, and did not desire the exposure of his property.

That he sold the land to the appellee, and that Mrs. Blakely executed to him titles without joining her husband in the conveyance. The question arises, whether the heirs at law of Mrs. Blakely can contest the validity of her conveyance. There is no incapacity in a married woman to become a trustee, and to exercise the legal judgment and discretion belonging to that character. A trustee in equity is regarded in the light of an instrument or agent for the *cestui que trust*, and the authority confided to him is in the nature of a power. It has long been settled that a married woman may execute a power without the co-operation of her husband. Sug. on Pow. 181. Some doubt has been expressed whether, at law, a married woman could convey an estate vested in her in trust, and inconveniences have been suggested as arising from her asserted incapacity to make assurances which a court of law would recognize as valid. And it has been determined that she could not defeat a right of her husband, or impose a legal responsibility upon him, by her unassisted act. Lewen, Trusts and Trustees, pp. 89, 90; Sug. on Pow. 192, 196; 2 Spence, Eq. 31. But within the scope of her authority a court of equity will sustain her acts, and require those whose co-operation is necessary to confirm them. In the present instance, her deed was within the scope of her authority and duty. She did not defeat an estate to which her husband was equitably entitled, nor does he claim adversely to it. The complainants are her own children, her heirs at law, who are seeking to devest of his estate a bona fide purchaser, and to acquire one for themselves—one to which their mother had no claim in equity or good conscience. Nor can the appellants avail themselves of the illegality *of the consider- [*503 ation on which their mother became the trustee for Beebe. The trust has not only been constituted, but carried into execution. The appellee is not a mere volunteer seeking to enforce its terms, nor does his equity depend upon the validity of the trust for its support. He has an independent equity, arising from his purchase from persons professing to hold a legal relation to each other and to the subject of the contract, and to enforce his right there is no need for any inquiry into the consideration or motives that operated upon these parties to assume their relation of the trustee and *cestui que trust*. In such a case, equity does not refuse to lend its assistance.

McBlair v. *Gibbes*, 17 How. 232.

The objection that Beebe is a necessary party to the bill cannot be supported. Beebe has not claimed adversely to the title of the appellee. The legal title has never been invested in him, nor do the appellants recognize any privity or connection with him. They claim the property discharged of any equity either in his favor or that of the appellee.

Upon the whole case, the opinion of the court is in favor of the appellee, and the decree of the District Court is affirmed.

RUEL GRIDLEY, Clarissa H. Beebe, Sarah P. Snyder, and Charles Snyder *et al.*, *Appts.*,
v.
EDWIN S. WESTBROOK and James P. Guager.

(See S. C. 23 How. 503–505.)

Deed, by attorney in fact of trustee—Gridley v. Wynant, ante, affirmed.

Where lands were purchased by one with his own money, and the titles were made for his own use to a married woman, under authority from her, and subsequently he sold them, and under power of attorney from such married woman executed a deed to the purchaser, such deed was held good against her heirs. Held, also, that there is no material variation between this cause and that of the same Gridley v. Wynant, *ante*, p. 411, just decided.
The authority of that case affirmed.

Submitted Dec. 19, 1859. Decided Jan. 3, 1860.

APPEAL from the District Court of the United States for the Northern District of Iowa.
The history of the case and a statement of the facts appear in the opinion of the court. See, also, the preceding case.
Mr. **James Grant** for appellants.
Messrs. **T. S. Wilson** and **Platt Smith** for appellees.

Mr. Justice **Campbell** delivered the opinion of the court:
This suit was commenced in the district court of Jackson county, Iowa, by the appellees, under articles 2025 and 2026 of the Code of Iowa, to quiet their title and possession to certain lands in that county against the impending and adverse claim of the appellants, the heirs at law of Sarah A. Blakely, deceased.
The appellants appeared, and answered the petition and procured the removal of the cause to the district court of the United States for Iowa, under the 12th section of the judiciary act of September, 1789 (1 Stat. at L. 73). After the removal of the suit to the district court, the appellants commenced a cross suit, asserting therein their own title to the lands in controversy, and praying for a decree of delivery of the possession to them, and an account of the mesne profits. The original and cross suits were "consolidated" on the motion of the appellants, and were heard as one suit.
The proceedings in these causes seem to have been framed upon the course of practice prevailing under the Code of Iowa; and we have found some difficulty in entertaining the suit, as not conforming to the mode of proceeding prescribed for courts of the United States in chancery proceedings; but as we are enabled to ascertain, from the pleadings and proofs, the matter in dispute between the parties, we shall proceed to adjudicate the questions they present.
The facts disclosed by the proofs show that William B. Beebe, an insolvent debtor, in order to carry on business without interruption, made purchases and sales of property on his own account, in Iowa, but under the shelter of the name of Sarah A. Blakely, the mother of his wife, a resident of Missouri. To enable him to do so with facility, he procured from her powers of attorney, which conferred authority for that purpose.

*The land described in the petition [*505 was purchased by Beebe with his own money, and the titles were made for his use to Mrs. Blakely. Subsequently he sold them to one of the parties to the cross suit (Mr. Wells) for a valuable consideration, and, as attorney in fact for Mrs. Blakely, executed to her a deed; and the appellees, Westbrook and Guager, claim as purchasers from this person.
At the time of the execution of the deed of Mrs. Blakely, and of her death, she was a *feme covert*. The appellants insist, that the conveyance to Mrs. Wells in the name of Mrs. Blakely is void, and that they are entitled to hold the lands as heirs at law.
We discover no material variation between the principles applicable in this cause and that of the same appellants and Wynant, which we have just decided.
Upon the authority of that case, we determine that the decree of the District Court must be affirmed.

CHARLES RICHARDSON *et al.*, Claimants of the Barque Tangier, *Appts.*,
v.
DAVID GODDARD *et al.*

(See S. C. 23 How. 28–45.)

Delivery by carrier, what is—where consignee must receive goods—valid delivery on wharf—goods not accepted, duty of carrier as to—liability for loss by fire—delivery on holiday—custom, as controlling.

Where the contract is to carry by sea, from port to port, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.
The carrier by water shall carry from port to port, or from wharf to wharf.
He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf.
But to constitute a valid delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody.
Such a delivery, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time.
When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has so done, he is no longer liable on his contract of affreightment.
Carriers are not liable, on their contract of affreightment, for the loss by fire of goods, where they delivered the goods at the place chosen by the consignee, and where he agreed to receive them and did receive a large portion of them, after full and fair notice.
Where the goods were deposited for the consignees in proper order and condition, at mid-day, on a week day, in good weather; this constituted a good delivery.
Carrier has a right to discharge cargo on a voluntary holiday, such as a day appointed by the gover-

NOTE.—*Delivery by common carrier by water.*
A carrier by water must convey goods from port to port or from wharf to wharf. This is the general commercial usage. The consignee must receive the goods at the wharf or from the ship. A delivery on the usual wharf will discharge the master, provided he gives notice to the consignee that he may come and take them. Hyde v. Trent, etc., Nav. Co. 5 Term R. 397; Chickering v. Fowler, 4 Pick. 371; Cope v. Cordover, 1 Rawle, 90; Ostrander v. Brown, 15 Johns. 39; Dibble v. Morgan, 1 Woods,

nor for fasting and prayer, and to demand the acceptance of his freight by the consignee on that day.

There is no law of Massachusetts which forbids the transaction of business on that day.

There is no general custom or usage which forbids the unlading of vessels, and a tender of freight to the consignee, on the day set apart for a church festival, fast, or holiday.

There is no special custom in the port of Boston which prohibits the carrier from unlading his vessel on such a day, and compels him to observe it as a holiday.

Argued Dec. 30, 1859, and Jan. 4, 1860. Decided Jan. 16, 1860.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The libel in this case was filed in the district court of the United States for the district of Massachusetts, by the appellees, on a contract of affreightment, to recover damages resulting from an alleged failure to deliver a part of a consignment of cotton.

The district court entered a decree dismissing the libel.

The circuit court, on appeal, reversed this decree and entered a decree in favor of the libelants, whereupon the claimants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **R. Choate** and **G. T. Shepley**, for appellants:

The question may be presented under two aspects.

First. Assuming Thursday, April 10, to have been an ordinary working day, can the libel be maintained?

Second. If not, then does the fact that Thursday was a fast day maintain it?

I. Upon the first assumption that Thursday is to be deemed an ordinary working day, the respondents established a full defense upon this proposition; that before the destruction of the cotton by accidental fire, and before one o'clock on Thursday, April 10, they had unladen it upon a suitable wharf, and one selected by the libelants, and made it ready for delivery under a full and reasonable notice to the libelants, thus legally tendering a delivery.

This involves two propositions.

First. That in point of law, such an unlading after such a notice, is such a delivery as terminates the liability of the carrier, as carrier.

Second. That, in point of fact, they had not unladen on such notice.

The propositions of law may be thus stated:

II. The unlading of goods upon a suitable wharf and at a usual time for unlading after reasonable notice to the consignee, accompanied with a readiness and present ability to deliver, is such a tender of delivery as discharges the ship owner from his liability as carrier.

Story, Bail. § 545; 2d Kent's Com. 6th ed. 604, and cases in note; *Norway Plains Co.* v. *Boston and Maine R. Co.* 1 Gray, 271; *Cope* v. *Cordova*, 1 Rawle, 203; *Hyde* v. *Trent and Mersey Nav. Co.* 5 T. R. 389; *Harman* v. *Clarke*, 4 Camp. 160-161; *Gould* v. *Chapin*, 10 Barb. 612; *Garside* v. *Trent and Mersey Nav. Co.* 4 T. R. 581; *Thomas* v. *The Boston & Prov. R. Co.* 10 Met. 472; *Fisk* v. *Newton*, 1 Den. 45; *Powell* v. *Myers*, 26 Wend. 591, Ang. Carr. § 313.

The case of *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314, S. C., 3 Man. & Gr. 643, is not in conflict, for that was a case of landing without any notice whatever.

III. The law, as thus completely established, rests upon this excellent reason: that if, by the universal usage, the ship owner ceases to carry at the wharf, and does not truck the goods to the owner, and the owner himself conveys them from the wharf, the liability of the carrier ceases when and where the duty to carry ceases; and it is the universal evidence in this cause, and is now judicially known to the court, that by uniform usage the ship owner, in no form and by no vehicle, ever carries beyond the wharf.

406; The Tybee, 1 Woods, 358; Gibson v. Culver, 17 Wend. 305; Shenk v. Phila. etc. Co. 60 Pa. 109; Western T. Co. v. Hawley, 1 Daly, 327; Solomon v. Phila. etc. Co. 2 Daly, 104.

He must deliver, within a reasonable time after the arrival of the ship. The circumstances of each case determine what is a reasonable time. Hand v. Baynes, 4 Whart. 204; Broadwell v. Butler, 6 McLean, 296; 1 Newb. 171; Gerhard v. Neese, 36 Tex. 693; Favor v. Philbrick, 5 N. H. 358; Nudd v. Wells, 11 Wis. 407; Ward v. N. Y. etc. R. Co. 47 N. Y. 29; Parsons v. Hardy, 14 Wend. 215; Gatliffe v. Bourne, 4 Bing. N. C. 314.

Where the consignee refused to receive the cargo at the port of destination, the master was bound to land it at the place designated, and store it for the benefit of the shippers, it not being of a perishable nature, and could not carry it to another port nor sell it. The same is true if the consignee is dead, absent, or cannot be found. Arthur v. The Cassius, 2 Story, 81; Illinois R. Co. v. Friend, 64 Ill. 303; Fenner v. Buf. & L. R. Co. 44 N. Y. 505; Mayell v. Potter, 2 Johns. Cas. 371; Cope v. Cordova, 1 Rawle, 203; Stephenson v. Hart, 4 Bing. 476; The Eddy, 72 U. S. (5 Wall.) 481.

If the goods, on the arrival of the ship, are put on board a lighter, and the owner takes the custody of them before they are landed, the master is discharged. Strong v. Natally, 4 Bos. & P. 16.

Goods cannot be abandoned upon the wharf. If this is done, carrier is responsible to the owner for their loss or injury. Rowland v. Miln, 2 Hilt. 150; McAndrew v. Whitlock, 52 N. Y. 40, Aff'g 2 Sweeny, 623.

There must be notice to the consignee. The Ville de Paris, 3 Ben. 277.

If delivery by a common carrier is made to a drayman, cartman or any other person not authorized by the consignee to receive it, it is at the risk of the carrier. Dean v. Vaccaro, 2 Head, 488; Sultana v. Chapman, 5 Wis. 454; Williams v. Holland, 22 How. Pr. (N. Y.) 137; Bartlett v. Phila. 32 Mo. 356; The Peytona, 2 Curt. 21; Ala. etc. R. Co. v. Kidd, 35 Ala. 209; Herman v. Goodrich, 21 Wis. 356.

Delivery after business hours is not good, nor is the consignee obliged to receive goods on a stormy day when they would be injured thereby. Eagle v. White, 6 Whart. 505; Hill v. Humphreys, 5 Watts & S. 123; The Grafton, 1 Blatchf. 173; Olcott, 43.

A delivery must be at a safe and proper place. Landing heavy goods upon an insufficient wharf renders the carrier liable if it breaks. The Majestic, 12 N. Y. Leg. Obs. 100.

The mere landing goods on a wharf is not sufficient; there must also be reasonable notice to the consignee allowing him time to make the usual and necessary preparations for receiving the goods. Salmon Falls Mfg. Co. v. The Tangier, 6 Am. Law Reg. 504; The Mary Washington v. Ayres, 5 Am. Law Reg. N. S. 692; The Eddy, 72 U. S. (5 Wall.) 481.

The consignments must be separated. The Middlesex, 11 Law Rep. N. S. 14.

Consignee cannot object that goods were placed on wharf at the usual dinner hour of truckmen. Salmon Falls Mfg. Co. v. The Tangier, 1 Cliff. 396. The master of the ship has a reasonable time to find out the freight due, but he has no right meantime to store goods at the owner's expense. The Diadem, 4 Ben. 247.

The custom of the port, brought to the knowledge of the parties, may, in the absence of a special contract, vary the rule as to delivery on wharf. The Tybee, 1 Woods, 358.

IV. The distinction between domestic and foreign vessels is inapplicable to this case. It is inapplicable in all cases where the ship or railroad does not directly or by trucks carry beyond the wharf or depot.

Fisk v. *Newton*, 1 Den. 45; *Chickering* v. *Fowler*, 4 Pick. 371; *Hemphill* v. *Chenie*, 6 Watts & S. 62.

V. Under special circumstances, after the liability of the carrier, as carrier, has determined, a duty of bailee as warehouseman or custodian may be *eo instante* or subsequently imposed on the carrier; but on the facts in this case, if any such modified duty were imposed upon the carrier, there was no breach of it, the fire having an origin without his fault.

The only question is, was there a landing on a wharf; usual or assented to, of the libelants' cotton, separately or accessibly placed, under notice, before it was burned.

The answer to this question we make in these three propositions:

1st. The place of delivery was a proper one. It was on a wharf, usual and selected by the libelants.

2d. The notices given were sufficient for all, and for unlading on Thursday, as well as on previous days.

3d. Before the fire the cotton was all unladen and that of the libelants was separated, and so accessibly placed as to make it the duty of the consignee to take charge of it.

Each of these propositions seems to be proved by the testimony in the case.

The next question is, whether the fact that Thursday was a fast day, rendered the act of unlading under notice ineffectual to terminate the carrier's liability.

To show this, it must be made to appear upon the whole evidence—that is, upon the evidence which the court judicially possesses or notices, and upon the evidence given at the trial—that it is the universal usage in the port of Boston not to unlade goods, not liable to injury by weather, upon the forenoon of fast day, from a vessel whose unlading had begun and been interrupted by the neglect of the consignee.

The argument upon which this proposition is maintained is this:

1. Thursday, April 10, 1856, was, *prima fronte*, a day proper for the discharge of cargo. The fact that the governor of Massachusetts recommends it to be observed as a day of fasting, humiliation, and prayer, cannot be judicially known to this court to render it *per se* a day improper for the unlading of a half-discharged vessel. That is a mere recommendation addressed to each man's free will, and which the respondents were legally at liberty to disregard, and as they did disregard it, all their rights remain unaffected under the general law.

2. It must appear, then, to the court upon the whole evidence, that there is a usage to do no work like this under circumstances like these, to wit: the discharging of a half discharged cargo under such circumstances as these, so universal as to bind the respondents.

The sources of this evidence are said to be—

1. The judicial knowledge of the court.

2. The proofs in the cause.

But hereunder the following propositions are submitted:

1. The court will not act upon any evidence except that of the witnesses in the cause.

The point to be proved is a pure and mere fact, to wit, the existence and the limits of an actual usage at that particular time in the port of Boston.

It is a question of how men of business meet the governor's proclamation in fact.

Now, this is wholly out of the sphere and scope of judicial notice.

2. The court judicially or personally knows some facts which will determine it to rely upon no evidence but that which is produced at these several trials.

If the day is a usual one for unlading goods, the unlading vests in the carrier all the right pertaining to unlading with notice. Whether it is a usual one for removing them from the wharf is wholly immaterial.

It is the custom of unlading a half unladen vessel which is in question.

Customs are limited, peculiar, and adapted to particular states of fact. Our rights depend on our case. The custom for our exact case is the only relevant one.

Our legal right to unlade on that day is clear—that is, no law prohibits it. To strike from our week one of its legal working days, and compel us to a fast or a rest to which law does not, a universal usage is demanded.

1 Duer on Ins. 258, 261, 262, 265; *The Paragon*, Ware, 322.

The proof, so far from establishing such a usage not to unlade, establishes the universal usage to unlade.

The following points of fact are established by the evidence:

1. That the discharge of vessels begun to be unladen before fast day, continues on that day.

2. Cargoes are moved on that day from the wharf.

3. Labor is generally done on that day by all to whom it is necessary or highly convenient to do it.

4. Express, freight, and passenger trains go on that day.

5. It is a working day in all charter-parties.

6. Public worship is not observed.

If the practice be for the carrier to unlade under such circumstances, even if the consignee may refuse to take, he cannot, by such refusal, impose upon the carrier any greater liability than that of bailee for reasonable care.

2. If such a usage, as is contended for by libelants, be established, it is one which may be waived. It was waived by Solis, the clerk, who had full power to represent the consignees respecting the unlading and delivery, as their agent, and he waived all objection to a delivery on fast day.

3. It is the duty of consignees to remove goods from the place where landed, so soon as not to occasion delay, and this they engaged to do in this case by Solis, their clerk.

They neglected to do so, and thereby made it necessary to complete unlading on fast day. They cannot have damages occasioned by fire which would not have injured their property, if they had not been guilty of neglect which subjected it to that injury.

Messrs. **C. Cushing** and **C. B. Goodrich**, for appellees:

1. The bills of lading in this case import one full and complete obligation to deliver as well as to carry.

Such is the general law of carriers by sea or land.

Ang. Carr. § 322.

And such is the special law of carriage by sea.

Fland. Ship. §§ 507, 513; see, also, *Stevens* v. *Boston and Maine Railroad*, 1 Gray, 277; Pars. Merc. L. 202, 207; *Miller* v. *Steam Nav. Co.* 13 Barb. 361.

2. The only exception to this rule in marine carriage is of perils of the sea.

Fire on the wharf, after landing, is not within the exceptions.

Oliver v. *Memphis Ins. Co.* 60 U. S. (19 How.) 312; *Airey* v. *Merrill*, 2 Curt. C. C. 8.

3. Delivery is either actual or constructive.

Actual delivery is to the consignee or his authorized agent, the deliveree receiving the goods in fact.

Constructive delivery consists of notice, tender, readiness, and present ability to deliver according to the contract, all such conditions being reasonable as to time and place, and so constituting duty to receive.

Ad. Cont. 798; Fland. Ship. § 811; Ang. Carr. § 323.

4. Unlading and delivery are, or may be, distinct facts, as well in constructive as in actual delivery.

Thus, the fact of landing on a wharf is not, necessarily, the fact of delivery.

Ad. Cont. 811, 812; Fland. Ship. 279; *Logs of Mahogany*, 2 Sumn. 589; *Ostrander* v. *Brown*, 15 Johns. 39; *Gibson* v. *Culver*, 17 Wend. 305; *Fisk* v. *Newton*, 1 Den. 45; Ang. Carr. 300.

5. Separation of the goods to be delivered from others, is of the essence of the question of the readiness to deliver and the duty to receive, so as to establish constructive delivery.

Brittan v. *Barnaby*, 62 U. S. (21 How.) 532.

6. Tender of delivery in such quantities relatively to time as may make reception and removal for storage practicable, is of the essence of constructive delivery.

Ang. Carr. §§ 287, 313; *Brittan* v. *Barnaby*, 21 How. 532; Pars. Merc. L. 208; *Price* v. *Powell*, 3 N. Y. 322; *Benson* v. *Blunt*, 1 Adol. & E. N. S. 870.

7. Due relation of notice of delivery to the time or times of delivery, so as to impose on the consignees no unreasonable consumption of time in the reception of the goods, is of the essence of constructive delivery.

Gatliff v. *Bourne*, 4 Bing. N. C. 321.

8. Proffer of delivery on and for a lawful day, is of the essence of constructive delivery.

Notice on the Lord's day and landing next morning are bad.

Bourne v. *Gatliff*, 11 Cl. & F. 49.

Generally, *dies festi* and holidays are not days for the execution of contracts.

Chit. Cont. 7 Am. ed. 721, note.

As to such days, the following things are to be noticed, *viz.:*

(*a*) In common contracts not negotiable, if day of performance falls due on a holiday, it is performable the next day.

Chit. Cont. *ut supra;* Chit. Bills, 11th Am. ed. 277, note; *Salter* v. *Burt*, 20 Wend. 205; *Staples* v. *Franklin Bank*, 1 Met. 47.

(*b*) In negotiable contracts, or with grace, the day before.

Story, Prom. N. § 219; Chit. Bills, 11 Am. ed. 377 *a*, note.

(*c*) National or local usages as to holidays have the same effect as statutes.

Story, Prom. N. § 222; Chit. Bills, 11th Am. ed. 378 a. n.; *City Bank* v. *Cutler*, 3 Pick. 414.

9. In constructive delivery, the conditions of reasonableness are affected and sometimes determined by the usage of business, which usage is a question of fact, regulated, however, by legal doctrines.

10. Under such delivery, actual or constructive, the ship's liability under the bill of lading continues.

Story, Bail. § 538; 3 Kent's Com. 163-167; *Price* v. *Powell*, 3 N. Y. 322; *Miller* v. *Steam Nav. Co.* 13 Barb. 361; *Hill* v. *Humphreys*, 5 Watts & S. 123; *Harman* v. *Clarke*, 4 Camp. 159; *Gould* v. *Chapin*, 10 Barb. 612; *Gatliff* v. *Bourne*, 4 Bing. (N. C.) 314; S. C. 3 Man. & Gr. 643; S. C. 11 Clark & F. 45; *Fisk* v. *Newton*, 1 Den. 45; *Thomas* v. *Bos. & Prov. R.* 10 Met. 472; *Lewis* v. *Western Railroad*, 11 Met. 509; *Norway Plains* v. *Bos. & Maine*, 1 Gray, 263.

It appears proved in the present case, that so far as any usage exists to supply the elements of reasonableness in the evidence of constructive delivery, it is to haul up to some suitable wharf and land the goods to be received there; that is conceded to be a lawful usage.

Gatliff v. *Bourne*, 4 Bing. (N. C.) 314.

It appears in the present case conclusively, that the libelants used all due diligence to take away their goods as soon as the landing commenced, and so long as it continued prior to Thursday; libelants' agents and servants worked on Monday and on Tuesday, so long as they could find any cotton.

So far as regards men and teams and storage, they could have removed all their cotton on Wednesday, but the parcels were not separated or set apart by the ship on being landed, and were not, according to law, made by the master ready for delivery, and so there could be no constructive delivery beyond the actual amount received in part, and receipted for by libelants' agent.

This consideration applies to so much of the cotton burned, if any, as was landed before Wednesday.

Fast day, by proclamation, is a lawful holiday in Massachusetts, on which libelants were not bound to receive, and therefore all goods landed that day remained at the risk of the ship.

Stat. of Mass. act of 1838, ch. 182, makes bills of exchange falling due on fast day payable the day before, with notice of protest the day after.

Act of 1856, ch. 113 (April 15, 1856), forbids courts and public offices to be open on fast day.

It is a *dies non* by immemorial usage in Massachusetts.

It is a much stronger case of *dies non* by usage than that in *City Bank* v. *Cutter*, 3 Pick. 414, which was of Commencement Day at Harvard College.

Conclusion.

1. There was no actual delivery in this case.

2. The goods were destroyed before the time of lawful reception arrived, and there was no constructive delivery.

3. The ship is, therefore, liable for the goods.

4. And to the full value.

And the decree of the circuit court must be affirmed.

Mr. Justice **Grier** delivered the opinion of the court:

The barque "Tangier, a foreign vessel in the port of Boston," is charged in the libel with a failure to deliver certain bales of cotton, according to her contract of affreightment. The answer admits the contract, and alleges a full compliance with it, by a delivery of the cargo on the wharf; and that after such delivery, a part of the cargo was consumed by fire, before it was removed to the consignees.

The libelants amended their libel, admitting the receipt of 163 bales, and setting forth, as a reason for not receiving and taking away from the wharf that portion of the cargo which was unladen on Thursday, "that, by the appointment of the governor of Massachusetts, that day was kept and regarded by the citzens as 'a day of fasting, humiliation, and prayer,' and that from time immemorial it has been the usage and custom to abstain from all secular work on that day;" and consequently, that the libelants were not bound to receive the cargo on that day; and that such a delivery, without their consent or agreement, is not a delivery or offer to deliver in compliance with the terms of the bill of lading.

Three questions of law were raised on the trial of this case below:

1. Whether the master is exempted from liability for a loss occasioned by accidental fire, after the goods are deposited on the wharf, by the act of Congress of March 3d, 1851 (9 Stat. at L. 635).

2. Whether the master is liable, under the circumstances of this case, for the loss of the cotton, on the general principles of the maritime law, excluding the fact of fast day.

3. If not, whether the right of the carrier to continue the discharge of his cargo is affected by the fact that the governor had appointed that day as a general fast day.

38*] *As our decision of the second and third of these points will dispose of this case, we do not think it necessary to express any opinion on the first.

We will first inquire whether there was such a delivery of cargo in this case as should discharge the carrier under this contract of affreightment, irrespective of the peculiar character of the day.

The facts in evidence, so far as they are material to the correct decision of this point, are, briefly, as follows:

The barque Tangier arrived in the port of Boston on the 8th of April, with a cargo of cotton, intending to discharge at Battery wharf; but at the request of the consignees, and for their convenience, she "hauled up" at Lewis's wharf. She commenced the discharge of her cargo on Monday, the 7th, and on the same day the master gave notice to the consignees of his readiness to deliver the goods. The unlading was commenced in the afternoon, and was continued through the forenoon of Tuesday, when, the cotton not being removed, the wharf became so full that the work was suspended. Notice was again given to the consignees; and they still neglecting to remove their cotton, a third notice was added on Wednesday morning. On the afternoon of that day, all the cotton which had been unladen on Monday and Tuesday was removed, excepting 325 bales, which remained on the wharf over night. On Thursday morning, the wharf was so far cleared that the unlading was completed by one o'clock P. M. On that day the libelants took away about five bales, and postponed taking the rest till the next day, giving as a reason that it was fast day. About three o'clock of this day, the cotton remaining on the wharf was consumed or damaged by an accidental fire.

The contract of the carrier, in this case, is "to deliver, in like good order and condition, at the port of Boston, unto Goddard & Pritchard."

What constitutes a good delivery, to satisfy the exigency of such a contract, will depend on the known and established usages of the particular trade, and the well-known usages of the port in which the delivery is to be made.

*A carrier by wagon may be bound to [*39 deliver his freight at the warehouse of the consignee; carriers by railroad and canal usually deliver at warehouses belonging to themselves or others. Where the contract is to carry by sea, from port to port, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.

There is no allegation of a particular custom as to the mode and place of delivery, peculiar to the city of Boston, which the carrier has not complied with. The general usages of the commercial and maritime law, as settled by judicial decisions must, therefore, be applied to the case. By these, it is well settled that the carrier by water shall carry from port to port, or from wharf to wharf. He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf. But to constitute a valid delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody.

Such a delivery, to be effectual, should not only be at the proper place, which is usually the wharf, but at a proper time. A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian, before the consignee had proper time and opportunity to take them into his possession and care, would not fulfill the obligation of his contract. When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has so done, he is no longer liable on his contract of affreightment.

Applying these principles to the facts of this case, it is clear that (saving the question as to the day) the respondents are not liable on their contract of affreightment for the loss of the

goods in question. They delivered the goods at the place chosen by the consignees, and where they agreed to receive them, and did receive a large portion of them, after full and fair notice.

The goods were deposited for the consignees [40*] in proper order *and condition, at midday, on a week day, in good weather. This undoubtedly constituted a good delivery; and the carriers are clearly not liable on their contract of affreightment, unless, by reason of the fact next to be noticed, they were restrained from unlading their vessel and tendering delivery on that day.

II. This inquiry involves the right of the carrier to labor on that day, and discharge cargo, and not the right of the consignee to keep a voluntary holiday, and to postpone the removal of the goods to his warehouse to a more convenient season. The policy of the law holds the carrier to a rigorous liability; and in the discharge of it, he is not bound to await the convenience or accommodate himself to the caprice or conscientious scruples of the consignee. The master of a ship usually has a certain number of lay days. He is bound to expedite the unlading of his vessel, in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think it proper to keep Saturday as his Sabbath, and to observe Friday as a fast day, or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as insurer of his property, to suit his convenience or his conscience.

Let us inquire, then: First, whether there is any law of the state of Massachusetts which forbids the transaction of business on the day in question; second, if not, is there any general custom or usage engrafted into the commercial or maritime law, and making a part thereof, which forbids the unlading of vessels and a tender of freight to the consignee on the day set apart for a church festival, fast, or holiday? and third, if not, is there any special custom in the port of Boston which prohibits the carrier from unlading his vessel on such a day, and compels him to observe it as a holiday?

1. There is no statute of Massachusetts which [41*] forbids the *citizen to labor and pursue his worldly business on any day of the week, except on the Lord's day, usually called Sunday. In the case of *Farnum* v. *Fowle*, 12 Mass. 89, it is said by Chief Justice Parker: "There are no fixed and established holidays in Massachusetts, in which all business is suspended," except Sunday.

2. The observance of Sunday as a Sabbath or day of ceremonial rest was first enjoined by the Emperor Constantine as a civil regulation, in conformity with the practice of the Christian church. Hence it is a maxim of the civil law, "*Diebus dominicis mercari, judicari vel jurari non debet.*" This day, with others soon after added by ecclesiastical authority (such as "*Dies natalis,*" or Christmas, and "*Pascha*" or Easter), were called "*Dies festi,*" or "*Feriæ,*" which we call festivals, saints' days, holy days, or holidays. In the thirteenth century, the number of these festivals enjoined by the church was so increased that they exceeded the number of Sundays in the year. The multiplication of them by the church had its origin in a spirit of kindness and Christian philanthropy. Their policy was to alleviate the hardships and misery of predial slaves and the poor laborers on the soil who were compelled to labor for their feudal lords. But afterwards, when these vassals were enfranchised and tilled the earth for themselves, they complained that "they were ruined" by the number of church festivals or compulsory holidays. In 1695, the French King forbid the establishment of any new holidays, unless by royal authority; and the church went further, and suppressed a large number of them, or transferred their observance to the next Sunday. See Dalloz, vol. XXIX., Tit. "*Jour feriè,*" and 2d Campeaux droit civil, page 168.

The same observance of these festivals was required by the ecclesiastical authorities as that which was due to Sunday. Men were forbidden to labor or to follow their usual business or employments. But to this rule there were many exceptions of persons and trades, who were not subjected to such observance.

Without enumerating all the exceptions, we may mention that, by the canon law, the observance of these days did not *extend "to [*42 those who sold provisions; to posts or public conveyances; to travelers; to carriers by land or water; to the lading and unlading of ships engaged in maritime commerce."

Thus we see that in those countries where these holidays had their origin, and the sanction both of church and state, they were not allowed to interfere with the necessities of commerce, or to extend to ships, or those who navigate them. And it would certainly present a strange anomaly, if this country, in the nineteenth century, should be found re-establishing the superstitious observances of the dark ages with increased rigor, which both priest and sovereign in the seventeenth have been compelled to abolish as nuisances.

In England and other Protestant countries, while a more strict observance of the Lord's day is enforced by statute, the other fasts and festivals enjoined by the church have never been treated as coming within the category of compulsory holidays. Every man is left free to follow the dictates of his conscience in regard to them. Formerly their courts sat even on Sunday; nor were contracts made on that day considered illegal or void till the statute of 29 Charles II. ch. 27, was enacted, whereby "no person whatever is allowed to do or exercise any worldly labor or work of their callings on the Lord's day." But this prohibition was never extended, either by statute or usage, to other church fasts, festivals, or holidays. It is true that there are three days in the year, to wit, "Candlemas, Ascension, and St. John the Baptist," in which the courts do not sit, and the officers are allowed a holiday. But there is no trace of any decision by their courts that worldly labor was prohibited on those days, or any usage that ships should not be unladen and freight delivered and received on such days.

These saints' days and church fasts or festivals are treated as voluntary holidays, not as Sabbaths of compulsory rest.

In the case of *Figgins* v. *Willie*, 2 W. Black. 1186, where a public officer claimed a right of holiday on the feast day of St. Barnabas, Chief Justice De Grey says: "I by no means approve of these self-made holidays; the offices ought to be open." And in *Sparrow* v. *Cooper*, 2 W. 43*] Black. 1315, the *same judge observes, in reference to the same day: "There is no prescriptive right to keep this as holiday. It is not established by any act of parliament. The boards of revenue, custom house, and excise may act as they please, and pay such compliment to their officers and servants as they shall judge expedient by remitting more frequently the hard labor of their clerks, but they are no examples for the court." And the justices, Gould and Blackstone, severally observe: "My objection extends to all holidays, as well as St. Barnabas day."

It may be observed in passing, that there, as well as here, the class of persons most anxious to multiply holidays were the public officers, apprentices, clerks, and others receiving yearly salaries.

It is matter of history that the state of Massachusetts was colonized by men who fled from ecclesiastical oppression, that they might enjoy liberty of conscience, and that while they enforced the most rigid observance of the Lord's day as a Sabbath, or day of ceremonial rest, they repudiated with abhorrence all saints' days and festivals observed by the churches of Rome or of England. They "did not desire to be again brought in bondage, to observe days and months, and times and years." And while they piously named a day in every year which they recommended that Christians should spend in fasting and prayer, they imposed it on no man's conscience to abstain from his worldly occupations on such day, much less did they anticipate that it would be perverted into an idle holiday. The proclamation of the governor is but a recommendation. It has not the force of law, nor was it so intended. The duties of fasting and prayer are voluntary, and not of compulsion, and holiday is a privilege, not a duty. In almost every state in the Union a day of thanksgiving is appointed in the fall of the year by the governor, because there is no ecclesiastical authority which would be acknowledged by the various denominations. It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor. Nor is it necessary to a literal compliance with the recommended fast day that all labor should 44*] cease, and the day be observed *as a Sabbath, or as a holiday. It is not so treated by those who conscientiously observe every Friday as a fast day.

III. Does the testimony in this case show that from time immemorial there has been a well-known usage, having the force and effect of law in Boston, which requires all men to cease from labor, and compels vessels engaged in foreign commerce to cease from discharging their cargoes, and hinders consignees from receiving them?

We do not know this fact judicially, for (except in this case) there is no judicial decision, or course of decisions, in Massachusetts, which establishes the doctrine that carriers must cease to discharge cargo on this day in the port of Boston, but rather the contrary. And after a careful examination of the testimony, we are compelled to say that we find no sufficient evidence of such a peculiar custom in Boston, differing from that of all other commercial cities in the world.

The testimony shows this, and no more: that some persons go to church on that day; some close the windows of their warehouses and shops, and either abstain from work or do it privately; some work half the day and some not at all. Public officers, school boys, apprentices, clerks, and others who live on salaries, or prefer pleasure to business, claim the privilege of holiday, while those who depend on their daily labor for their daily bread, and cannot afford to be idle, pursue their occupations as usual. The libelants appear to have had no conscientious scruples on the subject, as they received goods from other ships, and some from this. But the testimony is clear, that however great the number may be who choose to convert the day into a voluntary holiday for idleness or amusement, it never has been the custom that vessels discharging cargo on the wharves of Boston ceased on that day; that like the canon law regarding church festivals and holidays of other countries and former ages, the custom of Boston (if it amount to anything more than that every man might do as he pleased on that day) did not extend to vessels engaged in foreign commerce, or forbid the carrier to continue the delivery of freight on that day.

On the whole, we are of opinion that the barque Tangier *has made good delivery [*45 of her cargo to the consignees according to the exigency of her bill of lading, *and that the decree of the Circuit Court should be reversed, and the libel dismissed, with costs.*

SAMUEL IRVINE and Peter Forbes,
Plffs.,
v.
HERMAN J. REDFIELD, late Collector, *etc.*

(See S. C. 23 How. 170-172.)

Duties on foreign merchandise, how computed.

The duties upon foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port and the value for the computation is the wholesale market price there on such day.

Submitted Jan. 18, 1860. Decided Jan. 23, 1860.

ON a certificate of division between the Judges of the Circuit Court of the United States for the Southern District of New York.

This was an action of assumpsit brought in the court below, by the plaintiffs against the defendant, as late collector of customs of the United States at the port of New York. The defendant pleaded the general issue of non assumpsit.

When the case came on to be argued, there being a division of opinion between the judges, the case was certified to this court.

The question, upon which the judges were divided in opinion, appears in the opinion of the court.

The case was submitted on the transcript, without argument in this court.

Messrs. **McCulloh** and **Vallandigham** for plaintiffs.

Mr. **J. S. Black**, Atty-Gen. for defendant.

Mr. Justice **Wayne** delivered the opinion of the court:

This case comes to this court under a certificate of division of opinion from the circuit court of the United States for the southern district of the state of New York.

171*] *The point made is, "whether, by the period of exportation of merchandise from a foreign country to the United States, as used in the act of Congress entitled 'An Act to Amend the Acts Regulating the Appraisement of Imported Merchandise, and for Other Purposes,' approved the 3d March, 1851, was to be taken to mean the time when the merchandise had been laden aboard a general ship, and the bill of lading therefor given in the foreign port, or at the time when said ship actually departed from said foreign port, destined to the United States."

The facts in the record are, that the ship Henry Buck was a general ship at the port of Glasgow, in Scotland, in the month of May, 1855, destined for the port of New York, in the United States. That the plaintiff, on the 9th May, 1855, bought three hundred tons of Coltness pig iron, at the then wholesale market price of sixty-four shillings sterling per ton, and immediately commenced to load the same aboard the ship, and that the iron was all laden and bills of lading given for it on the 22d May, 1855, on which day the market price of such iron had risen to sixty-nine shillings per ton; that the ship remained in port, and sailed from Glasgow on the 4th June, 1855, on which day the market price of such iron had risen to seventy-four shillings and sixpence sterling per ton; and that, on the arrival of the ship in the United States, the iron was appraised at the customhouse at the market price of twenty-four shillings and sixpence sterling per ton. On that valuation the defendant collected duty, and twenty per cent on such value, in conformity with the 8th section of the act of Congress entitled, "An Act Reducing the Duty on Imports, and for Other Purposes," approved the 30 July, 1846 (9 Stat. at L. 42).

This court considered two years since in the case of *Sampson* v. *Peaslee*, 20 How., 571, the meaning of the acts of Congress of the 30th July, 1846 (9 Stat. at L., 42), and that of the 3d March, 1851 (9 Stat. at L., 629), for the collection of duties upon imported goods, and when and upon what twenty per centum should be charged upon an under valuation made by an importer in his entry of merchandise. It announced then, that if the appraised value of imports which have actually been purchased shall exceed by ten per centum or more the value of 172*] them declared upon the entry, *then, in addition to the duties imposed by law upon the value of the same, there shall be levied, collected, and paid, a duty of twenty per centum ad valorem on such appraised value. That the additional value of twenty per centum could only be levied upon the appraised value, and not upon charges and commissions added to it. Also, that the day of the sailing of a vessel from a foreign port is the true period of exportation of the goods; and that the Secretary of the Treasury had given a proper interpretation of the statute, in directing it to be done on the market value of the goods imported on the day of the sailing of the vessel, and that he was authorized by law to give such a direction.

We see no cause now for a different interpretation of the statute, and direct that the question certified to this court be answered, "that the duties on foreign merchandise are to be computed on their value on the day of the sailing of the vessel from the foreign port, and that the value for the computation is the wholesale market price there on such day."

LOUISA A. KENDALL, Adm'x of Daniel Green, Deceased, *Appt.*,

v.

FLETCHER CREIGHTON, in his own right, and as executor of Jonathan McCaleb, Deceased.

(See S. C. 23 How. 90-108.)

Remedies in United States courts—not modified by state laws or practice—creditor of an estate may sue—proceedings in state court do not prevent suit in United States Court—sureties of administrator—equity jurisdiction of circuit court to reach assets.

In the organization of the courts of the United States, the remedies at common law and in equity have been distinguished, and the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly through the United States, and does not receive any modification from the legislation of the states, or the practice of their courts having similar powers.

In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of the creditors, legatees, and heirs, in reference to the proper execution of their trust.

A single creditor may sue for his demand in equity, and obtain a decree for payment out of the personal estate, without taking a general account of the testator's debts.

The fact of the pendency of proceedings in insolvency in a state probate court, will not oust the jurisdiction of the circuit court of the United States.

A foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and the court will interpose to arrest the distribution of any surplus among the heirs.

No one can proceed against the sureties on an administration bond, at law, who has not recovered a judgment against the administrator.

The jurisdiction of a court of equity to enforce the bond, arises from its jurisdiction over administrators, to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case.

Where the original debtor has died insolvent, and his surety has died insolvent, and a portion of the assets belonging to the estate of the latter is in hands of the surety of this administrator, and a discovery of the assets in hand and their application to the payment of the debt are required—the circuit court was authorized to entertain the suit.

Submitted Jan. 10, 1860. Decided Jan. 30, 1860.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

NOTE.—*Jurisdiction of United States circuit court dependent on residence of parties*—see note to 36 L. ed. U. S. 579.

Adoption by Federal courts of remedies created by state statutes—see note to 18 L. R. A. 266.

The bill in this case was filed in the court below, by the intestate of the appellant, to reach assets alleged to belong to the estate of Amos Whiting, deceased.

The court below having dismissed the bill for want of jurisdiction, the complainant took an appeal to this court.

The question of jurisdiction is the only one before this court for consideration.

A further statement of the case appears in the opinion of the court.

Mr. **John D. Freeman,** for appellant:

All the allegations of the bill are sustained by the answers and proofs in the case, from which it clearly appears that the complainant is the sole distributee of Wheeler C. Green, deceased, who died intestate in Claiborne county, Mississippi, June, 1836; that Albert Tunstall administered on said estate, gave an administration bond in the penalty of $60,000, with Amos Whiting as his surety; that Tunstall wasted the whole estate and defaulted to the amount of $61,000; that complainant, by a lawful suit for that purpose in the probate court of Claiborne county, obtained a final decree against Tunstall for that amount, in June, 1841; that Amos Whiting was his surety and had departed this life in said county in the year 1837; that George Lake and Whiting's wife administered on Whiting's estate until March, 1839, when J. M. Rhodes intermarried with Whiting's wife, and administered in her right until October, 1841, when Lake and Rhodes and wife were removed from the administration of Whiting's estate for maladministration; that defendant, Creighton, became administrator *de bonis non* of Whiting's estate, on the removal of Lake, Rhodes and wife; that said Creighton is now insolvent; that defendant, Jonathan McCaleb, became his surety on his administrative bond in the penalty of $100,000, all of which bonds are sued upon and set forth in full; that Creighton has received a large amount of the assets of the estate of Amos Whiting, equitable or otherwise, which he has failed to inventory and account for, and which he refuses to render an account of in this court, insisting that he has accounted in the probate court of Claiborne county, and that such accounting is a bar to an account in this court.

The defendants admit the rendition of the decree against Tunstall for $61,000, but fail to make good their defense, or in any manner to invalidate the same, nor do they prove any claims against the estate of Green to have been paid by Tunstall.

That Whiting, as surety of Tunstall on his administration bond, is liable for the amount of this decree, cannot admit of a doubt.

20 Pick. 53; 8 Watts. 286; 1 McMullen, 85, 100, 380; 6 Porter, Ala. 393; 4 Porter, Ala. 395; 7 Blackford, 529.

Tunstall died insolvent; the money could not be made out of him. Amos Whiting, his surety, had died in 1837, and the only way to establish his liability as surety for Tunstall to pay the amount of Tunstall's defalcation to the estate of Green, was to proceed against the administrator of Whiting. But it is said that Whiting's administrator is not liable in equity to account until judgment had been first obtained against him at law. To this I reply, that it was the duty of Whiting, as surety of Tunstall to see that he administered the estate of Green according to law. He neglected this duty; the court of probate had full jurisdiction to ascertain and decree the amount of Tunstall's indebtedness to the estate of W. C. Green, as administrator of the same; this decree was had in accordance with law, as shown by the pleadings and proof, and the amount of this decree could have been enforced on Tunstall by attachment and imprisonment, if he had been possessed of the means to pay it. The decree of the probate court was, therefore, a lawful and final assessment of the damages against Whiting's principal in the administration bond, by the only tribunal in the state of Mississippi having jurisdiction of that subject, and must, therefore, be regarded as conclusive evidence of the amount of Whiting's liability for Tunstall, and with which his estate is chargeable.

1 Phil. Ev. 246; 7 How. 220; 2 Sumn. 458, 459; 2 J. J. Marsh. 195.

The jurisdiction of this court over executors and administrators is not affected by the Constitution and laws of Mississippi—its jurisdiction is not derived therefrom nor limited thereby, but only by the Constitution and laws of the United States; and these confer upon this court the same jurisdiction over administrators as that of the chancery courts of England.

9 Pet. 632–658; 3 Wheat. 212; 4 Wheat. 108; 5 Mason, 105; 3 Mason, 165; 3 Leigh. 407; 2 Blackf. 377; 1 Har. & J. 232; Munf. 368; 5 Rand. 319; Stew. & P. 133; 1 Sto. Eq. Jur. 515, §§ 542–548, and 552; Jer. Eq. Jur. 537, 538; 4 Johns. Ch. 619; 3 Johns. Ch. 56, 190; *Taylor* v. *Benham*, 5 How. 233; rule 51 of this court.

From these authorities it is evident that this court has full jurisdiction over the subject-matter of the bill, the objects of which are to obtain a discovery of assets in the hands of the administrator not inventoried, and to reach equitable assets of the estate in the hands of his surety, Jonathan McCaleb, and others, and to marshal the assets of the estate of Whiting, if the administrator does not admit sufficient assets to pay complainant's demand.

1 Story, Eq. Jur. 601, 602, § 543.

A creditor may file his bill for the payment of his own debt, and seek a discovery of assets for this purpose only. If he does so, and the bill is sustained, and an account is decreed to be taken, the court will, upon the footing of such an account, proceed to make a final decree in favor of the creditor, without sending him back to law for the recovery of his debt; for this is one of the cases in which a court of equity, being once in rightful possession of a case for discovery and account, will proceed to a final decree on all the merits.

1 Story, Eq. Jur. 603, 604, § 546.

The defendant, Jonathan McCaleb, is not only a surety on the bond of Creighton, but is charged with having in his hands equitable assets of the estate of Whiting, which a judgment against Creighton would not reach, and this fact is admitted by the answer of defendants. Creighton is alleged to be insolvent, and the charge is not denied; McCaleb, his surety, has money of the estate which Creighton refuses to collect; he is, therefore, a proper party, for all these reasons.

Story, Eq. Pl. 212, § 178; 5 Gill & J. 432-453; 10 Gill & J. 65, 100; 2 Rand. 398, 399.

In the case of *The Ordinary* v. *Snooks*, it was held that the probate court was the proper tribunal to assess damages on an administration bond.

5 Halst. N. J. 65; 1 Halst. cited as above.

But a court of equity has jurisdiction of a bill by a distributee or legatee against an administrator and his sureties, or either of them alone, on their bond, without any previous suit at law.

6 Call, Va. 21; 2 Rand. 483; 2 J. J. Marsh. 198; 3 Mon. 354; 4 Mon. 296, 457; 2 Bibb, 276; 2 Hen. & M. 8; and rule 51 of this court. These cases are conclusive on the points of jurisdiction, alike upon principle and as precedents.

If Mississippi has deprived her chancery court of a portion of its original jurisdiction, it does not follow that the jurisdiction of the Federal courts is thereby abridged in like degree.

See Const. of U. S. art. 3, § 2; § 11, judiciary act; also, *U. S.* v. *Howland*, 4 Wheat. 108; *Robinson* v. *Campbell*, 3 Wheat. 212; *Livingston* v. *Story*, 9 Pet. 655; *Pratt* v. *Northam*, 5 Mason, 105; *Gordon* v. *Hobart*, 2 Sumn. 401; *Gaines* v. *Relf*. 15 Pet. 13; *Ford* v. *Douglas*, 5 How. 163; *Taylor* v. *Benham*, 5 How. 269.

The question of jurisdiction having been settled, alike as to parties and subject-matter, and it appearing by the answers and proofs that Amos Whiting was the surety of A. Tunstall on his bond as administrator of W. C. Green, deceased—that said Tunstall defaulted to the amount of $61,000, which remains unpaid, for which a final decree was rendered against him by a tribunal having full authority to render such decree, and that defendants have failed in their attempt to invalidate said decree on a charge of fraud, it follows, as a matter of course, that complainant is entitled to a decree charging the estate of Amos Whiting, in the hands of his administrator *de bonis non*, with the amount of said decree of the probate court to the extent of the penalty of the administration bond of A. Tunstall, which is $60,000.

Messrs. **Geo. S. Yerger** and **T. J. & F. A. R. Wharton**, for appellee:

The purpose of the complainant in filing this bill was to relieve himself from the necessity of pursuing the only course which, under the operation of the Constitution and laws of Mississippi, it was competent for him to pursue, as well as to evade the force and effect of decisions of the high court of error and appeals, made in this very cause and between the same parties.

It will be borne in mind that this suit is an attempt to enforce the decree of the probate court of Claiborne county, Mississippi, which was rendered in the plenary proceedings instituted in that court by the complainant herein against Tunstall, the administrator appointed by that court, of Wheeler C. Green. The case is first brought to the attention of the said high court of errors and appeals in *Green* v. *Tunstall*, 5 How. Miss. 638. It was then and there held, that the probate court has not jurisdiction which will enable it to proceed against the sureties in an administrator's bond, on a plenary proceeding by bill. The sureties in the administrator's bond must be sued at law, after proceeding to fix the liability of the administrator. Being liable only on the administration bond, not being officers of the probate court, the only recourse against the sureties is by action at law against them, after the liability of the administrator has been ascertained by a proper proceeding in this behalf, and after final settlement by him, and a decree of the court fixing the amount of his liability and directing him to pay it.

The same rule is held in Alabama and South Carolina, as may be seen by reference to the cases cited by the high court, *viz.:*

1 Porter, 70; 3 Stew. & P. 263, 348; 2 Bailey, S. C. 60; 1 Bailey, S. C. 27; 1 Nott & McC. 587; 4 Nott & McC. 113, 120.

It will be recollected that Whiting was only a security of Tunstall in his administration bond, and survived the grant of letters to Tunstall only about ten months. The defendant, Creighton, is administrator of Whiting and executor of defendant, McCaleb, who was a security on the bond of defendant, Creighton, as administrator of Whiting. The case cited from 5 How., apart from being an adjudication between the same parties of the same subject-matter, would be an authority upon general principles for the appellees.

The next that we hear of these parties and this litigation in Mississippi, is in 7 Sm. & M. 197.

The high court there decided "that in an action at law on the bond of an administrator, the bond is but inducement to the action, and no recovery can be had on it without proof of damages. It is only security for such damages as the parties interested in the estate sustain. To make it a valid claim against an insolvent estate or against anyone, it must be accompanied by proof of damages; if not so accompanied, it is not a claim. There must be proof that the condition has been broken, for it is only on such a contingency that a right of action accrues." And again, "instead of allowing the penalty of the bond as a claim, the referees should have allowed the amount of damages sustained by a breach of the condition."

We again meet with this same claim in *Green* v. *Creighton*, 10 Sm. & M. 159. Now, however, the forum is changed, and instead of proceedings in the probate court of Claiborne county, it is a bill filed in the superior court of chancery of Mississippi, and we ask attention to the striking similarity of the prayer as set out in the report of the case, and the prayer of the present bill. The objects of the bill are very clearly specified in the opinion of the court, and are the same precisely in legal intendment and effect with the objects of this bill. An injunction had been granted to restrain defendant, Creighton, from paying a certain other claim against the estate of Whiting. The Chancellor dissolved the injunction, and from that order an appeal was taken to the high court of errors and appeals.

The following is the emphatic language of the court in affirming the degree of the Chancellor:

"Nothing, certainly, is better settled in this court than that the court of chancery does not possess the jurisdiction which it is here asked to exercise. The administration of estates and the settlement of the accounts of the administrators, falls peculiarly and exclusively under the cognizance of the probate court. . . .

Suits upon the bonds of administrators pertain to the circuit court."

In that bill it was alleged that the administrators had practised fraud in their settlement with the probate court, of which, however, no proof was offered or attempted, and the high court held that if the charge were established, a court of equity would have jurisdiction of the bill, to set aside the settlements and order new ones to be made in the probate court. They also noticed the objection taken by the appellant's counsel, "that there was no demurrer to the jurisdiction of the court below, and that it was too late to raise the objection in the high court, and beside that, that rule is only applicable in cases of concurrent jurisdiction, not where there is an entire want of jurisdiction of the subject-matter."

The foregoing summary will serve to show that this is no new case in the courts of Mississippi, either in name or principle, and will also serve to show a reason for the change of forum.

Precisely similar in all its features is the case of *Buckingham* v. *Owen*, 6 Sm. & M. 502.

After reviewing the authorities cited for the appellee, some of the very same cited by appellants in this case, particularly *Spotswood* v. *Dandridge*, 4 Munf. 289, they wholly deny the principle attempted to be established by them. They admit that in some of the states of the Union, in suits against executors and administrators, courts of equity have concurrent jurisdiction with courts of law, and that it is upon that principle a court of chancery in Virginia exercises it; but they quote, with approbation, the language in 2 Rob. Pr. 38, showing the strong inclination of the court of appeals in that state to restrict parties to their remedy at law, when it is full and adequate, and referring to the case before cited by us.

Green v. *Tunstall*, 5 How. Miss. 638.

They say that was a bill filed against the administrator and his sureties for a discovery and account of assets and for distribution. The object was similar to that in view in this case.

Buckingham v. *Owen*, 6 Sm. & M. 502.

The very authorities cited to sustain this bill were cited in the argument of that cause. The court decided that the remedy upon the bond was exclusive in a court of law. So they held that the Chancellor erred in overruling the demurrer: they reversed his decree and dismissed the bill for want of jurisdiction in the chancery court to entertain it.

The 4th art. § 18, of the Constitution of the state of Mississippi, provides for the establishment of the probate court. Its language is "That a probate court shall be established in each county of the state, with jurisdiction in all matters testamentary, and of administration of orphans' business, and the allotment of dower, in cases of idiocy and of lunacy, and of persons *non compos mentis*." In construing the powers of that court, derived from that clause of the Constitution, the high court of error and appeals of Mississippi has repeatedly held that its jurisdiction was exclusive in reference to the matters committed to it. And thus the superior court of chancery of said state has no jurisdiction whatever of the subjects confided to the probate court. Accordingly, on a bill filed in said chancery court to review in a matter of administration the proceedings of the probate court, it was held that the chancery court had no jurisdiction of the case; that it belonged exclusively to the probate court, and the bill was, therefore, dismissed.

See *Blanton* v. *King*, 2 How. Miss. 856; *Carmichael* v. *Browder*, 3 How. Miss. 252.

Again; when the probate court has full jurisdiction of a matter, its judgment is final and cannot be disturbed, unless fraud is charged and proved.

Stubblefield v. *McRaven*, 5 Sm. & M. 130; *Jones* v. *Coon*, 5 Sm. & M. 751.

The utmost that a court of chancery can do is, where fraud is charged against a settlement of an administrator in the probate court, to set aside a settlement in the probate court and direct a new settlement there—its jurisdiction does not extend beyond that as was held between the parties to this record in 10 Sm. & M. 159.

If this be true, as we have shown, that the probate court has exclusive jurisdiction within the sphere of its delegated powers; and if, further, it is true, both as a general rule of law and as settled by judicial decisions in this state, that the probate court could not proceed against the sureties on the bond after ascertaining and fixing by its decree the amount for which the administrator is responsible, but could only direct that as to them the bond should be put in suit in a court of law, upon what foundation does a complainant rest his claim?

We cite a few cases, to show what deference this court has always paid to the decisions of the state courts in sustaining their local laws.

McKeen v. *DeLancey*, 5 Cranch, 22, 23; *Polk's Lessee* v. *Wendal*, 9 Cranch, 87; *Mutual Assur. Soc.* v. *Watts*, 1 Wheat. 279; *Shipp* v. *Miller's Heirs*, 2 Wheat. 316; *Elmendorf* v. *Taylor*, 10 Wheat, 152; *Shelby* v. *Guy*, 11 Wheat, 361.

Mr. Justice Campbell delivered the opinion of the court:

The intestate of the plaintiff, as an heir of Wheeler Green, deceased, and claiming, by assignment of the remaining heirs, the entire estate, filed this bill against the defendant, in his capacity of administrator of Amos Whiting, deceased, and of executor of the will of Jonathan McCaleb. He states that Albert Tunstall became the administrator of the estate of Wheeler Green by the appointment of the court of probate of Claiborne county, Mississippi, in 1836; that he gave bond for the faithful performance of his duties, with Amos Whiting as his surety; that Tunstall received a large amount of property belonging to the estate, and committed a devastavit; that in the year 1841, his intestate summoned Tunstall before the probate court to make an account, and upon that accounting he was found to be indebted to him, as heir, $61,194.76; which sum he was required to pay by the decree of the court, and authority was given to prosecute a suit on the administration bond. The bill avers that Tunstall and Whiting, his surety, are both dead, and that all of his other sureties are insolvent. It charges that the defendant, Creighton, as administrator of Whiting, has assets in his hands for administration,

and that a portion of the assets is in the hands of McCaleb, who is the surety of Creighton on his bond to the probate court, as administrator of Whiting.

The object of the bill is to establish the claim of the intestate and his representative arising 105*] from the judgment against *Tunstall and the breach of his administration bond, on which Whiting is a surety, against the administrator of Whiting and his surety, and to obtain satisfaction from them to the extent of the assets in their hands belonging to that estate, and for this purpose they seek a discovery of the assets, and account and payment.

The defendants appeared to the bill, and allege that the estate of Whiting has been regularly administered; and that returns have been made to the probate court of Claiborne county, Mississippi, of whatever property came to the hands of the administrator, Creighton, whose character as administrator is admitted; and that he was then engaged in administering the estate under the laws of Mississippi; that the estate had been reported to the probate court as insolvent several years before this suit was instituted, and that commissioners had been appointed by that court to receive and credit the claims; which commission was still open for the proof of claims. They contest the validity of the judgment recovered against Tunstall, and the truth of the account preferred against them, and deny the jurisdiction of the circuit court to entertain this bill. The connection of McCaleb with the bond of Creighton is admitted, and also that a portion of the money of the estate of Whiting had been deposited with or lent to him. Upon the hearing of the cause on the pleadings and proofs, the bill was dismissed for want of jurisdiction, and by the agreement of the parties the record has been up so as to present that question only. None other will, therefore, be considered. In the organization of the courts of the United States, the remedies at common law and in equity have been distinguished, and the jurisdiction in equity is confided to the circuit courts, to be exercised uniformly through the United States, and does not receive any modification from the legislation of the states, or the practice of their courts having similar powers. *Livingston* v. *Story*, 9 Pet. 632.

The judiciary act of 1789 conferred upon the circuit courts authority "to take cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, 106*] exclusive *of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the state where the suit is brought, and a citizen of another state."

The questions presented for inquiry in this suit are whether the subject of the suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control of it. The court has jurisdiction of the parties. In the court of chancery, executors and administrators are considered as trustees, and that court exercises original jurisdiction over them, in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity, and obtain a decree for payment out of the personal estate, without taking a general account of the testator's debts. *Atty. Gen.* v. *Cornthwaite*, 2 Cox, 43; Adams, Ex. 257. And the existence of this jurisdiction has been acknowledged in this court, and in several of the courts of chancery in the states. *Hagan* v. *Walker*, 14 How. 29; *Pharis* v. *Leachman*, 20 Ala. 663; *Spottswood* v. *Dandridge*, 4 Munf. 289. The answer of the defendant contains an assertion that, prior to the filing of the bill, the estate of Whiting was reported to the probate court of Claiborne county as insolvent, and thereupon that court had appointed commissioners to audit the claims that might be presented and proved, as preparatory to a final settlement, and that the commission was still open for the exhibition of claims.

But of this statement there is no sufficient proof. Neither the report nor any decretal order founded on it is contained in the record, and the proceedings referring to one are of a date subsequent to the filing of the bill.

The question arises, then, whether the fact of the pendency of proceedings in insolvency in the probate court will oust the jurisdiction of the circuit court of the United States. In *Suydam* v. *Broadnax*, 14 Pet. 67, a similar question was presented. A plea in abatement was interposed in the circuit court in Alabama, in an action at law against administrators, to the effect that the decedent's estate had been reported as insolvent to a court of probate, and that jurisdiction over the *persons interested and [*107 the estate had been taken in that court. This court declared that the 11th section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit court of the United States. "It was certainly intended," says the court, "to give to suitors having a right to sue in the circuit court remedies co-extensive with those rights. These remedies would not be so, if any proceedings under an act of a state legislature to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court."

In *Williams* v. *Benedict*, 8 How. 107, this court decided that a judgment creditor in a court of the United States could not obtain an execution and levy upon the property of an estate legally reported as insolvent in the state of Mississippi to the probate court, and which was in the course of administration in that court. The court expressly reserve the question as to the right of a state to compel foreign creditors, in all cases, to seek their remedies against the estates of decedents in the state courts alone, to the exclusion of the jurisdiction of the courts of the United States.

The cases of *Peale* v. *Phipps*, 14 How. 368, and *Bank of Tenn.* v. *Horn*, 17 How. 157, are to the same effect.

The case of *The Union Bank* v. *Jolly*, 18 How. 503, was that of a judgment creditor who recovered a judgment against administrators, who subsequently reported the estate of their decendent insolvent. After administering the estate in the probate court, it was ascertained that there was a surplus in their hands. The creditor had not made himself a party to the settlement in the probate court; and the ad-

minstrators contended that his claim was barred.

This was a suit in Mississippi. This court determined that the creditor had a lien upon the assets thus situated.

Thus it will be seen that, under the decisions of this court, a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the 108*] administration and *settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs. What measures the courts of the United States may take to secure the equality of such creditors in the distribution of the assets, as provided in the state laws (if any) independently of the administration in the probate courts, cannot be considered until a case shall be presented to this court.

The remaining question to be considered is whether the debt described in the bill entitles a plaintiff to come into a court of equity, under the circumstances. It is well settled that no one can proceed against the sureties on an administration bond, at law, who has not recovered a judgment against the administrator. 5 How. Miss. 638; 6 Port. 393. But this rule is not founded upon the supposition that there is no breach of the bond until a judgment is actually obtained. The duty of the administrator arises to pay the debts when their existence is discovered; and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decrees to the substantial justice of the case. *Moore* v. *Waller*, 1 A. K. Marsh, 488; *Moore* v. *Armstrong*, 9 Port. 697; *Carew* v. *Mowatt*, 2 Edw. Ch. 57.

In this case, the original debtor, Tunstall, has died insolvent. Whiting, his surety, has died insolvent. A portion of the assets belonging to the estate of the latter is in the hands of the surety of this administrator. A discovery of the amount and nature of the assets in hand, and their application to the payment of the debt, are required, if they are subject to the application.

We conclude that the Circuit Court was authorized to entertain this suit, and that the decree dismissing the bill is erroneous.

Decree reversed.

EDWARD H. CASTLE, Elihu Granger, and J. P. Phillips, Survivors of Joseph Filkins, Deceased, *Plffs. in Err.*,

v.

EDWARD F. BULLARD.

(See S. C. 23 How. 172-190.)

Circuit courts, power of to nonsuit—one of several defendants—separate verdict—codefendant as a witness—evidence in cases of fraud—positive proof—circumstantial—liability of partners—instructions to jury—when subject of error.

Circuit courts have no power to grant a peremptory nonsuit against the will of the plaintiff.

At common law there cannot regularly be a nonsuit as to one and a verdict as to others; whenever it appears that there is evidence in a case to charge one or more of the defendants, which was proper to be submitted to the jury, as matter of law, it was not error to overrule the motion for nonsuit, even if the authority to grant it was conceded.

If a defendant, who is a material witness for the other defendants, has been improperly joined in a suit for the purpose of excluding his testimony, the jury will be directed to find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted as a witness for the other defendants.

But if there be any evidence against him, then he is not entitled to a separate verdict. His guilt or innocence must await the general verdict of the jury, who are the sole judges of the fact.

Courts are not agreed, at what stage of the trial the party thus improperly joined may insist upon a verdict in his favor.

In cases of fraud, other wrongful acts of the defendant are admissible in evidence, as tending to show the intent in respect to the matters immediately involved in the issue on trial.

Positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth.

Whenever the necessity arises for a resort to circumstantial evidence, objections to testimony on the ground of irrelevancy are not favored.

Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.

Where the goods were in the custody of partners, for sale on commission, and one of the partners made false and fraudulent representations as to the party to whom they were to be sold by them, the partnership is liable, if, in consequence of such representations, the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party.

Instructions given by the court at the trial are not, as a general rule, to be regarded as the subject of error on account of omissions not pointed out by the excepting party.

If the defendants had asked that further and more explicit instructions should be given, and the prayer had been refused, this objection would be entitled to more weight.

Where explanations immediately preceded the instructions embraced in the exceptions, the instructions excepted to must be considered in connection with those explanations.

Argued Jan. 19, 1860. Decided Jan. 30, 1860.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This action was brought in the court below, by the defendant in error, to recover damages resulting from an alleged breach of trust. The trial resulted in a verdict and judgment in favor of the plaintiff for $2,983.32, with costs amounting to $251.72, whereupon the defendants sued out this writ of error.

The facts of the case are very fully stated in the opinion of the court.

Mr. **T. Lyle Dickey**, for the plaintiffs in error:

1. There is no proof that defendant, Granger, had anything to do with the sale by Ballard, or was in any way connected with the firm of Filkins, Phillips & Co. Defendant in error refers, in his brief, to a letter by E. H. Castle, and printed business card attached, as connecting Granger with this firm. In relation to that, I say it was no part of plaintiff's evidence in chief.

2. It does not sustain the declaration. It shows a different firm, with a different style and different partners from that alleged, and last, that Granger is in no way connected by proof with, or responsible for, that letter and card,

NOTE.—*Liability of partners for fraud*—see note to 51 L. R. A. 479, and note to 45 C. C. A. 279.

and never saw it in his life. The act of one alleged partner is no proof against another, until the partnership is proved.

3 Campbell, 240, 312; 14 East, 226; 16 East, 169; 2 Stark. Ev. 31.

No attempt is made to show that at the time of Ballard's sale, E. S. Castle had ever failed to meet an engagement, or pay a debt at maturity, or that he was not in good credit, or that any one of the recommendations given him were untrue; in fact, we deny that his failure to pay his debts three months after, tends to show that he was unfit to be trusted, November 8, 1855.

6 Mon. 119.

It is conceded that the condition of a man's affairs may be shown by a comparison of all his assets with his liabilities. But before any comparison can be made, you must find some evidence showing that you probably have all his assets. Now, no one of the witnesses pretended that he even supposed that he had given all of E. S. Castle's effects at any one place. Now, the burden lies on the plaintiff to show the want of means of E. S. Castle, and he produces witnesses who do not pretend to have any knowledge of his affairs, and the court allows them to swear that they do not know of his having more than $5,000 of goods in Dubuque, in January, and the like.

This evidence was baseless and deceptive, and ought to have been excluded.

The refusal to allow a separate verdict as to Granger, against whom there was no proof, in order that the other defendant might use him as a witness, was erroneous. There was once some difference of opinion as to this right, but in Phil. Ev. 8th ed. 59, it is said: "It is now well settled by the unanimous opinion of all the judges, that a defendant (in torts) against whom plaintiff adduces no proof, is entitled to a separate verdict at once on the close of the plaintiff's case."

See, also, 2 Stark. Ev. 11, 798, 799.

Whether there be any evidence is a question of law (1st Greenl. § 49; Phil. Ev. 513), and while it is true that this court will not review a question of fact, yet no court can review the law of a case, without looking to the facts to which it is to be applied.

All the extraneous evidence in any event was irrelevant, until plaintiff had laid a foundation for such proof by giving evidence of the contract set up in the declaration between plaintiff and defendants as partners; and to do this, the partnership embracing Granger had to be proved.

In an action of tort, where a contract is alleged as ground of the supposed duty violated, such contract must be proved as laid.

Phil. Ev. 856; 2 Saund. Pl. & Ev. part 1st, 582.

Letters written to E. S. Castle were irrelevant and not material to the issue. We next insist that the proof of them was incompetent. Proof that a witness knows the signature of E. H. Castle is not proof that the witness knows the handwriting so as to be competent to express an opinion as to whether the body of letters are in E. H. Castle's handwriting.

Copies of these letters were allowed, when the proof did not tend to show that the originals were lost

The defendants offered to prove that whilst the goods of plaintiff were at 100 Randolph street, they were in the possession of E. H. Castle, and that whilst E. H. Castle had possession, he said that he did not hold the goods on sale, but was taking care of them for the owner.

This evidence the court excluded, and we allege, erroneously. The question whether the goods were in the possession of E. H. Castle or in the possession of the firm, was material to the issue. The declarations of Castle were competent to explain the nature of his possession. The same *question* in another form was made and ruled the same way, and defendants excepted on page 73.

1 Stark. Ev. 34, 35, 48, 62, 63, 64; 2 Stark. Ev. 401; 1 Greenl. §§ 108, 109; 3 Marsh. Ky. 395, 398; 5 Little, 5; 2 J. J. Marsh. 384; 4 Litt. 24; 5 Dana, 240.

Lastly, the charge of the court was erroneous. The court said:

1st. "If the goods were in the custody of the defendants, for sale on commission, and one or more of the partners made false or fraudulent representations as to the party to whom they were to be sold by the defendants, then the partnership would be liable; if, in consequence of such representations, the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party."

This, clearly, is not a sound proposition, unless you add to it that the party to whom the sale was made was actually unworthy of the credit, and by reason thereof, the debt was likely to be lost. The fact is, the whole record shows that the plaintiff and the court assumed, without proof, that E. S. Castle, at the time of the sale, was unfit to be trusted, and that E. H. Castle and Filkins knew this to be so, and by the hearing, and finally the charge of the court, the jury were taught to assume the same thing. It is only on this assumption that proof of mere purchases of goods by E. S. Castle were treated as so many frauds actually perpetrated, and every favorable word about E. S. Castle, spoken by E. H. Castle and by Filkins, were assumed on the trial by the plaintiff as so many willful lies for some dishonest purpose; and the court, by its general course of ruling, gave sanction to the assumption, and led the jury to do so.

The error in the second article of the charge consists in a false and erroneous idea expressed in the exception. The court says that upon a certain hypothesis the defendants are not liable, unless the firm, as a firm, were "party to such representations."

If the goods were not in defendant's possession for sale, but were there merely for safe keeping, and one of the partners made false representations touching the solvency of a proposed purchaser, and thus plaintiff was induced to sell and did make the sale himself, it is not perceived how it is possible that the firm, as a firm, could be "a party to the representations."

Mr. **E. F. Bullard**, in person, and *Mr.* **R. H. Gillet**, for defendant in error:

The defendant's exceptions present but two substantial law questions.

1. Whether evidence of other acts was admissible.

2. Whether the defendants were liable as partners.

1. The plaintiff may prove subsequent acts of

fraud and collusion to obtain goods from other persons, in order to show the previous intent of the defendant, and which the jury might infer from circumstances.

Allison v. *Matthieu*, 3 Johns. 235; 2 H. Black. 288; *Van Kirk* v. *Wilds*, 11 Barb. 526.

Such acts, prior or subsequent about the same time, are admissible with a view to the *quo animo*.

Cary v. *Hotailing*, 1 Hill, 316.

See English cases, cited by Cowen, J., same principle, approved by the court of appeals of New York.

Hall v. *Naylor*, 18 N. Y. 589.

2. It was competent to prove the amount of goods on hand in store of E. S. Castle, the amount of his debts, his general embarrassment, and all acts to show his pecuniary conditions, with a view to show the defendant's statements to be false and fraudulent.

This answers defendant's exception and others of that class.

The judgment in favor of Filkins, against E. S. Castle, was admissible on same ground, and also to prove that Filkins had knowledge when he made representations to the contrary.

Allen v. *Addington*, 7 Wend. 9.

3. The defendants being partners, and as such having sold the goods and received the $135 commission and freight, were jointly liable.

Story, Part. § 131.

The act was within their regular business as commission merchants.

"If one of a firm of commission merchants should sell goods consigned to the partnership fraudulently, or in violation of instructions, all the partners would be liable for the conversion, in an action of trover.

Story, Part. § 166; Coll. Part. § 6, pp. 304, 306, 2d ed.; *Nicoll* v. *Glennie*, 1 Maule. & S. 588; *Olmstead* v. *Hotailing*, 1 Hill, 317.

4. Upon the merits the defendants were clearly liable, and the first instruction is correct.

3 Johns. 235; 7 Wend. 9; *Bean* v. *Remway*, 17 How. Pr. 90; *Zabriskie* v. *Smith*, 13 N. Y. 322.

5. The loss of the original letters was sufficiently shown.

There is no doubt that the originals were in the handwriting of defendant, Castle, and that these were correct copies, so that the defendants were not injured by the absence of the originals.

180*] *Mr. Justice **Clifford** delivered the opinion of the court:

This was a writ of error to the circuit court of the United States for the northern district of Illinois.

Edward F. Bullard, a citizen of the state of New York, complained in the court below of Joseph Filkins, J. P. Phillips, Elihu Granger, and Edward H. Castle, in a plea of trespass on the case, alleging, at the same time, that they were partners, doing business as commission merchants at Chicago, in the state of Illinois, under the style and firm of Filkins, Phillips, & Company.

According to the transcript, the declaration was filed on the 7th day of July, 1856. As amended, it contained five counts, setting forth, in various forms, two distinct grounds of complaint against the defendants, which may be briefly stated as follows:

In the first place, it is alleged that the defendants, on the 8th day of November, 1855, fraudulently sold on credit, at Chicago, to one Edward S. Castle, certain goods belonging to the plaintiff, and which he had previously intrusted to them, as commission merchants, for sale; and that the purchaser, at the time of the sale, was in failing circumstances and irresponsible; charging, in the same connection, that the defendants, at the time of the transaction, well knew that the purchaser was insolvent, and wholly unfit to be trusted; and that they negotiated the sale with intent to deceive and defraud the plaintiff, whereby he suffered loss to an amount equal to the value of the goods so sold and delivered.

He also alleged, in other counts, that the defendants, prior to the sale of the goods, and at the time when it was made, represented to him that the said Edward H. Castle was worth at least eight thousand dollars above all his liabilities; that he was not embarrassed in his business affairs, or much indebted, and that he was a safe, cautious business man, and every way worthy of credit. Those representations, the plaintiff alleged, were false, and that the defendants well knew they were so at the time of the negotiation, and when the goods were delivered; and that they were so made by the defendants with intent to deceive and defraud him in the premises, and *had the effect to in- [*181 duce him to consent to the sale, and to deliver the goods, whereby he suffered loss, as is alleged in the other counts.

To those charges, as more formally set forth in the several counts of the declaration, the defendants jointly pleaded that they were not guilty; and on the 3d day of January, 1857, the parties went to trial on that issue.

Testimony was introduced by the plaintiff in the opening, showing that Filkins, Phillips, & Co. were commission merchants at the time of this transaction, doing business at Chicago, in the state of Illinois, and that they received the goods in question a short time prior to the sale, from one William H. Adams, of that city, to whom the goods had previously been sent by the plaintiff to be sold on commission. He also proved the sale of the goods by one of the firm of Filkins, Phillips, & Co., to Edward H. Castle, on credit, substantially as alleged in the declaration, and that two of the partners and the clerk of the firm were present at the time the sale took place.

Facts and circumstances were also adduced by the plaintiff, tending strongly to show that the purchaser was largely indebted and in failing circumstances at the time of the negotiation, and that two or more members of the firm must have known that he was insolvent and utterly unworthy of credit.

Five per cent was charged as commissions on the sale of the goods, amounting to the sum of $135; and the plaintiff introduced testimony tending to show that the purchaser, as a part of the transaction, gave his promissory note to the firm, payable in forty-five days, to secure that amount.

Evidence was also introduced by the plaintiff, showing that representations as to the business circumstances and pecuniary responsibility of the purchaser were made to him at the time of the sale, by one or more of the defendants, sub-

stantially in the manner as alleged in the declaration. And it was clearly shown that two or more of the firm well knew that those representations were false, and that the subject of them was wholly unfit to be trusted for that amount. 182*] *Proof was also introduced by the plaintiff, showing that the purchaser was a relative of one of the firm, and that he had repeatedly been assisted by others in obtaining credit. And many of the circumstances were of a character to afford a ground of presumption that all the defendants must have known the true state of his affairs, and that he was insolvent.

When the plaintiff rested his case, in the opening, the counsel of the defendants moved the court to order a nonsuit as to the defendant (Granger), upon the ground that the evidence offered by the plaintiff did not tend to charge him with a participation in the fraud alleged in the declaration. At that stage of the cause, there was no evidence immediately connecting him with the transaction, except what might properly arise from the fact of his being one of the partners. But the court overruled the motion for a nonsuit, and the defendants excepted.

They then requested the court, that the jury might be permitted to retire, and consider whether the evidence introduced was sufficient to charge this defendant; and if not, that the jury might be directed to find him not guilty, urging, as a reason for the motion, that they desired to examine him as a witness for the other defendants; but the court overruled the application, and the defendants excepted.

After these motions were overruled, evidence was introduced by the defendants, and further evidence was given by the plaintiff; all of which was submitted to the jury, who returned their verdict in favor of the plaintiff.

Numerous exceptions were taken by the defendants in the progress of this trial to the rulings of the court, in admitting and rejecting evidence, and they also excepted to two of the instructions given by the court to the jury.

1. As the facts have been found by the jury, the questions to be determined are those that arise upon the exceptions. Of these, the first in the order of the argument at the bar is the one founded upon the refusal of the court to order a nonsuit as to the defendant (Granger), as requested by counsel at the close of the plaintiff's testimony.

Several answers may be given to this com- 183*] plaint, each of *which is sufficient to show that the exception cannot be sustained. In the first place, circuit courts have no power to grant a peremptory nonsuit against the will of the plaintiff. It was expressly so held by this court in *Elmore* v. *Grymes*, 1 Pet. 497, and the same rule was also affirmed in *De Wolf* v. *Rabaud*, 1 Pet. 497. In the case last named, the defendants at the trial, after the evidence for the plaintiff was closed, moved the court for a nonsuit; which was denied, and the defendant excepted, and sued out a writ of error; but this court held that the refusal to grant the motion constituted no ground for the reversal of the judgment, remarking at the same time, that a nonsuit cannot be ordered in any case without the consent and acquiescence of the plaintiff.

Repeated decisions have been made to the same effect; and as long ago as 1832 it was declared, as the opinion of this court, in *Crane* v. *Morris*, 6 Pet. 609, that this point was no longer open for controversy. See, also, *Silsby* v. *Foote*, 14 How. 222.

Another answer to this complaint arises from the fact that the motion for nonsuit is inappropriate in a case like the present, where there are other defendants to whom it cannot be applied. In actions of this description, where there is more than one defendant, the charge, beyond question, as a general rule, is joint and several, and consequently, one may be found guilty and another not guilty; but at common law there cannot regularly be a nonsuit as to one, and a verdict as to others, and for that reason, whenever it appears that there is evidence in the case to charge one or more of the defendants, a nonsuit is never granted at common law, even in jurisdictions where the authority to grant the motion in a proper case is acknowledged to exist. *Revett* v. *Brown*, 2 M. & P. 18; Collier on Part. (Am. ed. 1848), § 809, p. 698.

But a more decisive answer to this ground of complaint arises from the fact that there was evidence in the case tending to charge this defendant, which rendered it proper that the question of his guilt or innocence should be submitted to the jury. He was a member of the firm of Filkins, Phillips, & Co., as appears by the bill of exceptions. All of the *goods in [*184 question were deposited in their warehouse, and the jury have found that the goods were sold by the firm. Two of the partners and the clerk of the firm were present at the sale, and the commissions earned in transacting the business went to the benefit of all the partners of which the firm was composed.

In view of all the circumstances, as disclosed in the evidence, it would be impossible to say, as matter of law, that it was error in the court to overrule the motion, even if the authority to grant it were conceded.

We come now to examine the second exception, which arises out of the refusal of the court to permit the jury to retire at the close of the plaintiff's case, and consider whether the evidence offered in the opening was sufficient to charge this defendant with a participation in the alleged fraud.

Upon this subject the general rule is, that if a defendant, who is a material witness for the other defendants, has been improperly joined in the suit, for the purpose of excluding his testimony, the jury will be directed to find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted as a witness for the other defendants. This course, however, can be allowed only where there is no evidence whatever against him, for the reason that then only does it appear that he was improperly joined in the suit, through the artifice and fraud of the plaintiff. If there be any evidence against him, then he is not entitled to a separate verdict, because, under such circumstances, it does not appear that he was improperly joined, and his guilt or innocence must wait the general verdict of the jury, who are the sole judges of the fact. 1 Greenl. Ev. § 358; *Brown* v. *Howard*, 14 Johns. 122.

Courts of justice are not quite agreed as to what stage of the trial the party thus improperly joined in the suit may insist upon a verdict in his favor—whether at the close of the

evidence offered by the plaintiff in the opening, or whether he must wait until the case is closed for the defendants. Mr. Greenleaf regards it as the settled practice, that if, at the close of the plaintiff's case, there is one defendant against 185*] whom no *evidence is given, he is entitled instantly to be acquitted; and it must be admitted that the decision of the court in *Child* v. *Chamberlain*, 6 C. & P. 213, favors that view of the law. But Lord Denman held, in *Sowell* v. *Champion*, 6 Ad. & El. 415, that the application to a judge in the course of a cause, to direct a verdict for one or more defendants in trespass, is addressed to his discretion, and that the discretion was to be regulated, not merely by the fact that, at the close of the plaintiff's case, no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is, says the learned judge, so palpable a failure of justice, where the evidence for the defense discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place until there is the strongest reason to believe that such a consequence cannot follow.

Some courts hold that the application, in all cases, is addressed to the discretion of the court. *Brotherton* v. *Livingston*, 3 Watts & S. 334; 1 Holt (*N. P.*) 275. Other courts have held, that where there is no evidence to affect a particular defendant in actions *ex delicto* against several, a separate verdict is demandable as a matter of right, and that a refusal to grant the application is the proper subject of exceptions. *Van Deusen* v. *Van Slyck*, 15 Johns. 223; *Bates* v. *Conkling*, 10 Wend. 389.

Whatever diversities of decision there may be upon this point, all agree that the application ought not to be granted, unless it appear that there is no evidence to affect the party in whose favor it is made. *Brown* v. *Howard*, 14 Johns. 122. Now, it has already appeared that there was evidence in this case affecting this defendant; and upon that ground, we hold that the circuit court was fully warranted in refusing to grant the application.

3. After a careful consideration of the several exceptions to the rulings of the court in admitting and rejecting evidence, we are of the opinion that none of them can be sustained. Considering the great number of the exceptions, their separate examination at this time will not 186*] be attempted, as it would *extend this investigation beyond reasonable limits. One class of them arises out of objections to the admissibility of evidence offered by the plaintiff, tending to show that the defendants, or some of them, had aided the purchaser in this case in committing similar acts of fraud in the purchase of other goods, about the same time, from other persons. According to the evidence, some of those purchases were prior and others subsequent to the period of the sale of the goods in this case. All of this class of exceptions may well be considered together, as they involve the same general principles in the law of evidence. Decided cases have established the doctrine that cases of fraud like the present are among the well recognized exceptions to the general rule, that other wrongful acts of the defendant are not admissible in evidence on the trial of the particular charge immediately involved in the issue. Similar fraudulent acts are admissible in cases of this description, if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration. Assuming the proposition, as stated, to be correct, of which there can be no doubt, it necessarily follows, that no one of this class of exceptions is well taken. Some of the decided cases go farther, and hold that such evidence is admissible, as affording a ground of presumption to prove the main charge; but, whether so or not, it is clearly competent, as tending to show the intent of the actor in respect to the matters immediately involved in the issue on trial. *Cary* v. *Hotailing*, 1 Hill, 316; *Irving* v. *Motley*, 7 Bing. 543; *Rowley* v. *Bigelow*, 12 Pick. 307. Another class of the exceptions arises out of objections made by the defendants to the admissibility of evidence introduced by the plaintiff, which, it is insisted, was irrelevant and immaterial. Some twelve exceptions are embraced in this class, and they are addressed to a large portion of the testimony introduced by the plaintiff.

In the course of the trial, the plaintiff offered evidence tending to show the pecuniary circumstances of the purchaser of these goods, his acts and conduct in respect to the goods *after [*187 the purchase, and that he was largely in debt and insolvent.

He also introduced evidence tending to show that two or more of the defendants had represented to other persons, about the same time, that the purchaser of the goods in question was in good standing, and that they had likewise assisted him in obtaining credit with other dealers in merchandise.

To all, or nearly all, of this evidence, as more fully detailed in the transcript, the defendants objected, and those objections constitute the foundation of the several exceptions included in this class. Much of the evidence was of a circumstantial character; and it is not going too far to say, that some of the circumstances adduced, if taken separately, might well have been excluded. Actions of this description, however, where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. 1 Stark. Ev. p. 58.

Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the grounds of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, ex-

pecially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Applying these principles to the several exceptions under consideration, it is clear that no one of them can be sustained.

188*] *Other exceptions to the rulings of court were taken during the progress of the trial; but it is so obvious that they are without merit, that we think it unnecessary to give them a separate examination at the present time, and they are accordingly overruled.

At the argument, it was supposed by the counsel of the original defendants that the circuit judge had allowed the plaintiff to introduce parol proof of the contents of a writ of attachment, referred to by one of the witnesses; but, on examination of the transcript, we find that no such evidence was admitted.

4. Exceptions were also taken to certain portions of the charge of the court. On this branch of the case, most reliance was placed upon certain objections to the first instruction given to the jury, which is as follows:

"If the goods were in the custody of the defendants, for sale on commission, and one or more of the partners made false and fraudulent representations as to the party to whom they were to be sold by the defendants, then the partnership would be liable, if, in consequence of such representations, the plaintiff consented to the sale to that party, and the sale was actually made by the firm to the party."

Some criticisms were also made in the printed argument for the defendants upon the second instruction, which, like the former, was duly excepted to; but, inasmuch as it is not essentially different in principle from the other, and as the questions presented in each depend upon the same general considerations, it will not be reproduced.

Both instructions were framed upon the theory that the defendants were not liable, unless the jury found from the evidence that the goods were actually sold by the firm; which, to say the least of it, was a theory sufficiently favorable to the defendants. Judge Story says in his valuable work on partnerships, that torts may arise in the course of the business of the partnership, for which all the members of the firm will be liable, although the act may not, in fact, have been assented to by all the partners. Thus, for example, if one of the partners should commit a fraud in the course of the partnership 189*] business, all *the partners may be liable therefor, although they may not all have concurred in the act. So, if one of a firm of commission merchants should sell goods consigned to the firm, fraudulently, or should sell goods so consigned in violation of instructions, all the partners would be liable. Story on Part. § 166; Collier on Part. (Am. ed. 1848), §§ 445 and 457; *Nicoll* v. *Glennie*, 1 Maule & S. 588.

In precise accordance with this view of the law. it is said, and well said, by the court, in *Olmsted* v. *Hotailing*, 1 Hill, 318, that it does not lie with one to claim property through the fraudulent act of another, whether partner or agent, without being affected by that act the same as if it were his own; and we think the same principle must apply in a case like the present, where a firm doing business as commission merchants have received the fruits of the fraud in the commissions earned for transacting the business.

Where one, assuming to be an agent, had committed a fraud in a sale, it was held, in *Taylor* v. *Green*, 8 Car. & P. 316, that the mere adoption of the sale and the receipt of the money, by the person for whom the sale was made, rendered him liable for the fraud.

Suffice it to say, without any further reference to authorities, that the theory of the instructions was sufficiently favorable to the defendants.

5. Complaint is also made that the instructions excepted to were not sufficiently comprehensive; that they did not embrace all the elements which constituted the charge, as laid in the declaration. Strong doubts are entertained whether this point is properly raised by the bill of exceptions; but whether so or not, we are satisfied that the exception cannot be sustained. Instructions given by the court at the trial are entitled to a reasonable interpretation; and if the proposition as stated is correct, they are not, as a general rule, to be regarded as the subject of error, on account of omissions not pointed out by the excepting party. Seven requests for instructions to the jury were presented by the counsel for the defendants, every one of which was given by the court, without any qualification. *If the defendants had supposed [*190 that the instructions given were either indefinite or not sufficiently comprehensive, they might well have asked that further and more explicit instructions should be given; and if they had done so, and the prayer had been refused, this objection would be entitled to more weight.

But another answer may be given to this objection, which is entirely conclusive against it. On recurring to the transcript, we find that the court, before the instructions excepted to were given, explained to the jury the nature and character of the charge, describing substantially the two forms in which it was presented in the several counts of the declaration; and, in effect, instructed them that it must be proved in the one or the other of those forms, in order to entitle the plaintiff to a verdict in his favor. Those explanations immediately preceded the instructions embraced in the exceptions, and, in fact, may be regarded as a part of the same. Beyond question, the instructions excepted to must be considered in connection with those explanations; and when so considered, it is obvious that this objection cannot be sustained.

In view of the whole case, we think the defendants have no just cause of complaint, and that there is no error in the record.

The judgment of the Circuit Court, therefore, is affirmed, with costs.

WILLIAM H. SHELDON, Claimant of a Quantity of Cotton, etc., *Appt.*,

v.

JOHN CLIFTON.

(See S. C. 23 How. 481-484.)

Jurisdiction dependent on amount—separate amounts adjudged against two defendants—when both must bring appeal.

Where a libel was filed to recover freight on cot-

NOTE.—*Jurisdiction of United States Supreme Court dependent on amount*—see note to 7 L. ed. U. S. 592, and note to 37 L. ed. U. S. 256.

ton, and a decree rendered, in favor of the libelant, for the amount of the freight, $2,338.06, and that B. pay to the libelant $583.84 thereof, and that S. pay $1,754.22 thereof, and S. appealed from the decree to this court, the court dismissed the appeal, on the ground that the decree against S. is less than $2,000.

The freight was separately awarded against the claimants, in proportion to the cotton shipped by each one, and the rights of each were distinct and independent.

But if it were otherwise, and the whole of the freight was jointly decreed against the claimants, the appeal must still be dismissed, as then both the claimants should have joined in it.

Argued Jan. 27, 1860. Decided Feb. 6, 1860.

APPEAL from the Circuit Court of the United States of the Southern District of New York.

The history of the case and a statement of the facts appear in the opinion of the court.

On motion to dismiss for want for jurisdiction.

Messrs. **Owen & Vose**, for appellant:

The "matter in dispute" in this action was the freight upon the entire cargo, which, according to the decree, amounted to $2,338.06, exclusive of costs. Unless the apportionment of this sum between the claimants, which the circuit court assumed to make, operates as a severance of the action, the motion must be denied.

The decree of the circuit court directs Sheldon to pay $1,754.22, together with $586.79 costs, amounting in the aggregate to $2,341.01.

The "matter in dispute" on this appeal, is the sum so decreed to be paid for damages and costs.

The costs referred to in the judiciary act are not those which have entered into and become a part of the judgment appealed from, but those which may accrue on the appeal. Such appears to have been the views of this court in the case of *Olney* v. *The Falcon*, 58 U. S. (17 How.) 19.

Mr. **C. Donohue**, for appellee:

The record shows that Mr. Sheldon is ordered and decreed to pay between $1.800 and $1.900, besides costs, and that Mr. Brower does not complain of the decree below.

No appeal lies unless the matter in dispute, exclusive of costs, exceeds the sum of $2,000.

Udall v. *The Ohio*, 58 U. S. (17 How.) 17; *Olney* v. *The Falcon*, 58 U. S. (17 How.) 19; *Allen* v. *Newberry*, 62 U. S. (21 How.) 248.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the southern district of New York, in admiralty. A motion has been made, on the part of the appellee, to dismiss the appeal, for the want of jurisdiction.

A libel was filed by Clifton, in the district court, to recover freight on the 269 bales of cotton and 9 bags of wool. Brower and Sheldon appeared as claimants, and contested the claim for the freight. Brower claimed sixty-seven of the 269 bales, and Sheldon two hundred and two bales. The district court dismissed the libel.

On appeal to the circuit court this decree was reversed, and decree rendered in favor of the libelant for the amount of the freight, $2,338.06; that J. W. Brower, claimant of a portion of the cotton, pay to the libelant the sum of $583.84, being the freight on the cotton claimed by him in the suit, and that the *claimant, W. [*484 H. Sheldon, pay for the portion claimed by him the sum of $1,754.22. Sheldon appealed from the decree to this court.

The motion is now made to dismiss the appeal, on the ground that the decree against Sheldon is less than $2.000, and which is apparent from a perusal of the decree. The sum decreed against him is only $1,754.22.

The freight was separately awarded against the claimants in proportion to the cotton shipped by each one. The rights of each were distinct and independent.

But if it were otherwise, and the whole of the freight jointly against the claimants, the appeal must still be dismissed, as then the claimants should have joined in it.

Motion to dismiss granted.

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*ALBERT CAGE and Henry Hays, Exrs. [*109 of Robert H. Cage, Deceased, *Appts.*,

v.

ALEXANDER A. CASSIDY *et al.*

(See S. C. 23 How. 109–117.)

Limit of surety's obligation—judgment against, obtained by artifice, relief from.

The natural limit of the obligation of a surety is to be found in the obligation of the principal; and when that is extinguished, the surety is, in general, liberated.

Where the obligation of the principal has been ascertained by the decree of the court, upon proof conceded to be sufficient, and has been fully discharged, and the surety has been "lulled into security," by the delusive promises of his creditor, and has been the victim of artifice and circumvention; and judgment against him was obtained in contempt of the injunction of the court; held, a proper case for his relief and for perpetuating the injunction.

Argued Jan. 20, 1860. Decided Feb. 13, 1860.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **R. J. Brent, H. May, and Chas. E. Phelps**, for appellants:

Why had not the Tennessee court full jurisdiction over the case?

Cassidy was in Tennessee, and Cage was suing in the state court to enforce equitable claims to a reduction of the note held by Cassidy in his individual character as payee thereof.

Cage was not enjoining by state process,

NOTE.—*When a judgment at law will be enjoined by a bill in equity*—see note to Davis v. Tillotson, 12 L. ed. U. S. 366.

judgments in the Federal courts. He was proceeding in the ordinary case *in personam* upon a personal contract. It is true that Cassidy, being a citizen in neither state, had a claim to evade the state jurisdiction; but conceding such a right, he waived it by not adopting a course required by the act of Congress to remove the case to the Federal courts in Tennessee. Undoubtedly, the Federal courts could not have enjoined suit in the Tennessee courts.

Diggs v. *Wolcott*, 4 Cranch, 179.

Nor have the state courts power to enjoin judgments in the Federal courts.

McKim v. *Voorhies*, 7 Cranch, 279.

Cassidy, even if he had any right to the protection of the Federal courts, should have removed the case; but as Cage was not a citizen of Tennessee, there was no right to remove the case from the state court.

1 Stat. at L. p. 79.

Courts of chancery have jurisdiction *in personam* in cases of contract, fraud, trust, etc., even over real estate in foreign countries.

See 2 Story, Eq. Jur. § 743; *Penn* v. *Lord Baltimore*, 1 Ves. Sr. 454; 3 Gill & J. 504; *Massie* v. *Watts*, 6 Cranch, 148; *Indiana R. R.* v. *Michigan et al.* 15 How. 233.

They have jurisdiction over all contracts where a person is within the territory.

Story, Confl. of Laws, §§ 539, 541, 543.

Here is no case of conflict jurisdiction between the state and Federal courts. It is true they appear to have decided differently; that is, the Federal court held the decree of distribution to be binding, and Cage as creating a cause of action when collaterally impeached by him, and the state court afterwards reversed the same decree on direct appeal. But the state court had undoubted authority to reverse the decree of its own probate court. The effect of that reversal on any and all courts of equity upon the judgments of the Federal court which were predicated on that erroneous decree, is a new and distinct inquiry, certainly competent for the consideration of the Federal court upon this bill of injunction, and in reference to the cases therein stated. It is clear that the decree of distribution alone entitled the distributees to sue the surety (5 How. Miss. 651). and equally clear that the distribution was illegally made after the letters of administration were revoked.

8 Sm. & M. 219.

It further appears that while the case was pending in the Tennessee state court, having competent jurisdiction thereof, for the purpose of abating and avoiding the note, and in defiance of the injunction of that court, Cassidy instituted a suit in the circuit court of the United States for the state of Mississippi against Cage, and recovered judgment on this very note, which was in litigation between the parties in Tennessee, notwithstanding the effort of Cage to defend himself in the premises, when sued at law.

The Tennessee court had jurisdiction, and if so, there can be no judicial inspection behind the decree, except by appellate power.

Grignon v. *Astor*, 2 How. 341; 10 Pet. 449; 2 H. & G. 42; 6 H. & J. 182; 4 H. & J. 394.

The true test of jurisdiction is whether a demurrer would lie to Cage's bill in Tennessee.

Tomlinson v. *McKaig*, 5 Gill, 256.

Even if this were a case of covenant jurisdiction, the court first having cognizance has exclusive jurisdiction.

1 Md. Ch. 351; 1 Md. Ch. 295; 2 Md. Ch. 42; 7 Gill, 446.

Under the Constitution that decree is just as conclusive in Mississippi as in Tennessee.

7 Cranch, 481; 3 Wheat 234; 6 Wheat. 129; 13 Pet. 312; 5 G. & J. 500; 3 Gill, 51.

A recovery on same cause of action in a sister state *pendente lite*, may be pleaded against further maintenance of suit, though this suit was brought first.

7 Gill, 426.

Defendant at law after judgment may enjoin judgment on grounds not known or not available at trial in court of law.

Gott v. *Carr*, 6 G. & J. 309; 12 G. & J. 365.

Surely the abatement on cancelation of that note and its injunction from suit on grounds of mistake, or fraud, or failure of consideration, was a mere personal demand against Cassidy, and to be enforced anywhere he was found, on familiar principles of equity.

15 Pet. 233; 1 Wheat. 440; 1 Pet. 1; 4 Cranch, 306.

Here it is conceded that the Tennessee decree, establishing fraud in Cassidy throughout, was supported by evidence.

3 Pet. 210.

And fraud vacates the judgment, as against the party.

Simms v. *Slacum*, 3 Cranch, 300.

Even after judgment on a note, the defendant may enjoin on ground of fraud in obtaining the note.

4 Pet. 210; 1 Pet. 63.

Jurisdiction once attaching, the court, to do complete justice, decides even a legal claim.

5 Pet. 264; 12 Pet. 178.

At law, the failure of consideration in a note must be total, and here it was partial, as conceded.

2 Wheat. 13.

Even if the note of Cage had been given to Cassidy, in his character of administrator, it was the mere personal chose in action, and his title of administrator would have been surplusage.

Graham v. *Fahnestock*, 5 Gill, 215.

Messrs. **J. H. Bradley** and **J. M. McCalla**, for appellees:

First. The decree of the probate court, ascertaining the amount due by the administration, remains unreversed.

The court had exclusive and conclusive jurisdiction over the subject-matter of controversy;

Gildart v. *Starke*, 1 How. Miss. 450; *Griffith* v. *Vertner*, 5 How. Miss. 736.

Provided the proper parties were before them or due notice was given.

Hall v. Cassidy, 25 Miss. 48.

Second. The court of Tennessee had no jurisdiction to settle the accounts of administrators, deriving their authority from the state of Mississippi.

Vaughan v. *Northup*, 15 Pet. 1; *Bell* v. *Suddeth*, 2 Sm. & M. 532.

And the appearance of Cassidy could not give them jurisdiction, whether he had admitted or denied it.

There was no fraud charged, nor any contract or agreement set up in the Tennessee bill,

which gave that court jurisdiction over Cassidy, so as to prevent his proceeding in the Federal court in Mississippi to coerce the payment of this note.

The circuit court in Mississippi had exclusive jurisdiction over that question, and was open to the complainant, Cage.

McKim v. *Voorhies*, 7 Cranch, 279.

Third. The reversal of the decree of distribution on the probate court, neither satisfies the equity between these parties nor destroys the consideration which was the foundation of that note, because the amount ascertained by the only competent authority to be due still stands a judgment, and in the absence of creditors, belongs to the distributees of the estate.

2d. The note was given by Cage with full knowledge of the circumstances, and when he might have resorted to his present application for relief, when he might have convened the parties in the probate court of Madison county, and have had the decree on the account opened, if there was jurisdiction to do so.

But there was no such jurisdiction, either in that court or in a court of equity.

Hendricks v. *Huddleston*, 5 Sm. & M. 422, 426; *Turnbull* v. *Endicott*, 3 Sm. & M. 302; *Griffith* v. *Vertner*, 5 How. Miss. 736.

The settlement of that account is final and conclusive.

Finally. If Cassidy procured the decree for account by fraud, or especially if consideration on which the note was given was fraudulent, and the note was given on false and fraudulent representations of Cassidy, these defenses would have been good defenses in the suit at law on the note. They were not set up; Cage, therefore, has by his own laches lost his equity, if he had any.

Mr. Justice **Campbell** delivered the opinion of the court:

R. H. Cage, the testator of the appellants, filed his bill in the circuit court, to be relieved from a judgment rendered there in favor of the appellee (A. A. Cassidy), in November, 1852.

The pleadings and proofs contained in the record disclose that the testator, in 1841, became surety to the probate court of Madison county, Mississippi, for William Douglass and William Hall, on their bond, as administrators of the estate of Henry L. Douglass, deceased. In 1848, their letters of administration were revoked: and Cassidy, the husband of Mary Douglass, the widow of Henry L. Douglass, and the guardian of Henrietta Douglass, their only child, was appointed administrator *de bonis non*.

In 1849, the probate court cited the administrators to *account, and upon their non-appearance rendered a decree against them for $6,822.87, and subsequently ordered that payment should be made to Cassidy and wife and Henrietta Douglass—one moiety to each, being their legal share; and in default of payment authorized a suit on the administration bond. In 1850, suits were instituted on the bond against Cage, the surety, in the circuit court, by Cassidy and Henrietta Douglass: but no suit was commenced against the principals, who resided in Tennessee. Judgments were rendered in 1851 against Cage, for the amount of the decree; and these were settled by his giving a note to Cassidy for their amount, payable one year after date, and by paying the costs.

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During the year 1851, Cage visited Tennessee, with a view to have a settlement between Douglass and Hall, his principals, and Cassidy, and to obtain an indemnity from those who had induced him to sign their bond. His negotiations were unproductive; and he filed a bill in the court of Chancery in Sumner county, Tennessee, to which Cassidy and wife, Henrietta Douglass, and Douglass and Hall, and others, were made parties.

In this bill he stated his relation as surety, and his legal claim to be exonerated from his obligation, and from his impending danger of loss. He insisted that his creditors, the distributees, and his principals, the administrators, should adjust their accounts, and that the balance should be settled. He charged that he had not made defense against the judgments in Mississippi, because the defendant, Cassidy, had assured him that he was not to be vexed or injured, and the suit was simply to serve as an instrument to bring his absent principals to a fair settlement. He charges that the account stated in the probate court was erroneous, within the knowledge of Cassidy, who had procured it, and that the balance was subject to credits that he knew to be just. He obtained an injunction against Cassidy, requiring him not to transfer his note or to commence any suit upon it pending the injunction.

The several defendants answered the bill; and in 1854 the cause came on for a hearing upon pleadings, proofs, orders, and a report upon the administration accounts.

*Before this time the administrators [*115 had obtained a writ of error upon the judgment rendered in the probate court; and in January, 1853, this judgment was annulled by the court of errors and appeals of Mississippi.

The defendant, Cassidy, in 1852, notwithstanding the injunction in Tennessee, commenced a suit upon the note of the surety (Cage), in the circuit court, and in November, 1852, recovered a judgment for the full amount, and sued out execution for its collection. Thereupon Cage filed the bill for injunction and relief with which the proceedings in the cause before this court were commenced.

In his bill he charges that the account, as stated in the probate court, is unjust. That Cassidy was aware of the injustice of the charges when they were made. That he had quieted the mind of the plaintiff, by assurances that he meditated no harm to him; but merely expected to bring the administrators to a fair settlement by that course, and only expected to hold the claim against him for that purpose. He specifies the errors in the account, and the efforts he had made to bring the parties to a settlement, and the pendency of his suit in Tennessee. Cassidy answered the bill, taking issue upon some of the material averments.

Thus the cause stood when the court of chancery in Sumner county, Tennessee, rendered its final decree in 1854. The court declared that the settlement in the probate court, the judgments in the circuit court on the bond, and the execution of the promissory note by Cage in liquidation, were superinduced by the promises and assurances of Cassidy to Cage, that he was not to be held personally, but they were to be

used to bring the principals to a fair accounting. That Cassidy knew that the statement of the account in the probate court was erroneous and unjust to the administrators, and that the recovery of the judgment on the note of Cage was a breach of the injunction, and a fraud upon him.

The court finds that, instead of a debt of $6,822.87, as reported against the administrators in 1849, there was only due the sum of $850.37. It charges against this sum the costs paid by Cage in the litigation to which he has been sub-
116*] jected, *and required the remainder to be paid into court: and thereupon entered a decree against Cassidy, enjoining him from proceeding further upon the judgment in the circuit court on the note.

This decree was presented to the circuit court in Mississippi, in suitable pleadings, and was considered by that court under a stipulation of the solicitors of the respective parties to this effect: "It is admitted that proof before the chancery court of Tennessee was sufficient to establish the state of accounts of Hall and Douglass, as administrators of H. L. Douglass, in Mississippi and Tennessee, as decreed by the Chancellor in the Tennessee case, filed in this cause as an exhibit. This agreement is made, in order to dispense with obtaining a copy of the proof before the chancery court of Tennessee, or retaking the depositions of the witnesses. In other words, all that is intended to be admitted hereby, and that is admitted, is that the decree of said chancery court was supported by the proof."

Upon the hearing in the circuit court, that court determined that the injunction which had been granted in the preliminary stage of this cause was improvidently allowed, and that the bill must be dismissed. From this decree this appeal is taken.

The natural limit of the obligation of a surety is to be found in the obligation of the principal; and when that is extinguished, the surety is, in general, liberated. In some codes, the obligation of a surety cannot extend beyond or exist under conditions more onerous than that of his principal. The obligation of the administrators, Douglass and Hall, has been ascertained by the decree of the court of chancery in Tennessee, upon proof, conceded to be sufficient, and has been fully discharged by its order. Notwithstanding this, the appellee (Cassidy) seeks to enforce a judgment for nearly ten times the amount of the debt found to be due in that decree, and now discharged. It is apparent that the effort is unconscionable, and can only be allowed under the influence of some inflexible and imperious rule of the court, that deprives the appellants of any title to its interposition.
117*] But the court *of chancery of Tennessee, upon sufficient proof, has declared that the surety had been "lulled into security" by the delusive promises of his creditor, and that he has been the victim of artifice and circumvention; that the judgment against him was obtained in contempt of the injunction of the court, and that the assertion of any right under it would be fraudulent. This decree remains in full force and effect.

These circumstances furnish additional motives for the intervention of the equitable powers of the court for the relief of the appellants.

It is the opinion of this court, that the decree of the Circuit Court is erroneous, and must be reversed. The cause is remanded, with directions to the Circuit Court to enter a decree perpetuating the injunction.

THE PHILADELPHIA, WILMINGTON, and BALTIMORE RAILROAD COMPANY, *Appts.*, *v.* THE PHILADELPHIA & HAVRE DE GRACE STEAM TOWBOAT COMPANY.

(See S. C. 23 How. 209-220.)

Jurisdiction in admiralty—in contracts and torts—injury to steamer by pile in river channel—injury on Sunday recoverable for—Sunday laws.

The jurisdiction of courts of admiralty in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality.

If wrongs be committed on the high seas, or within the ebb and flow of the tide, they come within the jurisdiction of that court.

The definition of the term "torts," when used in reference to admiralty jurisdiction, is not confined to wrongs or injuries committed by direct force.

It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.

Where injury to a steamer was caused by her coming in contact with a sight pile, driven into the channel of a river by contractors, and left, defendants held liable for this injury, because the pile was left in the channel by their contractors.

The case is not altered by the fact that the contractors were directed to do so by the engineers, who were the servants of defendants.

When they dismissed the contractors from the further fulfilment of their contract, it became their duty to take care that all obstructions to navigation, which had been placed in the channel by their orders, and for the purpose of their intended erection, should be removed.

Although this collision took place on Sunday, and a statute of Maryland forbids persons "to work" on the Lord's day, and the master and mariner of a ship or steamboat are liable to the penalty of the act for commencing their voyage from a port in Maryland on Sunday, it does not follow that the defendants can protect themselves from responding to the owners of the vessel for the damages suffered in consequence of the nuisance.

Courts have no power to add to this penalty the loss of a ship, by the tortious conduct of another, against whom the owner has committed no offense.

Vessel leaving a port on Sunday does not infringe the state laws with regard to the observance of that day.

This court will not reverse a decree, merely upon a doubt created by conflicting testimony as to damages.

Argued Jan. 24, 1860. Decided Feb. 13, 1860.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed in the district court of the United States for the district of Maryland, by the appellee, to recover damages for an injury alleged to have been sustained by a tow-boat belonging to the appellee, by her running against a sight pile in the Susquehanna river, left in said river by the agents of the appellant.

The district court entered a decree in favor

NOTE.—*To what places the jurisdiction of admiralty is confined*—see note to Allen v. Newberry, 16 L. ed. U. S. 110.

of the appellee, for $7,000.36, damages. The circuit court, on appeal, having affirmed this decree, the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Wm. Schley** and **Thomas Donaldson**, for appellant:

1. The district court of the United States has no jurisdiction in a case like the present.

The cases show that "marine torts," over which courts of admiralty have jurisdiction, are trespasses done and committed on navigable waters, as in the case of a collision between two vessels.

The placing and leaving the pile in the bed of the Susquehanna and within the body of a county, was a nuisance at common law, and the appellee's remedy was in the state courts, in an action on the case for particular damage caused by that nuisance.

The question is not one of mere locality. The subject-matter itself is not within the admiralty jurisdiction; and it is believed that none of the decisions of this court have gone to an extent which would include it.

Conkl. 21, 24; *Thomas* v. *Lane*, 2 Sumn. 9, 10; *Cutler* v. *Rae*, 7 How. 737; *The Tilton*, 5 Mas. 465; *Waring* v. *Clarke*, 5 How. 467; Ang. Tide Wat. 113; *Hancock* v. *York N. & B. R. W. Co.* 70 Eng. C. L. 347; Abb. Ship. 233; 9 Stat. at L. 1851.

2. The appellees could not recover in this case, because they were engaged in an unlawful act at the time when the accident occurred.

It is the law of Maryland, that no person whatever shall work or do any bodily labor, or willingly suffer any of his servants to do any manner of work or labor on the Lord's day, works of necessity and charity excepted.

There is nothing in this provision inconsistent with any of the laws of the United States regulating commerce, and the Federal courts would, therefore, take notice of and conform to the law of the state.

Act of assembly of Md. 1723, ch. 16, § 10; *Bank of U. S.* v. *Owens*, 2 Pet. 527; *Bosworth* v. *Inhab. of Swansey*, 10 Met. 363; *Robeson* v. *French*, 12 Met. 24; *Phillips* v. *Innes*, 4 C. & F. 234; Smith, Cont. 171.

3. It was the duty of the contractors to remove these sight piles when done with; and the act of the contractors or of their servants in sawing off those piles below the surface, and leaving them so as to obstruct the navigation, was in no sense the act of the appellant.

There is nothing to show that the appellant ever had knowledge of the fact that these piles were sawed off, instead of being removed, as the contract required; and the termination of the contract could not make the appellants liable for the consequences of a previous wrongful act of the contractors, the appellants not consenting either to making or continuing the nuisance.

Allen v. *Hayward*, 53 Eng. C. L. 974; *Reedie* v. *London & N. W. R. Co.* 4 Wels, H. & G. 244, 245; *Knight* v. *Fox*, 5 Exch. 721; *Steel* v. *S. E. R. Co.* 81 Eng. C. L. 550; *Overton* v. *Freeman*, 73 Eng. C. L. 867; *Peachey* v. *Rowland*, 13 C. B. 182; *Blake* v. *Ferris*, 5 N. Y. 48; *Hilliard* v. *Richardson*, 3 Gray, 354; *Rapson* v. *Cubitt*, 9 M. & W. 710; *Milligan* v. *Wedge*, 40 Eng. C. L. 177; *Burgess* v. *Gray*, 1 C. B. 578.

The sinking of the "Superior," after striking on the sight pile, was owing to the mismanagement of her captain, and the appellees cannot be entitled to recover the damages consequent upon her sinking, for the cost of raising her, or the loss of time while she was under water.

4. The amount of the decree is greater than the actual loss, which naturally or necessarily resulted from the injury; and greater, indeed, than the total value of the injured boat.

Mr. **Geo. W. Dobbin**, for appellee:

1. The steamer "Superior," the subject of the injury being, at the time of the wrong committed, a licensed vessel sailing in her lawful business on waters within the ebb and flow of the tide, a court of admiralty has jurisdiction to redress any trespass upon her, notwithstanding an action at law might have been maintained for the same injury.

3 Story, Cont. 530; 2 Browne Civ. & Adm. Law, 110, 203; *Thomas* v. *Lane*, 2 Sumn. 9; *The Ruckers*, 4 C. Rob. 73; *Steele* v. *Thatcher*, 1 Ware, 98; *Thackarey* v. *The Farmer*, Gilp. 529; *Waring* v. *Clarke*, 5 How. 464; *New Jersey S. Nav. Co.* v. *Merchants' Bank*, 6 How. 431, 432; *Manro* v. *Almeida*, 10 Wheat. 473; *Plummer* v. *Webb*, 4 Mas. 383; *Chamberlain* v. *Chandler*, 3 Mas. 242; Bee Adm. 369; Ang. Tide Wat. 119; *The Volant*, 1 W. Rob. 387; Zouche, 117, 122; Com. Dig. "Admiralty," E, 13; *Sir Leoline Jenkins*, 2 Brown C. and Ad. L. 475; *De Lovio* v. *Boit*, 2 Gall. 437; *Judge Winchester*, 1 Pet. Ad. Dec. 234.

2. The act of assembly of Maryland did not contemplate a restraint on the sailing of vessels engaged in foreign commerce or in the coasting trade, and if it did, such restraint is repugnant to the Constitution and laws of the United States. The "Superior" being a vessel duly enrolled and licensed in the district of Philadelphia, for the coasting trade, had a right to pursue such trade without any restraint thereon by the laws of the state of Maryland, in respect to the time within which such coasting trade might be prosecuted.

Gibbons v. *Ogden*, 9 Wheat. 240; *Brown* v. *State of Maryland*, 12 Wheat. 448; *Brown* v. *Jones*, 2 Gall. 477; *Willard* v. *Dorr*, 3 Mass. 93.

3. The railroad company, and not the contractors under them, are responsible for the injury.

The whole work was done under the direction and superintendence of the company, the contractors undertaking to do only as directed by the company's engineers; and there being no proof that the contractors violated their instructions, the presumption is that all that was done was by the order of the company's superintendent.

The pile, upon which the steamer ran, was not such an one as is contemplated by the contract, where it speaks of "scaffolding and piles that may be used while building."

At the time of the accident, the company had discharged the contractors and taken possession of all that was built of the bridge, in its then unfinished condition.

4. The captain of the steamer exercised the utmost prudence, skill and judgment after the accident, as the record abundantly shows; but

even if this were less apparent as a question in fact, it having undergone full examination in the district court, and the circuit court on appeal, this court will not disturb the decree unless in a clear case of mistake.

Walsh v. *Rogers*, 13 How. 284.

5. The sum decreed against the appellant in the district court and affirmed in the circuit court on appeal, is less than the proof shows to have resulted from the injury.

Williamson v. *Barrett*, 13 How. 110.

Mr. Justice **Grier** delivered the opinion of the court:

A brief statement of the facts of this case will be sufficient to show the relevancy of the questions to be decided.

The appellants were authorized by a statute of Maryland to construct a railway bridge over the mouth of the Susquehanna river, at Havre de Grace. They entered into an agreement with certain contractors, to prepare the foundations and erect the piers. In pursuance of their con- [*215] tract, these persons drove *piles into the channel of the river, under the direction of the engineers employed by the appellants. Before the completion of the contract, the appellants abandoned their purpose of building the bridge, and discharged the contractors. During the progress of the work, the contractors had driven certain piles, called sight piles, into the channel of the river, which were not removed or cut off level with the bottom, but were cut a few feet under the surface of the water, so that they became a hidden and dangerous nuisance. The steamboat "Superior," engaged in towing boats between Philadelphia and Havre de Grace, left a port in Maryland on Sunday morning, and soon after came into forcible collision with one or more of these piles; in consequence whereof she suffered great damage, and for which this libel was filed.

The appellants have, in this court, insisted chiefly on three points of defense to the charges of the libel:

I. It is contended that the "marine torts," over which courts of admiralty have jurisdiction, are trespasses done and committed with force on the sea and navigable waters, such as collision of vessels, assaults, etc., and that the placing and leaving the piles in the bed of the river, and within the body of a county, is a nuisance at common law, and the remedy of the appellees should have been by an action on the case.

The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality. If the wrongs be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that they come within the jurisdiction of that court. Even Lord Coke (4 Inst. 134) declares, "that of contracts, pleas, and *querels*, made upon the sea or any part thereof, which is not within any county, the admiral hath and ought to have jurisdiction."

Since the case of *Waring* v. *Clarke*, 5 How. 464, the exception of "*infra corpus comitatus*" is no longer allowed to prevail. In such cases, the party may have his remedy either in the common law courts or in the admiralty. Nor is the definition of the term "torts," when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed *by di- [*216] rect force. It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. It is a rule of maritime law, from the earliest times, "that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages." See Emerigon, vol. I. page 417; Consulat de la Mer, chap. 243; and Cleirac, 70.

In the resolution of the twelve judges, in 1632, it was determined in England, "that the courts of admiralty may inquire of and redress all annoyances and obstructions that are or may by any impediment to navigation, etc., and injuries done there which concern navigation on the sea."

Hence, "the impinging on an anchor or other injurious impediment negligently left in the way," has always been considered as coming within the category of maritime torts, having their remedy in the courts of admiralty. See 2 Brown Civ. and Adm. 203.

The objection to the jurisdiction of the court is, therefore, not sustained.

II. The testimony showed that the injury to the steamer was caused by her coming in contact with one of the sight piles, driven into the channel by the contractors, and left in the situation already stated.

This contract is set forth at length. It showed that the contractors were bound to "provide all necessary machinery, etc., and to furnish (and remove when done with) all scaffolding and piles that may be used while building."

It is contended by the appellants that they are not liable for the negligence which caused this injury, because the piles were not placed in the channel by their servants, but by those of the contractors; and that the case was not altered by the fact that the contractors were directed to do so by the engineers, who were the servants of appellants.

If the contractors had proceeded to complete their contract, and left the piles in the condition complained of, this defense to the action might have availed the appellants. But as the driving the piles for the legitimate purpose of the erection was *by authority of the [*217] law and in pursuance of the contract, the contractors had done no wrong in placing them there. The nuisance was the result of the negligence in cutting off the piles, not at the bottom of the river, but a few feet under the surface of the water. This the contractors were bound to do, after the piles had served their legitimate purpose in the construction of the bridge, and after they had completed their contract. But before this, the railroad company determined to discontinue the erection of the bridge. They dismissed the contractors from the further fulfilment of their contract. Under such circumstances, it became the duty of the appellants to take care that all the obstructions to the navigation, which had been placed in the channel by their orders, and for the purpose of their intended erection, should be removed. The nuisance, which resulted from leaving the piles in this dangerous condition, was the consequence of their own negligence or that of their servants, and not of the contractors.

III. The appellants urge, as a further ground of defense, that this collision took place on Sunday, shortly after the steamboat had com-

menced her voyage from the wharf, "parcel of the territory of Harford county, in the state of Maryland; that the boat was used and employed by her owners in towing canal boats; and that, when entering on her voyage, those who had her control and management were engaged in their usual and ordinary work and labor—the same not being a work of necessity or charity—contrary to the laws of the state of Maryland."

A statute of Maryland forbids persons "to work or do any bodily labor, or to willingly suffer any of their servants to do any manner of work or labor, on the Lord's day—works of necessity and charity excepted;" and a penalty is prescribed for a breach of the law.

It has been urged that there was nothing in this provision inconsistent with any of the laws regulating commerce, and that the Federal courts should, therefore, take notice of and conform to the laws of the state.

But assuming this proposition to be true, the inference from it will not follow as a legitimate *218] conclusion; for, if we admit *that the master and mariner of a ship or steamboat are liable to the penalty of the act for commencing their voyage from a port in Maryland on Sunday, it by no means follows that the appellants can protect themselves from responding to the owners of the vessel for the damages suffered in consequence of the nuisance.

The law relating to the observance of Sunday defines a duty of a citizen to the state, and to the state only. For a breach of this duty he is liable to the fine or penalty imposed by the statute. and nothing more. Courts of justice have no power to add to this penalty the loss of a ship, by the tortious conduct of another, against whom the owner has committed no offense. It is true, that in England, after the statute of 29—ch. 2d, forbidding labor on the Lord's day, they have, by a course of decision perhaps too obsequiously followed in this country, undertaken to add to the penalty, by declaring void, contracts made on that day; but this was only in case of executory contracts, which the courts were invoked to execute. It is true, that cases may be found in the state of Massachusetts (see 10 Met. 363, and 4 Cush. 322), which, on a superficial view, might seem to favor this doctrine of set-off in cases of tort. But those decisions depend on the peculiar legislation and customs of that state, more than on any general principles of justice or law. See the case of *Woodman* v. *Hubbard*, 5 Fost. 67.

We would refer, also, to a case very similar in its circumstances to the present, in the supreme court of Pennsylvania, in which this subject is very fully examined by the learned Chief Justice of that court; and we concur in his conclusion: "That we should work a confusion of relations, and lend a very doubtful assistance to morality, if we should allow one offender against the law, to the injury of another, to set off against the plaintiff that he, too, is a public offender." See *Mohney* v. *Cook*, 26 Pa. 342.

We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of $7,000 on the lebelants, by way of set-off, because their 219*] servants may have been subject *to a penalty of twenty shillings each, for breach of the statute.

Moreover, the steamboat in this case was sailing on a public river, within the ebb and flow of the tide; she had a coasting license, and was proceeding from a port in one state to a port in another. Has it ever been decided that a vessel leaving a port on Sunday infringes the state laws with regard to the observance of that day?

We have shown, in an opinion delivered at this term, that in other Christian countries, where the observance of Sundays and other holidays is enforced by both church and state, the sailing of vessels engaged in commerce, and even their lading and unlading, were classed among the works of necessity, which are excepted from the operation of such laws. This may be said to be confirmed by the usage of all nations, so far, at least, as it concerns commencing a voyage on that day. Vessels engaged in commerce on the sea must take the advantage of favorable winds and weather; and it is well known that sailors (for peculiar reasons of their own) give a preference to that day of the week over all others for commencing a voyage.

In the case of *Ulary* v. *The Washington*, Crabbe, 208, where a sailor justified his departure from a ship in port, because he was compelled to work on Sunday, Judge Hopkinson decided, "that, by the maritime law, sailors could not refuse to work on Sunday—the nature of the service requires that they should do so."

We have thus disposed of the questions of law raised in this case, and concur with the district and circuit court in their decision of them.

Some objections have been urged to the assessment of damages, and their amount.

On this subject there was much contradictory testimony, as usually happens when experts are examined as to matters of professional opinion. The judges of the courts where this question was tried can better judge of the relative value of such conflicting testimony, from their knowledge of places and persons, and they may examine witnesses *ore tenus*, if they see fit.

*There was evidence to support the [*220 decree; and we can see no manifest error into which the court below has fallen. Appellants ought not to expect that this court will reverse a decree, merely upon a doubt created by conflicting testimony.

The judgment of the Circuit Court is affirmed, with costs.

JOSEPH PENNOCK and Nathan F. Hart, *Appts.*,
v.
GEORGE S. COE, Trustee of the Cleveland, Zanesville, & Cincinnati Railroad Co.

(See S. C. 23 How. 117-132.)

Mortgage on after-acquired property of railroad, when valid—when it attaches—right of mortgagee—is prior to that of creditors, when—rights of bondholders—construction of charter.

The after-acquired rolling stock of a railroad

NOTE.—*The lien of a mortgage on after-acquired property.*

At common law nothing can be mortgaged that does not belong to the mortgagor at the time when the mortgage is made. Pierce v. Emery, 32 N. H. 484.

Where a railroad company executed a mortgage

company placed upon the road, attaches in equity, to a mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company.

There is no rule of law or principle of equity that denies effect to such an agreement.

Whenever a party undertakes, by deed or mortgage, to grant property, real or personal, *in præsenti*, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity.

But the principle has no application to a case where the mortgagor does not undertake to grant, *in præsenti*, property of the company not belonging to it, or not in existence at the date of the mortgage.

Where the terms of the grant or conveyance are: "all present and future to-be-acquired property of the parties of the first part, including iron rails and equipments, procured or to be procured," etc., the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor, in fulfilment of an express agreement, founded on a good and valuable consideration.

If the company, after having received the money upon the bonds and given the mortgage security, had undertaken to divert the fund from the purpose to which it was devoted, namely: the construction of the road and its equipment, and upon which the security mainly depended, a court of equity would have interposed, and enforced a specific performance: one of the covenants being, that the money should be faithfully applied to the building and equipment of the road.

Or if, after the road was put in operation, the company had undertaken to divert the rolling stock from the use of the road, a like interposition might have been invoked, in order to protect the security of the bondholders.

And if a court of equity would thus have compelled a specific performance of the contract, it would sanction the voluntary performance of it by the parties themselves, and give effect to the security as soon as the property is brought into existence.

The mortgage attached to the future acquisitions, as described in it, from the time they came into existence.

As to the claim of the judgment creditors, the mortgage being a valid and effective security for the bondholders of prior date, they present the superior equity to have the property in question applied to the discharge of the bonds.

If the property covered by the mortgage constitutes a fund more than sufficient to pay their demands, the court may compel the prior encumbrancer to satisfy the execution: or, on a refusal, the mortgage having become forfeited, compel a foreclosure and satisfaction of the bond debt, so as to enable the judgment creditor to reach the surplus.

Or the court might, upon any unreasonable resistance to the claim of the execution creditor, or inequitable interposition for delay, and to hinder and defeat the execution, permit a sale of the rolling stock sufficient to satisfy it.

But if the whole of the property mortgaged is insufficient to satisfy the mortgage, any interference of the judgment creditors, with a view to the satisfaction of their debts, consistent with the superior equity of the bondholders, would work only inconvenience and harm to the latter, without any benefit to the former.

To permit one of the bondholders under a second mortgage to proceed at law in the collection of his debt upon execution would disturb the *pro rata* distribution, and give him an inequitable preference, and prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien.

Power under the charter to construct the road from Hudson to Millersburg, and consequently to borrow money and pledge the road for this purpose, is to be found in the charter.

Argued Jan. 31, 1860. Decided Feb. 20, 1860.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The bill in this case was filed in the court below, by the appellee, mortgagee of the road of the railroad company, in trust for securing the payment of its bonds, to enjoin the execution of a judgment recovered at law against the company by the appellants. The said court having entered a decree granting the injunction as prayed, the respondents took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Spaulding & Parsons** and **E. M. Stanton**, for the appellants:

First. It is insisted, on the part of the appellants, that so much of the indenture made between the Akron branch of the Cleveland & Pittsburgh Railroad Company and George S.

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upon its road "constructed and to be constructed," etc., and real estate then owned, etc., or which should thereafter be owned by them, etc.; held, that the mortgage embraced, and was a valid lien upon, all the property therein described, whether the same was then owned by the company or was acquired subsequently for the purpose of its railroad. Seymour v. Can. & Niagara Falls R. Co. 25 Barb. 284, 14 How. Pr. 531.

A railroad mortgage to secure bonds which provides that all subsequently acquired property shall, upon the acquisition thereof, become subject to the lien, and operation of the mortgage makes rails subsequently acquired for the use of the road a part of the security in equity, against persons buying them with a knowledge of the facts or without parting with value for them. Weetjen v. St. Paul & P. R. Co. 4 Hun, 529.

A railroad mortgage as against the company and its privies, though given before the road is built, attaches thereto as fast as it is built, and to all property covered by its terms as fast as it comes into existence as property of the company. Galveston R. v. Cowdrey, 78 U. S. (11 Wall.) 459.

A railway mortgage expressed to cover after-acquired property, should not be allowed to overrule a lien given upon the purchase of such property for the price thereof. United States v. New Orleans R. Co. 79 U. S. (12 Wall.) 362.

A mortgage on a crop not sown, cannot at the time operate as a mortgage, but after the seed is sown and the crop grown, the mortgage lien attaches. Butt v. Ellett, 86 U. S. (19 Wall.) 544, Aff'g Ellett v. Butt, 1 Woods, 214.

A railroad mortgage covering all subsequently acquired property, was held to include a railroad and appurtenances afterwards leased by the mortgagors. Barnard v. Norwich, etc., R. Co. 14 Bank. Reg. 469.

A similar mortgage was held to include rolling stock; Pullan v. Cincinnati R. Co. 4 Biss. 35; and where they are named in mortgage, cars, engines and machinery in existence at time of foreclosure. Shaw v. Bill, 95 U. S. 10.

Where no rule of law is infringed, and the rights of third persons are not prejudiced, courts of equity will, in proper cases, give effect to mortgages of subsequently acquired property. Beall v. White, 94 U. S. 382.

Where a contract provides that cars furnished shall be property of person furnishing them, till paid for, his claim is prior to the lien of a mortgage covering after-acquired property. Fosdick v. Schall, 99 U. S. 235; Fosdick v. Car Co. 99 U. S. 256.

After-acquired lands which cannot be regarded as accretions to the road itself, will not pass under a general mortgage of a railroad as parcel thereof. Calhoun v. Paducah, etc., R. Co. 9 Cent. L. J. 66; 8 Reporter, 395.

Lands subsequently acquired, and not essential to the operation of the road, do not pass by implication under such a mortgage. They should have been described with reasonable certainty to be included. Calhoun v. Paducah, etc., R. Co. *supra*.

Claims, for right of way acquired by a railroad after it has executed a mortgage, are subject to the prior rights of mortgagees. Baylis v. La Fayette, etc., R. Co. 8 Reporter, 579.

Mortgage of future additions to a stock of goods in a particular shop, is a valid mortgage of such goods as fast as they are put into the shop by the mortgagor. Brett v. Carter, 2 Low. 458.

See, also, note to 9 L. R. A. 140.

Coe, trustee, on the 1st day of April, 1852, as purports to put in pledge or mortgage "future acquisitions," is inoperative and void.

Yelverton v. *Yelverton*, Cro. Eliz. 401; 4 Com. Dig. 310, Grant, D.; *Mogg* v. *Baker*, 3 Mees. & W. 195; *Jones* v. *Richardson*, 10 Met. 481; *Moody* v. *Wright*, 13 Met. 17; *Otis* v. *Sill*, 8 Barb. 102; *Rose* v. *Bevan*, 10 Md. 466.

Second. The indenture of April 1, 1852, is void for uncertainty as to the nature and extent of the grant.

It purports to convey "all the foregoing, present, and future to-be-acquired property of the said party of the first part." "*Dolus versatus in generalibus.*"

Doddington's Case, 2 Co. 32.

"A grant shall be void if it be totally uncertain; as, if a man grant as many trees as can be spared in his manor."

4 Com. Dig. 317; Grant, E. 14.

In the case at bar it will appear that the grantors reserve to themselves the right to "sell, hypothecate, or otherwise dispose of" any bonds or other property of the company not necessary to be retained for their railroad, nor required for the construction or convenient use of their road.

U. S. v. *King*, 3 How. 773; *Doe, ex dem. Holley*, v. *Curtis*, 3 How. Miss. 230; *Proctor* v. *Pool*, 4 Dev. 370; *Worthington* v. *Hylyer*, 4 Mass. 196; *Bullock* v. *Williams*, 16 Pick. 33; *Winslow* v. *Merchants' Ins. Co.* 4 Met. 306.

Third. The indenture of April 1, 1852, so far as the same purports to be a mortgage of the personal property, is fraudulent and void as against judgment creditors, for the reason that it provides for a continuing possession in the hands of the mortgagors, with power to sell and dispose of the property at their own discretion.

Divver v. *McLaughlin*, 2 Wend. 596; *Paget* v. *Perchard*, 1 Esp. 205.

Fourth. The railroad company had no authority as a corporate body to make a railway from "Hudson to Millersburg," and as a necessary consequence, had no power to borrow money for that purpose. The charter only authorized the construction of a railroad from Hudson in Summit county, to Wooster, in Wayne county, or some other point in the Ohio & Pennsylvania Railroad between Massillon and Wooster.

See Ohio Local Laws, vol. XLIX. p. 468.

"Corporate powers are never to be created by implication, nor extended by construction."

Penn. R. Co. v. *The Canal Commissioners*, 21 Pa. 9; *Stormfeltz* v. *The Manor Turnpike Co.* 13 Penn. 555; *East Anglian R. Co.* v. *Eastern Counties R. Co.* 7 Eng. L. and Eq. 505; Act Regulating Railroad Mortgages in Ohio, Swan's Rev. Stat. 241; *Colman* v. *The Eastern Counties R. Co.* 4 Eng. R. Cas. 382; *Perrine* v. *Ches. & Del. Can. Co.* 9 How. 172; *Inhab. of Springfield* v. *Conn. Riv. R. Co.* 4 Cush. 63; *Logan* v. *Earl of Courtown*, 13 Beav. 22; *Green* v. *Seymour*, 3 Sandf. Ch. 285; *The Penn. etc. Co.* v. *Dandridge*, 8 Gill & J. 248.

"Notes given by a corporation in violation of law are void."

Mr. Justice McLean, in *Root* v. *Godard*, 3 McLean 102; *McGintry* v. *Reeves*, 10 Ala. 137; *Commonwealth* v. *The Erie & N. R. Co.* 27 Pa. 339; *Peavey* v. *The Calais R. Co.* 30 Me. 498.

"A right cannot be claimed by a corporation under ambiguous terms."

Justice McLean in *Charles River Bridge Case*, 11 Pet. 559.

Fifth. The complainant does not show himself entitled to call upon a court of equity, "to stay the hand" of the judgment creditors of the railroad company.

When complainant has full and adequate remedy at law, equity will not interfere.

2 How. 383; 3 J. J. Marsh. 274; Waterman's Eden, Inj. 69.

Sixth. The appellants are judgment creditors of the R. Co., and are seeking satisfaction of their judgment by a proceeding at law. The equitable relations between them and other bondholders are not properly before the court for adjudication. The great question to be met and decided is this:

Can the rolling stock of a railroad company be seized and sold on execution?

Seventh. The railroad company had the possession and legal ownership of the chattels levied on, and a legal title and interest in them that might be sold on execution.

Watson, Sher. 182; Todd's Pr. 1003, 9th ed.; 1 Archb. Pr. 584; Bac. Abr. Execution, ch. 4; *Srodes* v. *Caven*, 3 Watts, 258; Story, Bail. § 350.

Mr. **W. S. C. Otis**, for appellees:

1. The act of February 19, 1851, conferred upon such persons as may have subscribed to the stock of the Akron branch, the franchise of being and acting as a corporation, with power to construct a railroad within the limits specified within the said act, to borrow money for such purpose, and to mortgage "all or any part of the said railroad, or of any other real or personal property belonging to said company, or of any portion of the tolls and revenue of said company which may thereafter accrue, for the purpose of raising money to construct said railroad, or to pay debts incurred in the construction thereof."

The counsel examined this act at length, and cited the following authorities:

Ang. & Ames Corp. §§ 76, 77, 78; *Queen* v. *Poor Law Commissioner*, 6 Adol. & E. 68; *Gordon* v. *Preston*, 1 Watts, 385; *Union Bank* v. *Jacobs*, 6 Humph. 515; *Rex* v. *Loxdale*, 1 Burr. 447; act regulating R. Cos. Feb. 11, 1848; act to provide for the creation and regulation of incorporated companies within the state of Ohio, May 1, 1852.

2. The act of February 19, 1851, conferred upon the company power to construct their road south of the Ohio & Pennsylvania R. R., and to connect the same with any railroad running in the direction of Columbus.

See *Bellville, etc. R. Co.* v. *Gregory*, 15 Ill. 20.

3. Neither the right of way, roadbed, superstructure, nor the machinery and cars upon the road for transportation, nor the repair of the track, are subject to levy and sale upon judgment and execution, irrespective of the lien created by the mortgages to Coe.

This proposition, so far as it relates to the right of way, roadbed, and superstructure, will not be controverted. It rests upon too solid a foundation of reason and authority to admit it.

Tippets v. *Walker*, 4 Mass. 595, 597; *Winchester and Lex. Turnpike Co.* v. *Vimont*, 5 B. Mon. 1; *Macon & Western R. Co.* v. *Parker*, 9 Ga. 377; *Ammant* v. *The New Alex. and Pittsburgh Turnpike Co.* 13 S. & R. 210; *Leedom* v. *The Plymouth R. Co.* 5 Watts & S. 265; *The Susquehanna Can. Co.* v. *Bonham*, 9 Watts & S. 27; *Seymour* v. *Milford & Chill. Turnp. Co.* 10 O. R. 477.

An examination into the reasons of this exemption of the right of way, roadbed, and superstructure from levy and sale, will show that they extend to and embrace the machinery and cars upon the road, as well as the road itself.

4. The legislature intended that the cars and machinery placed upon the road should become a part of it, by accession, in the same manner and to the same extent as buildings or other improvements annexed to land become a part of it, by accession.

Farrar v. *Stackpole*, 6 Me. 154; *Voorhis* v. *Freeman*, 2 Watts & S. 116; *Pyle* v. *Pennock*, 2 Watts & S. 390; *Gray* v. *Holdship*, 17 S. & R. 413; *Heaton* v. *Findley*, 12 Pa. 304; *Winslow* v. *Merchants' Ins. Co.* 4 Met. 306, 314; *Bishop* v. *Bishop*, 11 N. Y. 123; *Snedeker* v. *Warring*, 12 N. Y. 170; *Morgan* v. *Mason*, 20 O. R. 401; *Farmers' Loan and Trust Co.* v. *Hendrickson*, 25 Barb. 484.

Not only the public convenience, but public justice, requires that the machinery and cars upon the road should be exempt from levy and sale upon execution.

If the machinery and cars placed upon the road for the purpose of transportation and the repair of the track, became annexed to the road as a part of it under the charter of the company, then, as accessions to the original subject of the mortgage to Coe, they would be covered by it, by the rule of the common law.

Pettingill v. *Evans*, 5 N. H. 54; *Southworth* v. *Isham*, 3 Sandf. 448; *Holly* v. *Brown*, 14 Conn. 254, 265.

The power to mortgage the future to-be-acquired tolls and revenues of the company, carries with it, by necessary implication, the power to mortgage the future to-be-acquired equipment necessary to earn such tolls and revenues.

It is a fundamental principle, that when a right is expressly given to an individual or a corporation, all powers necessary to the enjoyment of the right are also given.

Leavitt v. *Blatchford*, 5 Barb. 9; *Morgan* v. *Mason*, 20 O. R. 401.

5. The mortgage to Coe is a lien upon the machinery and cars levied upon, though the same were not in existence at the time said mortgage was executed, and though the same did not become a part of the road by accession when placed upon it.

It is the general rule of the common law that nothing can be mortgaged which is not in existence and does not belong to the mortgagor at the time the mortgage is executed.

Winslow v. *Merchants' Ins. Co.* 4 Met. 306; *Jones* v. *Richardson*, 10 Met. 481; *Lunn* v. *Thornton*, 1 Mon. Gr. & S. 379; *Otis* v. *Sill*, 8 Barb. 102.

But these very authorities also establish the fact that this rule is founded solely upon a technicality.

The rule of the civil law is the very reverse of that of the common law in this particular.

1 Domat, Cush. ed. 649, art. 5; 650, art. 7.

There is, therefore, no inherent difficulty in making a mortgage which shall extend to after-acquired property, or property not *in esse*. And courts of equity which are not trammeled by the technical rules of the common law in the administration of justice, both in England and in this country, uphold such mortgages in pursuance of the rule of the civil law, when necessary to carry into effect the honest and just contracts of parties, according to their real intentions.

Fonb. B. 1 ch. 4, § 2; ch. 5, § 8; 1 Pow. Mort. 190; Coote Mort. Law Lib. Ed. 185; *Noel* v. *Bewley*, 3 Sim. 103; *Metcalfe* v. *Archbishop of York*, 1 Mylne & C. 553; *Langton* v. *Horton*, 1 Hare, 549; *Matter of Howe*, 1 Paige, 125, 129; *White* v. *Carpenter*, 2 Paige, 217, 266; *Abbott* v. *Goodwin*, 20 Me. 408; *Forman* v. *Proctor*, 9 B. Mon. 124; *Jencke* v. *Goffe*, 1 R. I. 511; *Field* v. *The Mayor of N. Y.* 6 N. Y. 179, 186; *Mitchell* v. *Winslow*, 2 Story, 630; Story, Eq. Jur. §§ 1040, 1040*b*, 1055.

On page 644 of the case of *Mitchell* v. *Winslow*, above cited, Judge Story states the rule to be "that wherever the parties by their contract intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in being or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy."

And the particular question raised in this case has been determined in the following cases:

Willink v. *The Morris Can. Co.* 3 Green Ch. 377; *Pierce* v. *Emery*, 32 N. H. 484; *Seymour* v. *Canandaigua and Niagara Falls R. Co.* 25 Barb. 286; *Farmers' Loan & Trust Co.* v. *Hendrickson*, 25 Barb. 484; *Phillips* v. *Winslow*, 2 Weekly Law Gazette, 4; S. C. reported in full, 18 B. Mon. 431; Redf. Railw, 590, and note; *Ludlow* v. *Hurd, Superior Court of Cincinnati*, 6 Am. Law Reg. 493.

I also refer to the opinion of Judge McLean pronounced in the case at bar, in the circuit court, reported in *Coe* v. *Pennock*, 6 Am. Law Reg. 27.

6. There is no want of certainty in the nature and extent of the grant. The deeds from the company to Coe clearly define, not only the nature and extent of the grant, but the objects upon which the grant operates.

It is sufficient in law, if the thing granted be so described that it can be distinguished from all other things of the same kind, even though resort must be had to extrinsic circumstances or parol proof to identify it.

Blake v. *Doherty*, 5 Wheat. 359; *Boardman* v. *Lessees of Reed*, 6 Pet. 328; *McChesney's Lessee* v. *Waimwright*, 5 Ohio, 452; *Eggleston* v. *Bradford*, 10 Ohio, 312; *Lawrence* v. *Evarts*, 7 Ohio St. 194; *Harding* v. *Coburn*, 12 Met. 333; *Morse* v. *Pike*, 15 N. H. 529; *Burditt* v. *Hunt*, 25 Me. 419; *Wolfe* v. *Dorr*, 24 Me. 104; *Barry* v. *Bennett*, 7 Met. 354; *Winslow* v. *Merchants'*

Ins. Co. 4 Met. 306; *Belknap* v. *Wendell*, 1 Fost. 175; *Dunning* v. *Stearns*, 9 Barb. 630.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the northern district of Ohio.

The bill was filed in the court below by Coe, mortgagee of the road of the railroad company, in trust, for securing the payment of its bonds, to enjoin the execution of a judgment recovered at law against the company, by Pennock and Hart, two of the defendants.

The facts of the case are these: The Cleveland, Zanesville, & Cincinnati Railroad Co. created a body politic and corporate by the laws of Ohio, to make a railroad between certain termini in that state, in pursuance of authority conferred by law, issued bonds to the amount of $500,000, payable ten years from date, with interest at the rate of seven per cent, payable semi-annually, on the first day of April and October in each year, and, to secure the payment of the same, executed a mortgage of the railroad and its equipments to the complainant, in trust for the bondholders, the description of which is **125*]** *in the words following: "All the present and future to-be-acquired property of the parties of the first part; that is to say, their road, made or to be made, including the right of way, and the land occupied thereby, together with the superstructure and tracts thereon, and all rails and other materials used therein, or procured therefor, with the above-described bonds, or the money obtained therefor, bridges, viaducts, culverts, fences, depots, grounds, and buildings thereon, engines, tenders, cars, tools, machinery, materials, contracts, and all other personal property, right thereto, or interest therein, together with the tolls, rents, or income, to be had or levied therefrom, and all franchises, rights, and privileges, of the parties of the first part, in, to, or concerning the same." At the time of the issuing of these bonds, and the execution of the mortgage, the railroad was in the course of construction, but only a small portion of it finished. It was constructed and equipped almost entirely by means of the funds raised from these bonds, together with a second issue to the amount of $700,000. The road cost upwards of $1,500,000. The stock subscribed and paid in amounted only to some $369,000.

The mortgage securing the payment of the second issue bears date the 1st of November, 1854, and was made to one George Mygatt, in trust for the bondholders, and the property described in and covered by it is the same as that described in the first mortgage. The road was finished to Millersburg, its present terminus south, in May, 1854, and the whole of the rolling stock was placed on it previous to the date of the second mortgage. This stock was purchased and placed on the road from time to time, as the locomotives and cars were needed in the progress of its construction.

The mortgage to the complainant contained a covenant, on the part of the company, that the money borrowed for the construction and equipment of the road should be faithfully applied to that object, and that the work should be carried on with due diligence until the same should be finished.

In case of default in the payment of the principal or interest of the bonds, the trustee was empowered to enter upon and take possession of the road, or, at the election of a moiety *of the bondholders, to sell the same at [***126** public auction, and apply the proceeds to the payment of the bonds.

The defendants, Pennock and Hart, being the holders of sixteen of the bonds issued under the second mortgage, recovered a judgment on the same May, 1856, against the railroad company, issued execution, and levied on a portion of the rolling stock of the road, and caused the same to be advertised for sale.

This bill was filed to enjoin the sale, and a decree was rendered perpetually enjoining it in the court below, which is now before us on appeal.

The first two grounds of objection taken to this decree may be considered together. They are: (1) That the mortgage to the trustee of the 1st April, 1852, is void or inoperative, as respects the locomotives and cars which were levied on under the execution of the defendants, inasmuch as they were not in existence at the date of it, but were constructed and placed on the road afterwards, being subsequently acquired property of the company; and (2) that the mortgage is void, on the ground of uncertainty as to the property described or attempted to be described therein and conveyed to the mortgagee. The description begins by conveying "all the following present and future acquired property of the said parties of the first part;" and after specifying the road and the several parts of it, together with the rolling stock, there is added, "and all other personal property, right thereto, and interest therein." This clause, probably, from the connection in which it is found, was intended to refer to property appurtenant to the road, and employed in its operation, and which had not been enumerated; and if so, the better opinion, perhaps, is that it would be bound by the mortgage even as against judgment creditors.

But it is unimportant to express any opinion upon the question, as the property in this case (the locomotives and cars) levied on are articles specifically enumerated; and the only uncertainty existing in respect to them arises out of their nonexistence at the date of the mortgage. An uncertainty of this character need not be separately examined, as it will be *re- [***127** solved by a consideration of the first question, which is, whether or not the after-acquired rolling stock of the company placed upon the road attaches, in equity, to the mortgage, if within the description, from the time it is placed there, so as to protect it against the judgment creditors of the railroad company.

If we are at liberty to determine this question by the terms and clear intent of the agreement of the parties, it will be found a very plain one. The company have agreed with the bondholders (for the mortgagee represents them), that if they will advance their money to build the road, and equip it, the road and equipments thus constructed, and as fast as constructed, shall be pledged as a security for the loan. This is the simple contract, when

stripped of form and verbiage; and in order to carry out this intent most effectually, and with as little hazard as possible to the lender, the company specially stipulate that the money thus borrowed shall be faithfully applied in the construction and equipment of the road. And in further fulfilment of the intent, the company agree that in case of default in the payment of principal or interest, the bondholders may enter upon and take possession of the road, and run it themselves, by their agents, applying the net proceeds to the payment of the debt.

The bondholders have fulfilled their part of the agreement—they have advanced the money on the faith of the security; the company have also fulfilled theirs—they have made the road and equipped it; it has been partially in operation since January, 1852, and in operation upon the whole line since May, 1854. The road, therefore, as described in the mortgage, from Hudson to Millersburg, and which was in the course of construction at the date of the instrument, has been finished, and the rolling stock, locomotives, tenders, and cars also described in it, and which were to be afterwards acquired, have been brought into existence, and placed upon it—all in conformity with the agreement of the parties; and the question is, whether there is any rule of law or principle of equity that denies effect to such an agreement.

The main argument urged against it is found-
128*] ed upon the *maxim, that "a person cannot grant a thing which he has not:" *ille non habet, non dat;* and many authorities are referred to at law to prove the proposition, and many more might have been added from cases in equity, for equity no more than law can deny it. The thing itself is an impossibility. It may, at once, therefore, be admitted, whenever a party undertakes, by deed or mortgage, to grant property, real or personal, *in præsenti*, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity.

But the principle has no application to the case before us. The mortgage here does not undertake to grant, *in præsenti*, property of the company not belonging to them or not in existence at the date of it, but carefully distinguishes between present property and that to be afterwards acquired. Portions of the road had been acquired and finished, and were in operation, when the mortgage was given, upon which it is conceded it took effect; other portions were acquired afterwards, and especially the iron and other fixtures, besides the greater part of the rolling stock.

The terms of the grant or conveyance are: "all present and future to-be-acquired property of the parties of the first part;" that is to say, "their road, made or to be made, and all rails and other materials, etc., including iron rails and equipments, procured or to be procured," etc. We have no occasion, therefore, of calling in question, much less denying, the soundness of the maxim, so strongly urged against the effect of the mortgage upon the property in question, as its force and operation depend upon a different state of facts, and to which different principles are applicable. The inquiry here is, not whether a person can grant *in præsenti* property not belonging to him, and not in existence, but whether the law will permit the grant or conveyance to take effect upon the property when it is brought into existence, and belongs to the grantor, in fulfilment of an express agreement, founded on a good and valuable consideration; and this, when no rule of law is infringed or rights of a third party prejudiced. The locomotives and cars were all placed upon the road as early as February, 1854, *when, at [*129 the furthest, the mortgage attached to those in question, according to its terms, if at all, and the judgment of the defendants was not recovered till May, 1856.

We think it very clear, if the company, after having received the money upon the bonds and given the mortgage security, had undertaken to divert the fund from the purpose to which it was devoted, namely: the construction of the road and its equipment, and upon which the security mainly depended, a court of equity would have interposed, and enforced a specific performance. One of the covenants was that the money should be faithfully applied to the building and equipment of the road, or if, after the road was put in operation, the company had undertaken to divert the rolling stock from the use of the road, a like interposition might have been invoked, and this in order to protect the security of the bondholders. And if a court of equity would thus have compelled a specific performance of the contract, we may certainly with confidence conclude that it would sanction the voluntary performance of it by the parties themselves, and give effect to the security as soon as the property is brought into existence.

The case of *Langton* v. *Horton*, 1 Hare, Ch. 549, supports this view. The mortgage security in that case was the assignment of the ship Foxhound, then on her voyage to the South seas, together with all and singular her masts, etc., "and all oil and head matter, and other cargo, which might be caught or brought home on the said ship, on and from her then present voyage." The cargo was levied on by a judgment creditor on the arrival of the ship at home. A bill was filed to have the mortgage declared a good and valid security for the money advanced, and that the complainants be entitled to the benefit of the security, in preference to the judgment creditor.

The Vice-Chancellor, in giving his opinion, observed: "Is it true that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract?"

And, in answer to the question, he said: "It is impossible to doubt, for some purposes at least, that by contract an *interest in a [*130 thing not in existence at the time of the contract may, in equity, become the property of the purchaser for value." And, after reviewing the cases in the books, he concludes: "I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point that Bixnie, the contracting party, would be bound by the assignment to the plaintiffs."

There are many cases in this country confirming this doctrine, and which have led to the practice extensively of giving this sort of security, especially in railroad and other similar great and important enterprises of the day.

2 Seld. 179; 3 Green, Ch. 377; 32 N. H. 484; 25 Barb. 286; 25 Barb. 284; 18 B. Mon. 431; Redfield on Railways, 590, and note; 2 Story, 630; *Tapfield* v. *Hillman*, 7 Jur. 771.

In the case of *Tapfield* v. *Hillman*, Tindall, Ch. J., seems inclined to the opinion that, even at law, a mortgage security of future acquisitions might have effect given to it, if the terms indicated an intent to comprehend them.

The counsel for the appellee referred to the case of *Chapman* v. *Weimer*, 4 Ohio St. 481, as denying effect to a mortgage upon after-acquired property. But that was a case at law; and even there the court held that the mortgage attached after the property was acquired, from the time the right was asserted by the mortgagee.

In conclusion upon this point, we are satisfied that the mortgage attached to the future acquisitions, as described in it, from the time they came into existence. As to the claim of the judgment creditors, there are several answers to it.

In the first place, the mortgage being a valid and effective security for the bondholders of prior date, they present the superior equity to have the property in question applied to the discharge of the bonds. It is true, if the property covered by the mortgage constituted a fund more than sufficient to pay their demands, the court might compel the prior incumbrancer to satisfy the execution, or, on a refusal, the mortgage having become forfeited, compel a foreclosure and satisfaction of the bond debt, so as to enable the judgment creditor to reach the 131*] *surplus. Or the court might, upon any unreasonable resistance of the claim of the execution creditor, or inequitable interposition for delay, and to hinder and defeat the execution, permit a sale of the rolling stock sufficient to satisfy it. But no such ground has been presented, or could be sustained upon the facts before us. On the contrary, it cannot be denied but that the whole of the property mortgaged is insufficient to satisfy the bondholders under the first mortgage, much less when those under the second are included. To permit any interference, therefore, on the part of the judgment creditors, with a view to the satisfaction of their debt, consistent with the superior equity of the bondholders, would work only inconvenience and harm to the latter, without any benefit to the former. 3 Hare, Ch. 416; 9 Ga. 377; Redfield on Railw. 506; 5 Ohio St. 92.

In the second place, the judgment sought to be enforced by the defendants was recovered upon bonds of the second issue, and secured, in common with all the bonds of that issue, upon this property, by virtue of the second mortgage. These bondholders have a common interest in this security, and are all equally entitled to the benefit of it; and in case of a deficiency of the fund to satisfy the whole of the debt, in equity, a distribution is made among the holders *pro rata*. The payment of the bonds of the second issue are also postponed until satisfaction of the issue comprehended within the first mortgage, as the second was taken with a full knowledge of the first. To permit, therefore, one of the bondholders under the second mortgage to proceed at law in the collection of his debt upon execution, would not only disturb the *pro rata* distribution in case of a deficiency, and give him an inequitable preference over his associates, but also have the effect to prejudice the superior equity of the bondholders under the first mortgage, which possesses the prior lien.

As the judgment creditors can have no interest in the management or disposition of the property, except as bondholders, on account of the deficiency of the fund, it is unimportant to inquire whether or not the court was right in refusing a receiver, or to direct a sale of the road, with a view to a distribution *of [*132 the proceeds. For aught that appears, the road has been managed, under its present directors, with prudence and fidelity, and to the satisfaction of the bondholders, the parties exclusively interested.

Another objection taken to the validity of the mortgage is, the want of power under the charter to construct the road from Hudson to Millersburg, and consequently to borrow money and pledge the road for this purpose. There is certainly some obscurity in the statutes creating this corporation as to the extent of the line of its road; but we agree with the court below, that, upon a reasonable interpretation of them, the power is to be found in their charter. They were authorized to construct the road from some convenient point on the Cleveland & Pittsburg Road, in Hudson, Summit county, through Cuyahoga Falls, and Akron, to Wooster, or some point on the Ohio & Pennsylvania Railroad, between Massillon and Wooster, and to connect with said Ohio & Pennsylvania Road, and any other railroad running in the direction of Columbus. It was clearly not limited, in its southern terminus, to its connection with the Ohio & Pennsylvania Road, for there is added, "and any other railroad running in the direction of Columbus." The extension of the road to the Ohio Central Road at Zanesville, or at some other point on this road, comes fairly within the description.

We have not referred particularly to the authority of the company, under the statute laws of Ohio, to borrow money and pledge the road for the security of the payment, as no such question is presented in the brief or was made on the argument. Indeed, the authority seems to be full and explicit.

Decree below, affirmed.

ANN R. DERMOTT, *Plff. in Err.*,
v.
ZEPHENIAH JONES.

(See S. C. 23 How. 220–235.)

Contract, alterations in—time of performance—condition precedent—concurrent promises—averment not proved—acceptance—special contract—recoupment of damages.

Where a special contract for erection of build-

NOTE.—*Time, when of the essence of the contract*—see note to Emerson v. Slater, 15 L. ed. U. S. 626.

ings had been departed from in the course of its execution, by defendant insisting that alterations and additions should be made in the buildings after they were begun, contrary to the specifications of the contract, although it may have delayed their completion, yet it having been assented to by the plaintiff, without any stipulation that the time for the performance of the whole was to be delayed, it must be presumed to have been undertaken by the plaintiff to be done, as to time, according to the original contract.

A failure by the plaintiff to finish and deliver on the day agreed, is fatal to a recovery upon the special contract, where it was the intention of the parties that the performance of the work was to be a condition precedent to payment.

Whether contracts are dependent or independent, considered.

Where the agreements go to the whole of the considerations on both sides, the promises are dependent, and one of them is a condition precedent to the other.

Concurrent promises are those where the acts to be performed are simultaneous; and either party may sue the other for the breach of the contract, on showing, either that he was able, ready, and willing to do his act at a proper time and in a proper way, or that he was prevented by the act or default of the other contracting party.

Where an instalment was to be paid on an appointed day, if the work should then be finished, and the plaintiff avers that he had complied with the contract, and he gave no proof to sustain the averment; held, that the evidence entitled the defendant to a verdict on that count.

The acceptance of the buildings by the defendant as they had been constructed by the plaintiff, was not any relief of the plaintiff from his undertaking to finish them in the time specified in the contract.

While a special contract remains unperformed, the party whose part of it has not been done, cannot recover a compensation for what he had done, until the whole shall be completed.

Where something has been done under a special contract, but not in strict accordance with that contract, the party cannot recover the remuneration stipulated for in the contract.

Still, if the other party has derived any benefit from the labor done, the law implies a promise on his part to pay such a remuneration as the benefit conferred is really worth; and to recover it, an action of *indebitatus assumpsit* is maintainable.

In the trial of such an action, the defendant may be allowed a recoupment from the damages, claimed by the plaintiff, for such loss as he shall have sustained from the negligence of the plaintiff.

But such recoupment cannot be claimed unless the defendant shall file a definite statement of his claims, with notice of it to the plaintiff.

Argued Jan. 26, 1860. Decided Feb. 20, 1860.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

This was an action of debt, brought in the court below by the defendant in error to recover the second instalment of $5,000, and for the value of certain extra work done and materials furnished under a certain contract.

The trial below resulted in a verdict and judgment in favor of the plaintiff, whereupon the defendant sued out this writ of error.

A very full statement of the case appears in the opinion of the court.

Messrs. **Robert J. Brent** and **John Prentiss Poe**, for the plaintiff in error:

1st. The plaintiff in error will contend that the court below erred in receiving and filing the amended *narratio*, for the following reasons:

1. Because neither the said declaration nor any of the counts therein contained come within the terms and intent of the general leave and allowance of amendment granted by the court in this cause, under color of which they have been filed by the plaintiff.

2. Because the 3d and 4th counts are quite beyond the court's power, authority, and competency.

3d. The court below also erred in sustaining the demurrer of plaintiff to the defendant's 3d plea, and in overruling the demurrer filed by the defendant to the 2d count of amended *narratio*, and in rejecting the defendant's 5th prayer. The question here is whether, by the true construction of the contract declared upon, it was agreed between the parties that the finishing and completing the building on or before October 1st, 1851, was a condition precedent to the plaintiff's right of recovery for the instalment sued for; the plaintiff in error maintaining that the day named was of the essence of the contract, and that a failure to complete upon that day was a breach fatal to the recovery upon the contract, and that there is nothing in the record to show a valid excuse for such failure, or waiver of her rights by plaintiff in error, which will authorize a judgment in this case against her. To decide this question, we must look at the contract itself, and decide "on the reason and sense of the thing, as it is to be collected from the whole contract."

2 Pars. Cont. 39; *Ritchie* v. *Atkinson*, 10 East, 295.

The words of the contract for payment are, "in consideration of the covenants," etc. These have always been held apt words to create a condition.

1 Tidd Pr. 442; *Watchman* v. *Crook*, 5 Gill & J. 258; *Thorpe* v. *Thorpe*, 1 Ld. Raym. 665; *Acherley* v. *Vernon*, Willes, 157.

Courts lean against construing covenants as independent.

Dakin v. *Williams*, 11 Wend. 67.

There can be no doubt that before the defendant in error could recover upon this contract for the 2d instalment, it was incumbent upon him to aver and prove that he had finished and delivered over the buildings as required by the specifications. This, it is believed, is not denied.

Pordage v. *Cole*, 1 Saund. 320.

But it is said that though performance was necessary before an action would lie, yet performance on or before the 1st of October was not necessary to authorize a recovery upon the contract, inasmuch as the money was to be paid in instalments, the first instalment being due before the completion of the buildings. This, however, we deny, and sound reason and the weight of authority, it is submitted, fully establish that this is a condition precedent.

2 Pars. Cont. 40, 41, 189, 38, note 9; *Cunningham* v. *Morrell*, 10 Johns. 203; 12 Pa. 97; *Grant* v. *Johnson*, 5 N. Y. 247; Platt, Cov. 83; *Watchman* v. *Crook*, 5 Gill & J. 254; *Slater* v. *Emerson*, 60 U. S. (19 How.) 224; *Johnson* v. *Reed*, 9 Mass. 78; *Lord* v. *Belknap*, 1 Cush. 279; *Bean* v. *Atwater*, 4 Conn. 4; *Kettle* v. *Harvey*, 21 Vt. 301; *McLure* v. *Rush*, 9 Dana, 64; *Ramsburg* v. *McCahan* 3 Gill, 341; 1 Chit. Pl. 325-327.

The case of *Terry* v. *Duntze*, 2 H. Bl. 389, though it has been several times followed, has been much oftener repudiated, and is not now regarded as an authority.

The next question is, whether the alleged departure of the plaintiff in error from the terms of the said agreement, and her requiring of the defendant in error to perform additional work

and furnish additional materials, and the sinking in of the earth foundations under said buildings, were a sufficient excuse for his not completing the buildings by the time specified, which, as we have seen, was of the essence of the contract.

Now, if time is material, it can no more be dispensed with by parol than any other portion of the contract; and if, therefore, the defendant in error completed the work, but not in strict conformity to the requirements of the contract, he must show some better reason for such failure than extra work required. The alterations and suggestions made during the progress of the work were assented to by him, and amounted, therefore, to a new contract, not a performance of the old, or a sufficient obstacle to its performance. If the defendant in error agreed to do the extra work required without obtaining, as he might have done, an extension of the time for the stipulated original work, he undertook to do the work, as modified, within the stipulated time or to run the risk of so doing. The original contract remains in force in every point where not modified. The sinking of the earth foundations clearly is not a valid excuse for nonperformance, for "the accident to excuse the not doing must not be only unavoidable, but must render the act physically impossible, and not merely unprofitable and inexpedient by reason of an increase of labor or cost."

2 Pars. Cont. 184, 188.

Competent skill being implied, Jones was obliged to construct a building which was fit for use and occupation; and it is no defense that it was made according to the plan of the specifications.

Chit. Cont. 59, 734; 14 Mass. 282; 6 Littell, 198; 6 T. R. 750; 1 Pars. Cont. 73, note z; 4 Barn. & C. 345, 1 H. Bl. 161; 2 Chit. 311; 1 Car. & P. 352; 8 Car. & P. 479; 3 Camp. 451; 10 East, 530; 1 Pet. C. C. 86; 3 Stark, 6; 7 East, 481; 22 Pick. 381.

It may next be inquired whether the acceptance by plaintiff in error, of the buildings six months after the time when they should have been delivered, was a waiver of the condition precedent as to performance within the time. Under the circumstances, no stress can be laid upon this acceptance. The plaintiff in error was obliged to accept the buildings, for they were upon her own land. The authorities are uniform and clear, that if a party seeking has not performed the work in exact accordance with the stipulations of the contract, and the failure has not been produced by the act of God or the wrongful conduct of the other party, and there has been no waiver, he is remitted to *indebitatus assumpsit*, upon a *quantum meruit* for his labor and a *quantum valebat* for his materials. Many of the cases do not even permit a recovery at all.

Hayward v. *Leonard*, 7 Pick. 181; *Taft* v. *Montague*, 14 Mass. 282; *Watchman* v. *Crook*, 5 Gill & J. 254; *Ramsburg* v. *McCahan*, 3 Gill, 341; *Slater* v. *Emerson*, 60 U. S. (19 How.) 224; *Ladue* v. *Seymour*, 24 Wend. 61; 2 Greenl. Ev. § 104; *Jewell* v. *Schroeppel*, 4 Cow. 564; *Jennings* v. *Camp*, 13 Johns. 94; *Kettle* v. *Harvey*, 21 Vt. 301; *Burn* v. *Miller*, 4 Taunt. 745; *Chapel* v. *Hickes*, 2 Cr. & M. 214; *Thornton* v. *Place*, 1 M. & Rob. 218; *Smith* v. *Wilson*, 8 East, 437; *Littler* v. *Holland*, 3 T. R. 592; *Britton* v. *Turner*, 6 N. H. 481; *Gregory* v. *Mack*, 3 Hill, 380; *Phillips* v. *Rose*, 8 Johns. 393.

The demurrer of plaintiff in error to the 2d count of the amended *narratio* should also have been sustained, because the instalment sued for is not recoverable in an action of debt, but if recoverable in any form of action, it should have been an action of covenant.

Debt will not lie on a sealed contract for any instalment but the last, unless there is a penalty.

Platt, Cov. 103; 2 Saund. 304, *n.* 6; 1 H. Bl. 554; 3 Sneed, 470.

Nor does debt lie on implied contract.

1 Chit. Pl. 103, 113; 1 Cranch, 344; 2 McL. 127; Evans Pr. p. 53; 1 Pet. C. C. 147.

3d. The demurrer to the 3d and 4th counts ought also to have been sustained.

They are defective for the reason in part urged against the 2d count, and moreover, they show neither promise nor agreement to pay the debt.

1 Chit. Pl. 114, 115; 2 Chit. Pl. 386; 3 Barn. & Ald. 208–209.

4th. The court below erred in refusing to allow the plaintiff in error to give evidence of the failure of the defendant in error to put up the granite front steps, with the view of recouping against his claim the damages occasioned by such failure.

Sickles v. *Pattison*, 14 Wend. 257.

Messrs. **Bradley, Badger, and Carlisle,** for defendant in error:

1. As to the form of action.

It was contended below, that the sum of $5,000 demanded in the 1st and 2d counts was a mere instalment of one entire debt, and that in such case there can be but one action of debt, and only after all the instalments have fallen due. But so long ago as *March* v. *Freeman*, 3 Lev. 383, it was held that where the nature of the case imported that the parties looked to distinct and several payments in view of the character of the consideration for the whole sum, there debt would lie for such several payments as they fall due.

See, also, *Faw* v. *Marsteller*, 2 Cranch, 10; *Raborg* v. *Peyton*, 2 Wheat. 385; *Woods* v. *Russell*, 5 Barn. & Ald. 942; *Laidler* v. *Burlinson*, 2 Mees. & W. 614; *Cunnigham* v. *Morrell*, 10 Johns. 205.

The question as to whether these covenants are mutual and independent, or dependent, and whether the completion of the stores and warehouse by the 1st of October was a condition precedent to the payment of the money, depends upon the intention of the parties, to be derived from the contract itself, the subject-matter, and the surrounding circumstances under which it was made.

The case of *Terry* v. *Duntze*, 2 H. Bl. 389, is in point, and if that case is law, there can be no doubt that this action is properly brought. It is said to have been overruled in 10 Johns. 203; 5 Gill & J. 254; 5 Wend. 496; 1 Seld. 257; 9 Mass. 78; 1 Cush. 279; 4 Conn. 4; 21 Vt. 301; but the principle will be found fully supported in *Heard* v. *Wadham*, 1 East. 625, 631; *Seers* v. *Fowler*, 2 Johns. 272, 387; *Wilcox* v. *Ten Eyck*, 5 Johns. 78; *Gardiner* v. *Corson*, 15 Mass. 500; *Reab* v. *Moor*, 19 Johns. 341; *Web-*

ster v. *Warren*, 2 Wash. C. C. 456; see, also, *P. W. & B. R. Co.* v. *Howard*, 13 How. 338, 339.

The nonperformance by the day does not go to the whole consideration of the contract, and therefore they are not dependent.

Boone v. *Eyre*, 1 H. Bl. 273, note; 1 Wm. Saund. 320.

If the time of completing the stores and warehouse was material, and he was delayed by the defendant beyond the 1st of October, she cannot avail herself of that delay.

Bank of Columbia v. *Hagner*, 1 Pet. 467; *Fannen* v. *Beauford*, 1 Bay, 237; *Olendennen* v. *Paulsel*, 3 Mo. 230.

And in such case performance need not be averred.

Marshall v. *Craig*, 1 Bibb, 379; *Couch* v. *Ingersoll*, 2 Pick. 292.

And if averred, proof of such acts will support the averment.

Farnham v. *Ross*, 2 Hall, 167.

2. Under this point the counsel first examineu the exceptions to the evidence, and then the prayers of defendant for instructions.

The second prayer for instruction contains the proposition that the plaintiff could not recover upon the 1st count, unless the jury should find that in point of fact the stores and warehouse were delivered on the 1st of October.

The fifth prayer contains the proposition that if the plaintiff, Jones, had constructed the stores and warehouse "in strict conformity to the specifications made a part of said contract," yet, nevertheless, he was bound for the defects, if any, which were occasioned by such "conformity," if in fact the stores and warehouse were not delivered fit for occupation on the 1st of October.

Both these propositions, it is submitted, are untenable. The first goes to the root of the first count.

It assumes that the time was of the essence of the contract.

It will be observed that the time is laid in this count under a *scilicet*. This would not vary the case if the time were material, but if the time had been stated without the *videlicit*, it might have been held necessary to prove it as laid, although otherwise immaterial. The materiality cannot consist in the precise day in this case, so that a delivery on the morning of the next day would not support the action; nor if delivery on the stipulated day and a single brick unlaid, or a single nail undriven, would the action be defeated. The language "the said stores and warehouse being then finished, etc.," shows that the meaning was, that if they were not done on that day, the money should not be due then; but if done within a reasonable time thereafter, the money should then be due. But above all, the evidence shows that a strict compliance was prevented by the defendant. She was "the cause wherefore the condition could not be performed, and therefore shall never take advantage for nonperformance thereof."

Co. Litt. 206, B.

3. We contend that even if there be error as to the first count, the second count is good. It is in accordance with the rules that, the execution of the work being a condition precedent to the right to demand the money, the plaintiff must show either, first, a performance; or second, an offer to perform rejected by the defendant; or third, his readiness, until the defendant discharged him or prevented the execution of the matter to be performed.

Chit. Cont. 737, 7th Am. ed. 1 Chit. Pl. 326, 367, ed. 1851.

The second count avers performance in reasonable time and acceptance by the defendant.

This is admitted by the demurrer, and is also proved.

See *Van Buren* v. *Digges*, 11 How. 470.

The count was in debt for a sum certain. It was confessed by the demurrer and left nothing uncertain; but the right of the plaintiff below appeared thereon with judicial certainty.

Taylor v. *Capper*, 14 East, 442; 2 Saund. 107, note 2.

Judgment should be given here according to the right as it appears upon the whole record.

4 East, 502; 2 Str. 1055; 5 East, 266; Plowd. 66.

This court has decided that on a writ of error the whole record is to be inspected.

Bank U. S. v. *Smith*, 11 Wheat. 171; *Scott* v. *Sandford*, 60 U. S. (19 How.) 403.

Mr. Justice **Wayne** delivered the opinion of the court:

This record shows that the plaintiff and the defendant entered into a building contract, under seal with specifications annexed, on the 22d April, 1851. It was agreed between them that Jones, the plaintiff, should do, in a good, substantial, and workmanlike manner, the houses, buildings, and work of every sort and kind described in a schedule annexed to the contract, of which it was a part; that he should procure and supply all the materials, implements, and fixtures, requisite for executing the work in all its parts and details; and that the stores fronting on Market Space and the warehouse on Seventh street should be finished and ready for use and occupation, and be delivered over to the defendant, on the first day of October after the date of the contract, and all the rest of the work on the first day of December afterward. The defendant agreed, upon her part, to pay the plaintiff for the performance of the work, and for the materials furnished, $24,000 by instalments: $5,000 on the 1st day of July, 1851; $5,000 on the 1st day of October following; it being expressed in their contract that the stores and warehouse were then to be delivered to the defendant ready for use and occupation; and that the residue of the $24,000 was to be paid to the plaintiff on the 1st day of January, 1860, with interest upon $4,000 of it from the 1st day of May, 1851, and with interest on $10,000 from the 1st day of December, 1851. We do not deem it necessary to notice the other covenants of the contract, as they have no bearing upon the case as we shall treat it.

*The suit, as originally brought, is an [*227 action of debt for the recovery from the defendant of the second instalment of $5,000, and for the value of certain extra work done and materials furnished by the plaintiff for the defendant's use. The original declaration contains four counts: First, charges the defendant in the sum of $5,000 for work and labor done, and materials furnished and used by her in the erec-

tion and finishing certain stores and buildings in the city of Washington; second, for a like sum paid by the plaintiff for the defendant; third, for a like sum had and received; and fourth, for a like sum paid, laid out, and expended by the plaintiff for defendant at her request. The defendant pleaded to the declaration four pleas: First, that she was not indebted as alleged; second, a special plea setting out in detail a contract under seal, with the plaintiff, for the erection of such buildings as are mentioned in it, and for the completion of them —protesting that the plaintiff had not complied with the terms of the same, and declaring that the sum of $5,000 claimed by the plaintiff was the second instalment, which, by the contract, was to be due and payable to the plaintiff on the 1st day of October, 1851, and denying that the buildings were done by that day, or that any claim for the $5,000 had accrued before the bringing of the suit, by reason of any contract or agreement different from the special contract, or for any consideration other than the $5,000 claimed in the declaration. In the third plea, the identity of the sum sued for with the second instalment is reaffirmed, payable on the 1st of October, 1851, upon condition that the buildings and stores should be completed and ready for use by that day—averring performance on her part of the conditions and covenants of the contract, and nonperformance on the part of the plaintiff, especially his failure to complete and have ready for use the warehouse and stores by the time specified. The fourth plea refers to the special contract, avers performance on her part, nonperformance on the part of the plaintiff, and especially that he had not finished and completed the buildings and stores by the day specified in the contract, or at any time, either 228*] before or *after that day. At this point of the pleading the plaintiff applied to be permitted to amend his declaration, and added to it four counts. The first sets out in detail the special contract referred to in the defendant's second, third, and fourth pleas; avers performance generally, on his part, and nonperformance on the part of the defendant. The second count is the same as the first, down to the averment of performance by plaintiff inclusive, and then it avers that the defendant departed from the stipulations of the contract, and required the plaintiff to do additional work, and to furnish additional materials, whereby the defendant delayed the plaintiff, and prevented him from completing the buildings by the time agreed, which the plaintiff would otherwise have done. It is then averred that, notwithstanding the additional labor, the plaintiff had completed the work in a reasonable time after the 1st day of October, 1851, to wit, on the 4th of December following, and that the defendant then accepted the same, whereby the second instalment of $5,000 became payable. The third count is substantially a repetition of the original declaration, and the fourth claims $10,000 for work and labor done, and for a like sum laid out by the plaintiff for the defendant, from all of which his right of action had accrued before it was instituted.

The defendant filed three pleas to the first count of the amended declaration: (1) That she was not indebted as was alleged; (2) that the plaintiff had not performed the special agreement; (3) that he had not performed the condition precedent of the contract, to complete the building, which he had agreed to do by the 1st day of October, 1851. To the rest of the count the defendant demurred. As the verdict of the jury and the judgment rendered for the plaintiff are upon the first amended count, contrary to instructions asked of the court by the defendant, we shall not notice the subsequent pleadings and proceedings in the case, and will confine ourselves to what we consider to have been the legal rights of the parties under the original declaration and the first amended count. The evidence shows that the three stores and the warehouse were not finished by the 1st of October, 1851. It is also proved that *the [*229 special contract had been departed from in the course of its execution; that the defendant insisted that alterations and additions should be made in the buildings after they were begun, contrary to the specifications of the special contract, and that the plaintiff had yielded to her requirements. It may have delayed the completion of the stores and warehouse, as it increased the work to be done; but it having been assented to by the plaintiff without any stipulation that the time for performance of the whole was to be delayed, it must be presumed to have been undertaken by the plaintiff to be done, as to time, according to the original contract. The sinking of the wall probably caused the delay, but that cannot give to the plaintiff any exemption from his obligation to finish the stores and warehouse on the 1st of October, without further proof as to the cause of it; nor could it, in any event, entitle him to an instruction from the court that he might recover under a count or a special contract, in which he avers that the work had been completed by him on the 1st of October in conformity with it. The defendant in the court below, plaintiff, in error here, to maintain the issues on her part, and to reduce the damages claimed by the plaintiff, introduced witnesses to show that the work, though it had been done, had not been so in a skilful and workmanlike manner, and that the materials used for it were of an inferior kind, especially in the construction of the store wall, and that it was so deficient in other particulars that she had been put to a large expense to make the buildings fit for use and occupation, which amounted to $10,000. The plaintiff gave rebutting testimony, and then the defendant prayed the court to instruct the jury "that, if the three stores and warehouse were not finished fit for use and occupation, and delivered to her on the 1st of October, 1851, but were at the time when they were delivered wholly unfit and unsafe for occupation, with the walls of some of them sunken out of plumb, and cracked, and in danger of falling, so as to be utterly untenantable, then the plaintiff was not entitled to demand and recover in this order the said sum of $5,000, as the stipulated instalments which the special contract purports to make payable on the 1st October, 1851, but *that [*230 the plaintiff was entitled to recover only the value of his work, after deducting the cost and expense incurred by the defendant in repairing the stores and warehouse, to render them fit for

occupation, but that the plaintiff, as claimant, was entitled only to nominal damages.

Also, if the defendant did not, at any time whatever, execute and finish, ready for use and occupation, and deliver in that state and condition to the defendant, the stores and warehouse, but had delivered them over to the defendant in a state wholly unsafe and unfit for use, and untenantable, etc., etc., and that the defendant had been obliged to reconstruct the walls, and to refix the buildings, so as to fit them for use and occupation, at her own costs and charges, then that the defendant may recoup or deduct the same against the plaintiff's claim for the said instalment of $5,000 claimed in the suit, or the value of the work done by the plaintiff upon the stores and warehouse; but that, in all events, the plaintiff could only recover nominal damages.

These instructions the court refused to give, without the following qualifications:

"If the jury shall find from the evidence that the plaintiff, Jones, has executed the work according to the specifications forming a part of the contract, in a skilful, diligent, and careful and workmanlike manner, and that his performance of it was with the knowledge and approbation of the defendant, then they should find for the plaintiff the said sum of $5,000, with interest from the date of the delivery of the stores and warehouse to the defendant."

The defendant excepted to the refusal of the instructions as they had been prayed for, and to the qualifications of them as they were given to the jury.

There is error in this instruction. The count and the plea of the defendant, and the instruction asked, raised the construction of the special contract, whether or not the right of the plaintiff to recover the second instalment did not depend upon the completion of the stores and warehouse by the 1st of October, 1851; whether that was not a condition precedent, or a case in which the parties had agreed—one to deliver the buildings finished, according to the 231*] special *contract, and the other to pay the second instalment concurrently, if they were then so delivered. A failure by the plaintiff to finish and deliver on that day is fatal to a recovery upon the special contract. The plaintiff in the first amended count declares upon it as such, avers his performance accordingly, and the proof is that he had not so performed. We infer, from the whole contract, that it was the intention of the parties that the performance of the work was to be a condition precedent to the payment of the second instalment. There is no word in the contract to make that doubtful.

The plaintiff undertook to furnish the materials and to construct the buildings, according to specifications. Part of them were to be finished and to be delivered to the defendant on the 1st of October, 1851, and the residue on the 1st December afterwards. For the whole, the defendant was to pay $24,000,—$5,000 on the 1st of July, 1851; $5,000 on the 1st of October, 1851, if the stores and warehouse were then finished for use and occupation, and delivered over on that day to the defendant; and if that was done, then the balance of the $24,000 was to be paid on the 1st of January, 1860, with interest, as mentioned in the special contract.

The words of the contracts for payment are, "in consideration of the covenants and their due performance." Such words import a condition. It is difficult at all times to distinguish whether contracts are dependent or independent; but there are rules collected from judicial decisions by which it may be determined. We have tested the correctness of them by an examination of several authorities.

"When the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the other." Such is the case with the special contract with which we are now dealing. "If the agreements go to a part only of the consideration on both sides, the promises are so far independent. If money is to be paid on a day certain, in consideration of a thing to be performed at an earlier day, the performance of that thing is a condition precedent to the payment; and if money is to be paid by instalments, some before a thing shall be done and some when it is *done, the doing of the [*232 thing is not a condition precedent to the former payments, but is so to the latter. And if there be a day for the payment of money, and that comes before the day for the doing of the thing, or before the time when the thing from its nature can be performed, then the payment is obligatory, and an action may be brought for it, independently of the act to be done. Concurrent promises are those where the acts to be performed are simultaneous; and either party may sue the other for a breach of the contract, on showing, either that he was able, ready, and willing to do his act at a proper time and in a proper way, or that he was prevented by the act or default of the other contracting party." 2 Pars. Cont. ch. 3, 189.

The first instalment was to be paid on an appointed day, in consideration of the work to be begun; and the second instalment was to be paid on a subsequent day, if the work should then be finished and delivered over to the defendant, ready and fit for use and occupation. Before that day it could not have been demanded; on that day, the work having been, performed, it might have been. The evidence shows that the work had not been done on the 1st of October, 1851, and was not finished until the 1st of December.

The plaintiff avers in his first amended count that he had, on his part, complied with his undertaking in the special contract. The issue upon it is, that he had not done so, and he gave no proof to sustain the averment.

The evidence entitled the defendant to a verdict on that count; but the court, without regard to the time fixed upon for the work to be finished, instructed the jury, that if the work had been done according to the specifications forming a part of the contract, in a skilful and workmanlike manner, or if his execution of it was with the knowledge and approbation of the defendant, then they were to find for the plaintiff the sum of $5,000, with interest from the date of the delivery of the stores and warehouse. It must be obvious that this instruction makes between the parties a different contract from that into which they had entered, and one different from that the plaintiff had declared upon.

*The plaintiff gave no evidence to sup- [*233

port the count; but there was evidence showing the reverse of performance on his part. For this error in the court's instruction to the jury upon the first amended count, we shall remand the case for another trial upon the plaintiff's original declaration in debt with the common counts, as in *indebitatus assumpsit.*

We do not consider that the plaintiff's right to recover upon that declaration was in any way affected by the extra work which was done upon the requisition of the defendant, or by the increase of materials which he furnished for that purpose; or that the sinking of the foundation of the buildings excused him from finishing the work by the time specified; or that the acceptance of the buildings by the defendant as they had been constructed by the plaintiff was any release of the plaintiff from his undertaking to finish them in the time specified in the contract. But after that time had passed, the plaintiff continued, with the knowledge and permission of the defendant, and also with the knowledge of her superintending architect, to do the work specified in the contract, and also to do the extra work, and to furnish the materials necessary for both. And when the work was done by the plaintiff, however imperfectly that may have been, the defendant accepted it.

The law in such a case implies that the work done and the materials furnished were to be paid for. The general rule of law is that while a special contract remains open—that is, unperformed—the party whose part of it has not been done cannot sue in *indebitatus assumpsit* to recover a compensation for what he has done, until the whole shall be completed. This principle is affirmed and acted upon in *Cutter* v. *Powell*, 6 T. R. 320; also in *Hulle* v. *Heightman*, 2 East, 245, and in several other cases.

But the exceptions from that rule are in cases in which something has been done under a special contract, but not in strict accordance with that contract. In such a case, the party cannot recover the remuneration stipulated for in the contract, because he has not done that which was to be the consideration of it. Still, if the other party has derived any benefit from the labor done, it would be unjust to allow him to 234*] retain *that without paying anything. The law, therefore, implies a promise on his part to pay such a remuneration as the benefit conferred is really worth; and to recover it, an action of *indebitatus assumpsit* is maintainable.

Such is the law now in England and in the United States, notwithstanding many cases are to be found in the reports of both countries at variance with it. It was recognized by this court to be the existing rule in the case of *Slater* v. *Emerson*, 19 How. 224, 239.

The difference between the rule now and in earlier times, it is believed, has caused much of the difficulty in the establishment of the present rule. Formerly it was held that whenever anything was done under a special contract not in conformity with it, the party for whom it was done was obliged to pay the stipulated price; but that he might resort to a cross action, to indemnify himself for the deficiency in the consideration. *Blair* v. *Davis*, 1794, cited in 7 East, 470. See Smith's L. Cases, in the notes following the case of *Cutter* v. *Powell*, 2d. vol., for a full description, historical and chronological, of the rule as it now prevails and as it formerly was.

The rule, as it now exists, has been recently discussed and affirmed in the Queen's Bench, in the case of *Munro* v. *Phelpes*, 8 El. & B. 739; 92 Eng. C. L.

It has been the rule in the courts of New York for more than thirty years. In the case of *Jewell* v. *Schroeppel*, 4 Cow. 564, it was decided, that if there be a special contract under seal to do work, and it be not done pursuant to the agreement, whether in point of time or in other respects, the party who did the work may recover upon the common counts in assumpsit, for work and labor done. If, when the time arrives for performance, the party goes on to complete the work, with the knowledge of his employer, it was evidence of a promise to pay for the work. So if the employer does not object.

This rule prevails, also, in Massachusetts, in Pennsylvania, and in several of the other states. Also in Alabama, as may *be seen in the [*235 case of *McVoy* v. *Wheeler*, 6 Port. 201. It is discussed, with a very accurate discrimination of its application, in the 2d vol. of Professor Parsons upon Contracts.

In the trial of such an action, where the defense is not presented as a matter of set-off, arising on an independent contract, but for the purpose of reducing the plaintiff's damages, because he had not complied with his cross obligations arising on the same contract, the defendant may be allowed a recoupment from the damages claimed by the plaintiff for such loss as she shall have sustained from the negligence of the plaintiff. Such evidence is allowed to prevent circuity of action, and to prevent further litigation upon the same matter. It may be well to say, that the court allowed a recoupment in *Green* v. *Biddle*, 8 Wheat. 1, to a disseisor, who was a bona fide occupant of land, for the improvement made by him upon it, against the plaintiff's damages. But such recoupment cannot be claimed unless the defendant shall file a definite statement of his claims, with notice of it to the plaintiff, sufficiently in time before the trial term of the case to enable the latter to meet the matter with proof on his side.

We have pursued the case in hand further than may have been necessary, but it was thought best to do so, as the points now here ruled have not before been expressly under the consideration of this court.

The judgment given in the court below is reversed; and we shall order that the case shall be remanded to it, with directions for its trial again, pursuant to our rulings in this opinion.

THE UNITED STATES, *Appt.*,
v.
JOHN ROSE and George Kinlock.

(See S. C. 23 How. 262-273.)

Sutter's general title—colonisation laws of 1824 and 1828—title, when protected by treaty with United States.

The "General title of Sutter" was considered by the court at its last term, and its operation declared

in the cases of The U. S. v. Nye and The U. S. v. Bassett, reported in 62 U. S. (21 How.) 408, 412.

The authority of Micheltorena to distribute the lands of the department is found in the colonization laws of 1824 and 1828.

The claims under "the general title of Sutter" exhibit a wide divergence from the essential rules prescribed in the colonization laws. They are not valid claims under the treaty of Guadaloupe Hidalgo.

Every species of title that originated in the rightful exercise of legitimate authority, and existed under the safeguard of Mexican laws at the date of the acquisition of California by the United States, is protected by the treaty of Cession.

But it is the duty of the court to distinguish between rights acquired under the laws and usages of Mexico, and claims depending upon the mere pleasure of those who were in power.

Argued Feb. 7, 1860. Decided Feb. 20, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose on a petition filed before the board of land commissioners in California, by the appellees, for the confirmation to them of a claim to six square leagues of land.

The board of land commissioners entered a decree confirming the claim.

The district court, on appeal, having affirmed this decree, the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, **E. M. Stanton,** and **H. S. Foote** for appellants.

Messrs. **J. J. Crittenden, J. P. Benjamin,** and **R. Johnson,** for appellees:

The claim is founded on what is known in California and to this court as the "general title," granted by Governor Micheltorena.

The reason for making this title general—that is, to a described class instead of to individuals—is stated on the face of the grant, namely: that because of other occupations the government had not then time to make grants severally and to each individual entitled thereto.

John Smith was one of the class entitled under the general grant of December 22, 1844. It is proved that before that date, in the year 1844, he had presented to the governor, Micheltorena, his petition with a map or *diseno*, for the six leagues of land in question—called or marked on the map, "Rancho de Yuba."

Smith was put in possession by Sutter, and within twelve months after date of the "general title," he was in the occupation of the land, "made improvements and built an adobe house, and had upon the said land about four hundred head of cattle, with some horses."

Bidwell's testimony is, that Smith settled on the land in the fall of 1844, or early in 1845, and continued to live on it until he sold, in 1848. He had previously lived on adjoining land, which he had purchased of Sutter. Smith's petition for the land in question, and the favorable report thereon by Sutter, were made to the governor in September, 1844, and in that year, according to his own testimony, he not only made improvements, but "had about six hundred cattle and a few horses on his land." He was a Canadian by birth, was naturalized as a Mexican, and had been in California since 1835.

It does not appear that he was ever engaged in the military service, or that the grant was made to him otherwise than in the due administration of the Colonization laws of Mexico.

It is contended, on the part of the appellees, that these latter circumstances distinguish their case from the cases of *Nye* and *Bassett*, decided by this court at the last term, and reported in 62 U. S. (21 How.) 408, *et seq.*; and further, it is also most respectfully urged, that those cases were erroneously decided and ought not to be followed.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellees were confirmed in a tract of land in Yuba county, California, containing six square leagues, bounded north by the Yuba river, west by the eastern line of Captain Sutter's land, south by Johnson's *rancho*, and easterly for quantity.

*The original claimant is John Smith. [*266 He was examined as a witness and testifies that he was a naturalized citizen of Mexico. That in September, 1844, he petitioned the governor of California for the land and obtained a favorable report from Captain Sutter, and in 1845 received from the latter a copy of the "general title," which the governor had authorized him to give. Then in 1844 he built a house upon the land, planted an orchard of fruit trees, and in that and the following year inclosed a field by ditches, and cultivated it, and that he had there a stock of cattle. He says he resided on the land until 1848, when he sold it to persons under whom the claimants derive their claim.

To account for the nonproduction of any documentary evidence, he says that the petition and report, with a copy of the general title were lost in the Sacramento river in 1845; that subsequently he obtained another copy, and this, with his naturalization papers, was sent to Monterey, to be laid before the departmental assembly, but they were never returned to him. Bidwell testifies that he prepared a petition for Smith to Sutter, representing the loss of his papers, and asking for another copy of the title, and that Sutter admitted the claim. He testifies that Smith cultivated the land.

The two depositions of Sutter show that he recognized the claim of Smith to have the benefit of the general title, and that he gave him copies as stated by other witnesses. Other testimony in the record disproves the statements of those witnesses in reference to the improvement of the land, and shows satisfactorily that they were made on a different tract of land, and in no connection with this claim.

The "general title of Sutter" was considered by the court at its last term, and its operation declared in the cases of *U. S.* v. *Nye*, 21 How. 408, and *U. S.* v. *Bassett*, 21 How. 412. The opinion of the court in those cases has been examined in the argument at the bar, and has been re-examined by the court.

The testimony of Sutter in the case of *Nye* was, that the general title was inclosed to him in a letter by Micheltorena, the governor, by his request. That the governor was blockaded *at Monterey, and was in need of mili- [*267 tary aid, the general title was sent to him upon his advice. That he executed the trust con-

ferred upon him, by giving copies of the title to those "who had rendered meritorious service to the country, and who applied to him." The general title was issued before his men marched from New Helvetia to join Micheltorena, and, in some cases, copies were given before and some after his return from the expedition, "but only to such as he thought deserved it." Governor Micheltorena made a speech to the soldiers, and promised to deliver grants to all "whom he should recommend," "referring as well to those to whom copies had been delivered as to those to whom he should deliver them."

In the cases of *U. S.* v. *Nye* and *U. S.* v. *Bassett*, it was proved that the claimants were soldiers in the war of Micheltorena, and had taken possession of the land within their claim under a temporary license from the governor. There is no evidence of the kind in this case. The statement of facts in this testimony, and the inferences drawn from it by the court, are corroborated by public documents existing in the archives of California. These show, that in the autumn of 1844 there was an insurrection against the authority of Micheltorena, which terminated in a compact signed at Santa Teresa, the 1st December of that year, by the contending chiefs. Micheltorena agreed to disband and send away a battalion of infantry (*presidiarios*), "with some vicious officers" within three months, and should himself retire to Monterey; that the headquarters of the opposing forces should be at San Jose, and that their expenses should be charged to the department. In that month, both parties recommenced preparations for renewing hostilities. On the 24th of December, Alvarado asked Sutter for explanations "in relation to the assembling of men" at his fort, and charged him with the design of "invading the Californias."

He transmitted to Micheltorena a copy of this letter, and arraigned Sutter "for preparing to attack the forces of the north, under the pretext of placing himself in the defense of Micheltorena's government, claiming to have relations 268*] with *him for this purpose." He says: "Considering the movement of Sutter and his conduct as an arbitrary act of his own, unauthorized by the government, and knowing positively that he is organizing a force, composed of adventurers and Indians, to attack this garrison I assure Your Excellency that I am in a condition to make a defense, and to attack him as soon as he marches against this place, to carry out his dark designs."

On the 28th December, Micheltorena replied to a letter from Sutter, in which he says: "I approve in its whole what you say to me in your last. What you may do, I approve: what you may promise I will fulfill; what you may spend, I will pay. . . . The country calls for our services; our personal security requires it, and the government will know how to recompense all. . . . If you have not left, owing to some event, without the necessity of a new order, when you learn that I am moving from Monterey to San Juan, you will move at once; for I will have well calculated the time to act against them."

On the 12th January, 1845, he addressed a letter to an officer, in which he says: "All which is said to you under this date by Senor Don Sutter, who is now, with arms in hand, defending the rights of the nation, and supporting the departmental government that I exercise, will be duly obeyed by you."

Sutter, under these orders, reached Santa Barbara in the early part of February, with two companies, and placed them under the command of Micheltorena.

On the other hand, Alvarado and Castro, in January, 1845, denounced the governor to the departmental assembly, "that he appointed as commander of armed adventurers the same Sutter, of whom there is sufficient evidence that he seeks to possess himself of the department, attacking the national integrity; a proof that the country is in danger; and the presumption is that Governor Micheltorena does not deserve the public confidence." They arraign him, because he had called "to promote civil war in the country the foreigner (Sutter), accused before the supreme government of the country as a conspirator against the national integrity, and *because united to more than one hun- [*269 dred adventurous hunters, proceeding from the United States, without more fortune than the muzzles of their rifles, he has increased his files, and causing devastation," etc. They asserted *to the departmental assembly, as the only* legal authority which they and their party recognized, "that General Micheltorena is a traitor to his country, and as such he ought to be presented to the tribunals of the Republic, to be judged in accordance with the laws. 2d. That the assembly should, in the interim, regulate all the branches of the administration. 3d. That they should transmit the charges against the governor of Mexico, by a commission, and ask that the government of the department may be committed to its natives and residents, of sufficient capacity and knowledge for its management.

This communication was referred to a committee of the assembly, who reported that the governor had repudiated the compact of Santa Teresa, and prepared himself to chastise those who had demanded its conditions; that his connection with Sutter was dangerous to the safety of the department, and had deprived him of the support of the citizens, "for there is not a single individual therein," they say, "who, at seeing Don John Auguste Sutter commence a campaign in California, that does not remember that this gentleman has expressed his fatal design of subduing the country."

On the 15th February, the departmental assembly disavowed the authority of the governor, pronounced his office vacant, and called upon Pio Pico, the first member of the assembly, to take charge of the departmental government in the interim.

On the 22d February, 1845, a treaty was concluded between the commissioners of the assembly and of the governor, which was sanctioned by the respective chiefs, in which it was stipulated "that, from this date, the political command of the department is delivered to the first member of the most excellent departmental assembly, because it was so disposed by said body, agreeably to the laws; for which purpose, His Excellency, General Micheltorena, will deliver a circular order in the hands of the chief of the division of the opponents, that *the [*270

same be published throughout the limits of the department."

It is acknowledged that the governor "could no longer contend, with his small forces and scanty resources, against the general outbreak of the country;" and therefore he obligates himself to march to San Pedro, thence to be conveyed to Monterey, and thence to some port in the Republic of Mexico.

Sutter remained a prisoner in the hands of his enemies. On the 26th of the month (February), he addressed a letter to Pio Pico, as governor, in which he speaks of his detention in the city, and attributes it to his connections with Micheltorena. He refers to his relations and duties as an officer, protests that he was ignorant, and deceived as to the cause of the insurrection against Micheltorena, and that he was then convinced of his delusion, and repented of his credulity. He promises obedience to the authorities, offers to place his fort at the disposal of the government, and prays for his release. It does not appear that he was able to return home until the 1st of April, about which time Micheltorena sailed from Monterey.

Pio Pico remained in charge of the government, as senior member of the assembly, until the 15th day of April, 1846, when he was installed as constitutional governor of the department, pursuant to an appointment made in consequence of the memorial of the assembly on the 27th of June of the previous year.

We have entered into this minute statement of the relations of Sutter to the authorities of Mexico, and especially those in the department of California, in order to estimate with exactness the import of his acts, under the power conferred by Micheltorena, and how far they imposed an obligation upon the public faith of those governments, and upon this government, as their successor.

The authority of Micheltorena to distribute the lands of the department arises in the colonization laws of 1824 and 1828. The object of those laws was to secure for the Republic a population composed of industrious, obedient, 271*] and loyal *citizens who might contribute to its strength and prosperity.

In the distribution of the public domain for this purpose, the political chief was directed to inform himself particularly of the circumstances and condition of every applicant for land; and that his power of selection should not be inconsiderately or corruptly used, he was required to preserve a record of his acts of administration, and to submit reports to the departmental assembly and the supreme government, the approval of one or the other being necessary for their definitive validity.

The claims presented to the land commission of the United States in California, and to this court on appeal by the claimants, under the "general title of Sutter," exhibit a wide divergence from the essential rules prescribed in the colonization laws. The petition is not preserved in the archives, but was retained by the applicant. The governor declined to act, until he could examine the country of which the colonization is proposed. In the absence of the petition, and without the desired information, under a "supreme pressure of business," he decides suddenly to send to a subordinate and suspected officer the authority to determine the most serious question of administration confided to his care—that of selecting persons who should own and occupy the soil of the department. He does not preserve a record of this act, nor a copy of the paper he issues, nor did he present it to the departmental assembly for its ratification.

We are compelled to seek an explanation of this anomalous exercise of authority, and to examine the conditions attached to this unusual mode of administration; to inquire of the relation which the proposed objects of the favor occupied and were to occupy to the department and its authorities, and the consequences contemplated by the governor and his agent to ensue from their use of this title, to ascertain its signification. We have no doubt that the court may employ this medium of proof for this purpose.

We learn that the treaty concluded at Santa Teresa was an armistice merely, and that Micheltorena, immediately after, *conclud- [*272 ed to use the agency and influence of Sutter to punish his enemies and sustain his power; and, to increase that influence, issued this "general title." Their alliance was regarded by the departmental assembly as treasonable, and justifying the deposition and expulsion of the governor from the department. Sutter became their prisoner, and was compelled to renounce his connection with his chief to make his peace. His companies were regarded as public enemies, and were disbanded and dispersed. The supreme government acquiesced in the decisions of the assembly, and recognized and commissioned the governor of their appointment.

No indemnity was granted to the adherents of Micheltorena, nor provision made for the fulfilment of his promises to them; nor have we discovered an instance in which their accomplishment was demanded of the succeeding government. Our opinion, consequently, is, that these acts and promises were not considered in California or Mexico as valid obligations, binding the conscience of the Republic; and therefore they are not valid claims under the treaty of Guadaloupe Hidalgo.

In some of the instances, Micheltorena granted a permission to the applicant to occupy the land provisionally, until he could visit that portion of the department to act upon their petition. It is contended that this license is so far a recognition of the merit of the application, as to impose upon the United States the obligation to accede to it; that it confirmed an interest in the land, that they should perpetuate by a grant.

We agree that every species of title that originated in the rightful exercise of legitimate authority, and existed under the safeguard of Mexican laws at the date of the acquisition of California by the United States, is protected by the Treaty of Cession. The change of the government does not alter the relations of the inhabitants in this particular. This court is charged with the duty, in the last resort, to recognize the validity of all such claims. But it is the duty of the court to distinguish between rights acquired under the laws and usages of Mexico, and claims depending upon the mere pleasure of those who were in power—

between the vested estate and the hope or expectation of favor or bounty. The license of the 273*] *governor to the applicant to make a temporary occupation, until he could inform himself, so as to act considerately or intelligently, we think, cannot be treated as conferring a property in the land.

We have examined these cases with unusual care, in consequence of the number of parties in interest and the amount of property involved. Upon the most liberal estimate of the powers of the governor, and the most indulgent view of the claims of the petitioners, we are unable to determine that they are valid.

Judgment of the District Court reversed, and cause remanded, with directions to dismiss the petition.

NATHAN E. HOOPER, Louisa J. Hooper, and Amanda E. Hooper, Minors, by Absalom Fowler, their next friend, *Plffs. in Err.*,

v.

JACOB SCHEIMER.

SAME

v.

ELIAS M. CONWAY.

(See S. C. 23 How. 235–249.)

Ejectment in Arkansas—when maintainable in Federal court.

By the statute of Arkansas, an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register and receiver of the proper land office of the United States.

This court held in the case of Bagnall v. Broderick, 13 Pet. 450, that a patent for land carries the fee, and is the best title known to a court of law. Such is the settled doctrine of this court.

An action of ejectment cannot be maintained in the Federal courts against a defendant in possession,—on an entry made with the register and receiver, notwithstanding a state legislature may have provided by statute that it can.

The law is only binding on the state courts, and has no force in the circuit courts of the Union.

Submitted Jan. 26, 1860. Decided Feb. 20, 1860.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **J. Stilwell**, for plaintiffs in error:

Can the plaintiffs, claiming under a grant of pre-emption, recover against the defendant, claiming under a patent issued subsequent to the pre-emption? We respectfully submit that by the act of Congress of 29th May, 1830, the N. W. fractional quarter, section 2, 1 N. 12 W. was appropriated to the use of the occupant, Nathan Cloyes, was not subject to be granted to any other person, by Congress or any officer of the United States, until the expiration of the time allowed him to make payment therefor by that act and the act of 15th July, 1832; and it appearing that payment was made by his heirs within the time, the patent was void.

Perry v. *O'Hanlon*, 11 Mo. 595; *McAfee* v. *Keirn*, 7 Smedes & M. 789; *Nicks* v. *Rector*, 4 Ark. 283, 284; *Borum* v. *Garland*, 16 Ark. 454; 6 Pet. 738; 13 Pet. 513; 5 Wheat. 303; *Crommelin* v. *Minter*, 9 Ala. N. S. 605; *Stoddard* v. *Chambers*, 2 How. 284; 10 Smedes & M. Miss. 461; 7 Smedes & M. Miss. 366.

A pre-emption is a legal vested right.

9 How. U. S. 333; 4 Ark. 283.

The patent issued to Governor Pope, being void as issued without authority, may be impeached in a court of chancery.

10 Johns. 26; 11 Mo. 595; 16 Ohio, 66; 8 Mo. 94.

Under the statute of Arkansas, the patent certificate is of equal grade and dignity with the patent itself.

Rev. Stat. of Ark. p. 44; ch. 53, §§ 1 and 2; *McClairen* v. *Wicker*, 8 Ark. 195; *Perry* v. *O'Hanlon*, 11 Mo. 595; *Morton* v. *Blakenship*, 5 Mo. 356; *Bruner* v. *Manlove*, 1 Scam. Ill. 162; *Isaacs* v. *Steel*, 3 Scam. Ill. 99.

And it is a better title than a patent founded on a subsequent entry within the meaning of the statute;

Pettigrew v. *Shirley*, 9 Mo. 688; 5 Mo. 350; 11 Mo. 595;

The patent could not affect the pre-existing title of the ancestor of the plaintiffs;

N. O. v. *Armas*, 9 Pet. 236; *U. S.* v. *Arredondo*, 6 Pet. 738; *Catlin* v. *Jackson*, 8 Johns. 555; *Jackson* v. *Cory*, 8 Johns. 388; *Nicks* v. *Rector*, 4 Ark. 283;

And extraneous evidence was admissible, to show that the patent was void for want of authority to issue it.

2 How. 317; *Collins* v. *Brannin*, 1 Mo. 385, 540.

The title of the plaintiffs related to the date of the Pre-emption act (29th May, 1830). The making of proof of occupation and cultivation, the adjudication of the right by the land officers, and the payment of the purchase money, were successive steps to perfect the right, and are to be regarded as having been done on that day;

Pettigrew v. *Shirley*, 9 Mo. 688; *Borum* v. *Garland*, 16 Ark. 454;

And consequently, the intervening rights cut out.

Landes v. *Brant*, 10 How. 372; Walk. Miss. 97; 12 Mo. 148; 3 Cow. 75; Vin. Abr. title *Relation;* 5 Crouse Dig., 510, *et seq.*

When the patent was issued, the land had been appropriated and was not subject to grant, and it ought to have been excluded by the circuit court, or the jury instructed to disregard it as the plaintiffs asked. The act of issuing it was a mere ministerial act, and as to the rights of the plaintiffs' ancestors was wholly ineffectual to prejudice them.

Ware v. *Brush*, 1 McLean, 535.

Mr. **S. H. Hempstead**, for defendant in error:

1. The first and principal question is whether a patent issued by the United States can be impeached, annulled, and set aside in an action of law.

In ejectment the rule is universal, that the plaintiff must show the right to possession to be in himself positively. A tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself.

Love v. *Simms*, 9 Wheat. 524; *Greenleaf's Lessee* v. *Birth*, 6 Pet. 312; *King* v. *Stevens*, 18

NOTE.—*State laws affecting jurisdiction of Federal courts*—see note to 1 C. C. A. 513.

Ala. 475; *Rupert* v. *Mark*, 15 Ill. 540; 1 Blackf. 131, 8 Blackf. 320, 366.

In Kentucky, it is a settled principle that courts of law will not look beyond the patent, and it is only in a court of equity that a prior right or equity can be established. The courts of the United States have adopted the same principle.

Finley v. *Williams*, 9 Cranch, 167; see, also, *Bledsoe* v. *Wells*, 4 Bibb, 329; *Alexander* v. *Greenup*, 1 Munf. 134; 5 Com. Dig. f. 1, f. 4, f. 6, f. 7, title *Patent*; 2 Bl. Com. 346; 5 Com. Dig. Patent, f. 6, p. 357; 2 Com. Dig. Chancery, ch. 1, p. 366; *Taylor* v. *Fletcher*, 7 B. Mon. 81.

A patent, when attacked incidentally, cannot be declared void, unless it be procured by actual fraud, or is void on its face, or has been declared void by law.

Underwood v. *Crutcher*, 7 J. J. Marsh. 532.

It is only where letters patent are void on their face as being issued contrary to law, or where the grant is of an estate contrary to law, as against the prohibition of a statute, that it possibly may be held void in a collateral proceeding.

Jackson v. *Marsh*, 6 Cow. 282; *Jackson* v. *Lawton*, 10 Johns. 23; *Parmelee* v. *Oswego Co.* 7 Barb. 622; *The People* v. *Livingston*, 8 Barb. 278, 284-287, 295; *Jackson* v. *Hart*, 12 Johns. 77; *People* v. *Mauran*, 5 Den. 389, 398, 400.

The principle indicating the introduction of extrinsic evidence to impeach a patent free from objection on its face, does not depend on the grade or nature of the evidence.

Norwell v. *Camm*, 6 Munf. 233, 238; *Witherinton* v. *McDonald*, 1 Hen. & Mun. 303; *Alexander* v. *Greenup*, 1 Munf. 140.

The same doctrine was laid down by Marshall, Ch. J., in *Stringer* v. *Lessee of Young*, 3 Pet. 340; he said no case had shown that a patent may be impeached at law unless it be for fraud; not legal and technical, but actual and positive fraud in fact, committed by the person who obtained it; and even that, said he, is questioned, citing the above case of *Witherinton* v. *McDonald*, 1 H. & M. 306; also, *Hoofnagle* v. *Anderson*, 7 Wheat. 212; *Boardman* v. *Reed*, 6 Pet. 342; 6 Cranch, 131; 8 How. 233; *Patterson* v. *Winn*, 11 Wheat. 380.

The opinion of the Chief Justice evidently was, that a patent could not be impeached at law even for fraud—actual positive fraud. It has been said a patent is void and confers no title, when it issues for land that has been previously patented to another individual, or granted to him by act of Congress, which is equivalent to a patent.

Stoddard v. *Chambers*, 2 How. 318; *Grignon* v. *Astor*, 2 How. 344.

Why is this so? Why, under such circumstances, may a patent be held inoperative at law? Those cases themselves answer, because the fee has passed out of the United States and vested in the first patentee or grantee.

59 U. S. (18 How.) 88; 9 Cranch, 99.

Those cases do not warrant, nor are there any cases to be found in the courts of the United States which warrant the impeachment of a patent at law, in a case where a pre-emptioner claims in opposition to that patent. Resort must be had to a court of equity, and to that alone.

A patent is a better legal title than an entry with the register and receiver, and in an action of ejectment must prevail over it.

Gaines v. *Hale*, 16 Ark. 25; *Griffith* v. *Deerfelt*, 17 Mo. 31; *Dickinson* v. *Brown*, 9 S. & M. 130; *Bruckner* v. *Lawrence*, 1 Doug. Mich. 37; *Bagnell* v. *Broderick*, 13 Pet. 436; *Wilcox* v. *Jackson*, 13 Pet. 516; *Wiggins* v. *Lusk*, 12 Ill. 132.

A patent is evidence in a court of law of the regularity of all previous steps to it, and no facts behind it can be investigated.

6 Pet. 724; 5 Wheat. 293; 7 Wheat. 151; 11 Wheat. 580; 4 Pet. 340.

No equitable title can be set up in ejectment, in opposition to the legal title.

Jackson v. *Chase*, 2 Johns. 84; *Jackson* v. *Pierce*, 2 Johns. 222; *Phelps* v. *Kellogg*, 15 Ill. 136.

A patent is conclusive in a court of law.

West v. *Cochran*, 58 U. S. (17 How.) 403; 15 How. 450; 14 How. 382. The legal title must prevail at law. 13 How. 24; 11 How. 568; 9 How. 171; 8 How. 365.

A plaintiff must recover upon the strength of his title, and that must be a legal, as contradistinguished from an equitable title.

Livingston v. *Story*, 9 Pet. 632; *U. S.* v. *King*, 8 How. 846; *Gilmer* v. *Poindexter*, 10 How. 257.

A patent cannot be collaterally avoided at law, even for fraud.

Field v. *Seabury*, 60 U. S. (19 How.) 324, 332. This case is conclusive of the subject, and it was said that the case in 2 How. 318, did not authorize the impeachment of a patent at law. Courts of justice have no authority to disregard surveys and patents, when dealing with them in actions of ejectment.

West v. *Cochran*, 58 U. S. (17 How.) 403; *Willot* v. *Sandford*, 60 U. S. (19 How.) 82.

The legislature of Arkansas has provided that an action of ejectment may be maintained on an entry made with the register and receiver of the proper land office of the United States, or on a pre-emption right under the laws of the United States.

Digest, 454.

But a patent being a superior legal title, must of course prevail over them; nor would it be competent for any state legislation to give such titles, which are only of an equitable nature, precedence over the legal title.

Wilcox v. *Jackson*, 13 Pet. 516; *Irvine* v. *Marshall*, 61 U. S. (20 How.) 566; *Bagnell* v. *Broderick*, 13 Pet. 450, 451.

And although actions of ejectment may be maintained on an equitable title, or less than a complete legal title in the state courts, by virtue of positive legislation, yet it may admit of great doubt whether, in the courts of the United States, that action can be sustained on anything but the paramount legal title. Such I understand to have been decided.

Carson v. *Boudinot*, 2 Wash. C. C. 33; *Swayze* v. *Burke*, 12 Pet. 23.

2. The right forum to impeach the patent was a court of chancery; and that had been resorted to and the pre-emption claim of Cloyes declared invalid, and to be in fact a base fraud, as the proof in the chancery case conclusively showed it was.

Lytle v. *The State*, 17 Ark. 608. It was pure-

ly vexatious to bring this ejectment suit, and the plaintiffs had no right to do it, as the same matter was involved in their chancery suit.

Mason v. *Chambers*, 4 J. J. Marsh. 401.

Mr. Justice **Catron** delivered the opinion of the court:

An action of ejectment was brought in the circuit court of the United States for the eastern district of Arkansas, founded on an entry made in a United States land office. This was the only title produced on the trial by the plaintiffs.

The defendant held possession under a patent from the United States to John Pope (governor, etc.), with which the defendant connected himself by a regular chain of conveyances. The circuit court held the patent to be the better legal title, and so instructed the jury, who found for the defendant; and the plaintiffs prosecute this writ of error to reverse that judgment.

249*] *By the statute of Arkansas, an action of ejectment may be maintained where the plaintiff claims possession by virtue of an entry made with the register and receiver of the proper land office of the United States. Ark. Dig. 454.

This court held, in the case of *Bagnell* v. *Broderick*, 13 Pet. 450, "that Congress had the sole power to declare the dignity and effect of a patent issuing from the United States; that a patent carries the fee, and is the best title known to a court of law." Such is the settled doctrine of this court.

But there is another question, standing in advance of the foregoing, to wit: Can an action of ejectment be maintained in the Federal courts against a defendant in possession, on an entry made with the register and receiver?

It is also the settled doctrine of this court, that no action of ejectment will lie on such equitable title, notwithstanding a state legislature may have provided otherwise by statute. The law is only binding on the state courts, and has no force in the circuit courts of the Union.

Fenn v. *Holme*, 21 How. 482.

It is ordered that the judgment be affirmed.

The case *of Hooper* v. *Conway*, depends on the same titles and facts and instructions to the jury as are set forth in this case, and the same verdict and judgment were given in the circuit court.

We order it to be affirmed likewise.

WILLIAM B. SUTTON, Samuel L. Griffith, and James Sutton, Copartners, under the Firm and Style of Sutton, Griffith, & Co., *Plffs. in Err.*,

v.

STACY B. BANCROFT, Thomas Beaver *et al.*, Copartners, under the Firm and Style of Bancroft, Beaver, & Co.

(See S. C. 23 How. 320, 321.)

Judgment, when affirmed with ten per cent damages.

Where, in a suit on a promissory note executed by defendants, they did not pretend to have any defense, and entered a false plea, which was overruled, and refused to plead in bar, and judgment was entered against them for want of a plea, and they do not pretend to allege any error, the judgment will be affirmed, with ten per cent damages.

Argued Feb. 14, 1860. Decided Feb. 20, 1860.

IN ERROR to the District Court of the United States for the Western District of Arkansas.

This was an action of assumpsit brought in the court below by the defendants in error, on a certain promissory note. The court below having entered a judgment in favor of the plaintiffs, the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

No counsel appeared in this court for the plaintiffs in error.

Mr. **George C. Watkins**, for defendants in error:

The judgment was rendered on May 22, 1856, since which time the hands of the plaintiffs below have been tied from having execution, and the plaintiffs in error have never appeared in this court, nor have they taken any steps to prosecute their writ of error.

The defendants in error now ask for an affirmance of the judgment, with exemplary damages for delay.

Mr. Justice **Grier** delivered the opinion of the court:

*The plaintiffs in error were sued on [*321 a promissory note executed by them. They did not pretend to have any defense. They entered a false plea, which was overruled on demurrer. They refused to plead in bar. Judgment was entered against them in due form, for want of a plea.

They do not pretend to allege any error in the proceedings.

The judgment is, therefore, affirmed, with ten per cent damages.

THE UNITED STATES, *Appellant.*

v.

WILLIAM BENNITZ.

(See S. C. 23 How. 255-262.)

Sutter's general title invalid.

The merits of the claims arising under the general title of Sutter have been discussed in the case of Nye and Bassett, reported in 62 U. S. (21 How.) 408, 412.

This claim is in all respects similar; and for the reasons assigned in those cases, is invalid.

Argued Feb. 6, 1860. Decided Feb. 27, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

See, also, statements by counsel.

Messrs. **J. S. Black,** *Atty.-Gen.*, and **E. M. Stanton,** for appellants:

The claimant sets forth no title from the record. He produces from his own private custody the following documents:

June 18, 1844. Petition of Bennitz for a tract of land called Breisgan, five leagues on the Sacramento river.

Same day. Referred to Jimeno, and by him to Sutter, for report.

July 16, 1844. Report by Sutter that the land is unoccupied.

July 16, 1844. Jimeno's recommendation that it should wait until the governor can visit the Sacramento; to which the governor says, "Let him occupy it, provisionally, until I go up to conclude it."

These documents are not proved otherwise than by the testimony of one witness (J. J. Warner), who swears that he believes the signatures of Micheltorena, Jimeno, and Sutter, to be genuine.

December 22, 1844. Micheltorena's general grant to J. A. Sutter.

John A. Sutter, being called as a witness, says that Bennitz was one of the persons to whom the general grant applies.

This claim rests on the general grant of Micheltorena to Sutter, and on that alone. It is void; the title is worse than worthless.

Messrs. **R. H. Gillet, C. Benham,** and **A. Felch,** for appellee:

Bennitz acquired an interest in the land claimed, by virtue of the license granted by Micheltorena on the 26th of July, 1844.

Bennitz petitioned for the land in the ordinary manner. It was referred to the secretary and by him sent to Sutter for report. The latter reported favorably. On returning the papers to the governor, the secretary suggested that the formal grant of the legal title should be delayed until the governor should visit that part of the country and dispose of the previous applications. Thereupon the governor authorized Bennitz to take possession, and hold it until he should go up and conclude the matter of the grants. He indorsed—"Let him occupy it, provisionally, until I go up and conclude the matter." But he never went up.

This conferred a right of possession and occupancy that has never been revoked. The petitioner took possession by his agent, and occupied for fifteen or eighteen months, until the agent was killed by the Indians, as in *Reading's Case*, and he continued to claim the land.

On the 22d of December, 1844, Micheltorena gave what is denominated the "general title," which was intended as a confirmatory grant of this and other lands. This satisfied Bennitz that he had acquired a legal title, and he continued to occupy down to 1846 (when his agent was killed), and he also continued to claim the land.

This case is clearly distinguishable from those of *Sutter* and *Nye*, decided at the last term.

62 U. S. (21 How.) 170-408.

In each of those cases there was a petition, a reference, and a report by the local officer, but no further action by the governor in either. All rested upon the subsequent general title.

There was something in this case which was treated by Mexico and the claimant as an interest. There was an application for a definite spot which was not occupied, and it was so reported, and permission given to occupy it until further action by the governor, and then there was possession and continued occupancy. Mexico could not have recovered against him as a trespasser, after the license and occupancy under it, and no one denouncing the land, the governor could not eject him. Here were tangible facts. The claimant thought he had some rights, and no one questioned them. He was told his title was confirmed, and a formal document followed. Here was something of substance. Not being a legal title, but still being something which would affect the conscience of Mexico, it was clearly an equity. If it was an equity, this court is bound to recognize and confirm it.

Mr. Justice **Campbell,** delivered the opinion of the court:

The claimant applied to Micheltorena, in 1844, for a concession of five square leagues of land, lying in the valley of the Sacramento river, and bounded on the west by that stream. The petition was referred to Captain Sutter, who reported that the land was vacant.

The secretary reported that the governor having deferred any action upon petitions like the present, until he could make a visit to the region of the Sacramento and San Joaquin, it would be proper to dispose of this in the same manner.

*The governor so ordered, authorizing [*262 the applicant to take provisional possession, until he could make his visit. The suit of the claimant was submitted to the board of commissioners on this testimony, and it was rejected as invalid.

Upon appeal to the district court, the claimant proved that he was a soldier in the war of Micheltorena, and an officer in one of the companies of Sutter. That the governor acknowledged his services in that war, and verbally recognized the validity of his claim for the land specified, and that it will be perfected by means of the "general title" of Sutter. The claimant also proved, that in March, 1845, two persons went upon the land, to make improvements under his claim. That one of them shortly after retreated from fear of the Indians; and the other (Julien) made some improvement and cultivation, and occupied the land twelve or fifteen months, when he was killed by them. In the case of *U. S.* v. *Reading*, 18 How. 1, it was proved that Julien occupied the land of that claimant.

The merits of the claims arising under the general title of Sutter have been discussed in the cases of *U. S.* v. *Nye*, 21 How. 408, and *U. S.* v. *Bassett*, 21 How. 412. This claim is in all respects similar; and for the reasons assigned in those cases, is invalid.

Decree reversed. Cause remanded, with directions to dismiss the petition.

THE UNITED STATES, *Appt.*,
v.
JOSE ANTONIO ALVISO.

(See S. C. 28 How. 318-320.)

Mexican claim, validity of.

Where, in a Mexican claim, no imputation is made against the integrity of claimant's documentary evidence, and no suspicion exists unfavorable to the bona fides of his petition, or the continuity of his possession and claim, and he has been recognized as the proprietor of the land since 1840, the court will not willingly disturb the decree in his favor.

Argued Feb. 14, 1860. Decided Feb. 27, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and the facts involved sufficiently appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty.-Gen.*, and **E. M. Stanton,** for appellants:

This title is utterly incapable of being sustained, because—

1. There is no *espediente* for it to be found among the archives, nor note of it in any *Toma De Razon*, nor in the index which is extant and contains all the grants that were made for that year.

2. Even if the *espediente* had been found, and it had been noted upon the proper book, the whole transaction between Alviso and the government would not have amounted to a grant of land.

It is a mere marginal order upon a petition, not an order of concession, such as the governors usually made after they received the reports that were sent in to them from the local magistrates. This was only an order of reference, calling upon the administrator of the ex-mission of San Francisco to report, and authorizing the petitioner in tne meantime to occupy the land provisionally. Everything was to wait until the information required by the governor should be sent in to him. The governor also ordered that a map should be produced. It appears from the evidence that no report was ever made by the governor, no map ever produced before him, and that he was never asked to make the grant or concede the title.

2. The papers in this case, like all those whose genuineness is not proved by some corresponding entry upon the record, are probably mere fabrications. The best that can be said of them is that the claimant had some old papers which showed that an application had once been made for the land, but afterwards abandoned; that he did not think the land worth getting a title for, until after the conquest of the country by the Americans, and that he gathered up his shapeless documents and produced them. If this be the worst of it, it is to all intents and purposes a false and fraudulent claim. But besides this, the evidence that even such papers as these were ever really made, is exceedingly slender and unreliable.

Messrs. **C. Robinson** and **B. W. Leigh,** for appellees:

In the discussion of the present question, we are to be guided, not by any decisions of this court precisely in point, but by the laws, usages, and customs of the Mexican government, the principles of equity and the decisions of this court in analogous cases.

See the act of Congress of March 3, 1851, § 11, 9 Stat. at L. 631; *Frémont* v. *The U. S.*, 58 U. S. (17 How.) 542, 543.

A statement of the effect of the decisions of this court to which the act refers will be found in the opinion of the court in the case of *Frémont* v. *The U. S.*

It cannot be maintained that the governor of California did not have power to authorize a provisional occupation of vacant land, to await the report and formal grant. In the language of this court in the case of *The U. S.* v. *Sutter*, 62 U. S. (21 How.) 170. "The decisions of the court show that they have been disposed to interpret liberally the measures of the Mexican authorities in California, and to view with indulgence the acts and modes of dealing with the inhabitants having reference to the laws of distribution and settlement of the public domain. The circumstances in which the governor was placed, required that his power and discretion should not be confined within narrow limits."

The claim is valid upon the general principles of equity, for there is no defect of consideration. The consideration here is as good and as sufficient as it was in *Scott's Exr.* v. *Osborne's Exr.* 2 Munf. 413.

It is the case of an offer—an agreement—by one party, accepted and acted on by the other.

Dowell v. *Dew*, 1 You. & Coll. 356.

The complainant acted under it in taking possession of the property, and expended money in its improvement.

King's Heirs v. *Thompson*, 9 Pet. 219.

And upon making out, against an individual, such a case as he has here made out against the government, a court of equity would decree specific execution of the contract.

1 Spence, Eq. 645; Ad. Eq. pp. 79, 80 of Eng. pp. 247, 248 of Am. ed.

For, as Sir William Grant observes, "supposing the contract to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it is as much of course in this court to decree a specific performance as it is to give damages at law."

Hall v. *Warren*, 9 Ves. 608.

The contract was by a competent party, and in its nature and circumstances unobjectionable. Here, as in *Powell* v. *Thomas*, 6 Hare. 305, there was never any dispute between the the parties with respect to the occupation of the land for the purpose for which it was taken, and there was no question between them as to any other matter—no such question to prove as there was there.

The occupation here was as plainly under the agreement as it was in *Gregory* v. *Mighell*, 18 Ves. 333, and upon the doctrine of these and other cases, relief should be given by quieting the complainant in his possession of the land. Sir William Grant, in effect, said: "I will not listen to anything so monstrous as to say he is not to have it. You have let him have the land; he has been upon it for a great number of years. He shall have it for the rest of the term."

Mr. Justice **Campbell** delivered the opinion of the court:

The appellee was confirmed in his claim to

two square leagues of land in the county of Santa Cruz, and known as La Cañada de Verde y Arroyo de la Purissima by the board of commissioners and the district court of California.

His testimony consists of a petition by his brother (Jose Maria Alviso) to the governor of California, in 1838, for a grant of the land, and permission to occupy it, while the proceedings for the perfection of his title were pending. This petition was granted, and the administrator of the ex-mission of San Francisco de Assis, was directed to make a report upon the subject.

In 1839 this order was exhibited to the prefect of that district, who agreed to reserve the land for the claimant, and that the claimant might occupy it, referring him to the governor for a complete title. In 1840 the administrator reported that the land was unoccupied, and was not recognized as the property of the mission or of any private person. The claimant has a conveyance from his brother, the petitioner, dated in 1840.

The testimony shows that his occupation commenced in 1840, and has continued for fourteen years; that he has improved and cultivated the land, and that his family have resided on it.

The claimant appears to have been a citizen of the department, and no objection was made or is suggested why he should not have been a colonist of that portion of the public domain he has solicited. No imputation has been made **320*]** against the *integrity of his documentary evidence, and no suspicion exists unfavorable to the bona fides of his petition, or the continuity of his possession and claim. He has been recognized as the proprietor of this land since 1840.

Under all the circumstances of the case, the court is not willing to disturb the decrees in his favor.

Decree of the District Court, affirmed.

THE UNITED STATES, *Appt.*,
v.
ANTONIO MARIA OSIO.

(See S. C. 23 How. 273-287.)

Mexican land claim—license to occupy—power of governor.

Where a decree of the Mexican governor granted the right or license to occupy an island to raise stock, subject to the right of the government to enter at any time and appropriate the premises as a site for a military fort; and the petitioner never availed himself of the license granted, or made any improvements on the island under the decree; held, that he had acquired no interest in the land, by virtue of that proceeding, at the date of the cession to the United States.

Colonization grants were usually made subject to the approval of the departmental assembly. No such approval was ever obtained in this case.

The power conferred was to be exercised by the governor, in concurrence with the departmental assembly; and a grant made by the governor without such concurrence was simply void.

The governor, under the circumstances of this case, had no authority, without the concurrence of the departmental assembly to make this grant, and the grant is void.

Argued Feb. 15, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **E. M. Stanton,** for appellants:

It is not pretended by Alvarado, or anyone else, that he had authority to grant away the islands in the Bay of San Francisco for purposes of colonization, previous to the order sent down from the supreme government, and dated at Mexico, July 20, 1838. That order authorizes the islands to be granted by the governor of the department in concurrence with the departmental Junta, who were to proceed with activity and prudence. If this was a joint authority, as by its terms it was unquestionably intended to be, then the non-concurrence of the departmental Junta with the governor makes the grant void and worthless. But even if this view of the subject should not be taken by the court, it will undoubtedly be regarded as a very impressive fact against the genuineness of this claim, that the concurrence of the assembly was never asked for, during the whole period that intervened between 1839 and 1846.

Mr. **R. H. Gillet,** for appellee:

First. No form of grant is required by the order of the supreme government, authorizing the grant of the islands, nor required by the colonization law or regulations.

Larkin's Case, 59 U. S. (18 How.) 562.

Second. Meritorious, useful, and patriotic services were good considerations for a grant.

See *U. S.* v. *Sutherland*, 60 U. S. (19 How.) 363, 364; *U. S.* v. *Peralta*, 60 U. S. (19 How.) 348; *Case of Arguello*, 59 U. S. (18 How.) 540; *Larkin's Case*, 59 U. S. (18 How.) 562.

Third. Confirmation by the departmental assembly is not necessary, in order to confirm a California grant made by a governor. It was the duty of the government, and not of the grantee, to present it for confirmation.

Fremont v. *The U. S.*, 58 U. S. (17 How.) 563; *Cruz Cervantes' Case*, 59 U. S. (18 How.) 553; *Larkin's Case*, 59 U. S. (18 How.) 562.

Fourth. When an equitable right has once vested under a California grant by the governor, it cannot be devested except by the denouncement of a third person legally made.

Fifth. The question of the bona fides of this grant cannot now be raised, as it was not raised below.

Sixth. Conditions subsequent, if not complied with, do not render the grant void, nor authorize the government to forfeit the grantee's rights to its own use.

Fremont's Case, 58 U. S. (17 How.) 560; *Larkin's Case*, 59 U. S. (18 How.) 563.

Seventh. When an officer of the Mexican government who had the legal power to make grants of land, exercises that power in a manner to create a reasonable belief in the mind of an applicant for a grant that the instrument given is a grant, and he takes possession, occupies the same, and makes improvements thereon in good faith, such grant, if not in strict legal form, creates an equitable right which entitles the grantee to a confirmation thereof.

Eighth. By the laws, usages, and customs of Mexico, this claim would have been confirmed, and, therefore, this court must confirm it.

The act under which these cases came before the board required that body, the district court, and this court, to be "governed by (1) the

treaty of Guadaloupe Hidalgo; (2) the law of nations; (3) the laws, usages, and customs of the government from which the claim is derived; (4) the principles of equity; (5) the decisions of the Supreme Court, so far as the same are applicable.

9 U. S. L. 633, § 11.

Ninth. It is a well-settled rule, that equity cannot be resorted to for the purpose of enforcing forfeitures, but only to avoid them.

Mr. Justice **Clifford** delivered the opinion of the court:

275*] *This is an appeal from a decree of the district court of the United States for the northern district of California, affirming a decree of the commissioners appointed under the act of the 3d of March, 1851 (9 Stat. at L. 631), to adjudicate private land claims. Every person claiming land in California, by virtue of any right or title derived from the Spanish or Mexican government, is required by the 8th section of that act to present his claim, together with the evidence in support of the same, to the commissioners in the first instance, for their adjudication.

Pursuant to that requirement, the appellee in this case presented his petition to that tribunal, claiming title to the island of Los Angeles, situated near the entrance of the Bay of San Francisco, and praying that his claim to the same might be confirmed. As the foundation of his title, he set up a certain instrument or document purporting to be a grant of the island to him by Governor Alvarado. It bears date at Monterey, on the 11th day of June, 1839; and the claimant alleged in his petition to the commissioners that the grant was made under certain special orders issued to the governor by the Mexican government. He obtained a decree in his favor before the commissioners, and the district court, on appeal, affirmed that decree; whereupon an appeal was taken, in behalf of the United States, to this court; and the question now is, whether the claim, upon the evidence exhibited, is valid, within the principles prescribed as the rule of decision in the 11th section of the act requiring the adjudication to be made.

Unlike what is usual in cases of this description, it will be noticed that none of the documentary evidences of title, introduced in support of the claim, purport to be founded upon the colonization law of 1824, or the regulations of 1828; and for that reason we shall refer to these documents with some degree of particularity, in order that their precise import and effect may be clearly understood.

On the 7th day of October, 1837, the present claimant presented a petition to Governor Alvarado, praying for a grant of the island in question, "to build a house thereon, and breed horses and mules;" representing, in his petition, **276***] that as early *as 1830 he had made a similar request, and expressing the hope that the grant might be made.

Some further delay occurred in the contemplated enterprise of the petitioner, as appears from the fact that no action was taken on his second petition until the 1st day of February, 1838, when the governor, by an order appearing in the margin of the petition, referred it, not to the alcalde of the district, but to the military commandancy north of San Francisco, for a report. That office was filled at the time by Mariano G. Vallejo, who accordingly reported, on the 7th day of the same month, that the island might be granted to the petitioner; but suggested that it would be well to make an exception in the grant, to the effect that, whenever the government might desire or find it convenient to build a fort on the principal height thereof, it should not be hindered from so doing. With that report before him, the governor, on the 19th day of February, 1838, made a decree, wherein he states that he had concluded to grant to the petitioner the occupation of the island in question, "to the end that he may make such use of it as he may deem most suitable, to build a house, raise stock, and do everything that may concern the advancement of the mercantile and agricultural branches—upon the condition that, whenever it may be convenient, the government may establish a fort thereon."

Direction was given to the petitioner, by the terms of the instrument, to present himself, with the decree, not to the office where land adjudications under the colonization laws were usually recorded, but to the military commandancy, that an entry thereof might be made, for the due verification of the same.

No such note of the proceeding was ever made in the office of the military *commandante*, or in any book containing the adjudications of land titles. But the several documents are duly certified copies of unrecorded originals which were found in the Mexican archives. Their genuineness is controverted by the counsel for the appellants; but we do not think it necessary to consider that question on this branch of the case, for the reason that the petitioner never took possession of the *island under that [*277 decree, and does not claim title under it in the petition which he presented to the land commissioners.

All that the decree purports to grant to the petitioner, in any view which can be taken of it, is the right or license to occupy the island for the purposes therein described, subject to the right of the government to enter at any time and appropriate the premises as a site for a military fort; and inasmuch as the petitioner never availed himself of the license granted, or made any improvements on the island under the decree, it is quite clear that he had acquired no interest in the land, by virtue of that proceeding, at the date of the cession to the United States, which the Mexican government was bound to respect.

Four other documents were introduced by the petitioner, before the commissioners, in support of his claim: (1) A dispatch from the Minister of the Interior of the Republic of Mexico, addressed to Governor Alvarado; (2) a petition from the appellee to the same; (3) a duplicate copy of the grant set up in his petition to the commissioners, which is without any signatures; (4) the original grant of the island in question, which purports to be signed by the governor, and to be countersigned by the secretary. Of these, the first three are duly certified copies of unrecorded originals which were found in the Mexican archives.

As exhibited in the transcript, the dispatch bears date at Mexico, on the 20th day of July, 1838. By that dispatch the governor was informed that "the President, desiring on the one

part to protect the settlement of the desert islands adjacent to that department, which are a part of the national territory, and on the other to check the many foreign adventurers who may avail themselves of those considerable portions, from which they may do great damage to our fishery, commerce, and interests, has been pleased to resolve that Your Excellency, in concurrence with the departmental Junta, proceed, with activity and prudence to grant and distribute the lands on said island to the citizens of the nation who may solicit the same."

In addition to what is here stated, two per-[*278] sons, Antonio *and Carlos Carillo, are named in the communication, to whom, on account of their useful and patriotic services, preference was to be given in making the grants, to the extent of allowing them to select one exclusively for their benefit.

Such is the substance of the dispatch, so far as it is material to consider it in this investigation.

On the 15th day of February, 1839, the present claimant presented to Governor Alvarado another petition, wherein, after referring to the fact that the island in question had been granted to him during the preceding year, for the breeding of horses, he prays that a new title of possession may be given to him, in accordance with the superior decree, which, as he assumes, empowered the governor to grant, for purposes of colonization, the islands near by, on the coast.

Some idea of the situation of the island, and of the importance which was attached to it in a military point of view, may be gathered from the exposition of the military *commandante*, made by the governor on the 17th day of August, 1837. One of the purposes of that court was to recommend that the custom-house established at Monterey should be transferred to the port of San Francisco. Various reasons were assigned for the change; and among others, it was stated that the latter port was impregnable, by reason of its truly military position.

After describing the port, and expatiating upon the advantages which would flow from the transfer, the report goes on to state that, near its entrance and within the gulf, are several small islands, where are found water and a variety of timber most suitable for a fortification; adding that it contains safe anchorages and suitable coves for landing goods and for storehouses, particularly the island of Los Angeles, which is one league in circumference, lying at the entrance of the gulf, and forming two straits with their points — giving their names—so that it is the key of the whole of it, inasmuch as from this very place the coming in or going out of vessels can be prevented with the utmost facility.

Suffice it to say, without repeating any more of its details, that the whole report is of a character to afford the most convincing proof that the public authorities of the territory, as [*279] *early as August, 1837, fully appreciated the importance of the island, as a necessary site to be retained by the government for the purposes of national defense. Arch. Exch. p. 5.

Grants under the colonization laws were usually issued in duplicates—one copy being designed for the party to whom it was made, and the other to remain in the archives, to be transmitted, with the *espediente*, to the departmental assembly for its approval. They were in all respects the same, except that the copy left in the office, sometimes called the duplicate copy, was not always signed by the governor and secretary, and did not usually contain the order directing a note of the grant to be entered in the office where the land adjudications were required to be recorded.

In this case there is no *espediente*, other than the one presented with the first-named petition, which is not necessarily or even properly connected with the grant set up by the claimant. Two copies of this grant were produced by the petitioner, both bearing date at Monterey, on the 11th day of June, 1839, nearly two years after the governor received the before-mentioned exposition of the military *commandante*, showing the importance of the island to the government as a site for works of defense. They are of the same tenor and effect, and both purport to be absolute grants, without any of the conditions usually to be found in the concessions issued under the colonization laws. As before remarked, the copy not signed, together with the petition, were found in the Mexican archives; but the original, properly so called, was produced from the custody of the party.

Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled, according to the practice in the department of California, when a short entry was made in a book kept for the purpose, specifying the number of the *espediente*, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case there is a certificate appearing at the bottom of the instrument, to the effect that such an entry had been made, but it is wholly unsupported by proof of the existence of any such record.

*An attempt was made before the com-[*280] missioners, or in the district court, to account for the absence of such record evidence, by showing that a book of Spanish records, of the description mentioned, was consumed by fire, at San Francisco, in 1851; but the recollections of the witness called for the purpose are so indistinct, and his knowledge of the contents of the book so slight, that the evidence is not entitled to much weight. Jimeno, who signed the certificate, was not called, and, in view of all the circumstances, there does not appear to be any ground to conclude that any such record was ever made.

Colonization grants were usually made, subject to the approval of the departmental assembly, and the regulations of 1828 expressly declare that grants to individuals and families shall not be held to be definitely valid without the previous consent of that deputation. No such approval was ever obtained in this case; and it does not appear that the dispatch, or order, as it is denominated by the governor, was ever communicated by him to the departmental assembly, until the 27th day of February, 1840. His message communicating the dispatch, though brief, clearly indicates that the members of the assembly had no previous knowledge upon the subject.

A document purporting to be an unsigned copy of the grant and the petition, are all the

papers that were found in the archives, except those connected with the first proceeding under which the license to occupy the island was granted. They were loose papers, not recorded, or even numbered, and, in view of all the circumstances, add little or nothing to the probability in favor of the integrity of the transaction. Two witnesses were examined by the claimant to prove the authenticity of the grant. Governor Alvarado testified that his signature to the grant was genuine, and that he gave it at the time of its date. In effect, the other witness testified that he was acquainted with the handwriting of the governor, and also with that of the secretary, and that they were genuine. Where no record evidence is exhibited, the mere proof of handwriting by third persons, who did 281*] not subscribe the instrument *as witnesses, or see it executed, is not sufficient in this class of cases to establish the validity of the claim, without some other confirmatory evidence. But the testimony of Governor Alvarado stands upon a somewhat different footing. His statements purport to be founded upon knowledge of what he affirms, and if not true, they must be willfully false, or the result of an imperfect or greatly impaired and deceived recollection. Resting, as this claim does, in a great measure, so far as the genuineness of the grant is concerned, upon the testimony of this witness, we have examined his deposition with care, and think proper to remark that it discloses facts and circumstances which, to some extent, affect the credit of the witness. By his manner of testifying, as there disclosed, he evinces a strong bias in favor of the party calling him, as is manifested throughout the deposition. Some of his answers are evasive; others, when compared with preceding statements in the same deposition, are contradictory; and in several instances he refused altogether to answer the questions propounded on cross-examination. Suffice it is to say, without entering more into detail, that we would not think his testimony sufficient, without some corroboration, to entitle the petitioner to a confirmation of his claim.

On the part of the United States the confirmation of the claim is resisted chiefly upon two grounds. It is insisted, in the first place, that the evidence introduced by the claimant to establish the authenticity of the grant is not sufficient to entitle him to a confirmation, and that in point of fact the grant was fabricated, after our conquest of the territory. Second, it is contended that the grant, even if it be shown that it is genuine, was issued by the governor without authority of law.

In support of the first proposition, various suggestions were made at the argument, in addition to those which have already been the subject of remark. Most of them were based upon the state and condition of the title papers, the circumstances of the transaction, and the conduct of the parties, as tending to show the improbability that any such grant was ever made. Much stress was laid upon the fact that the grant was never approved by the departmental 282*] assembly, or any note of it *entered in the office where the adjudications of land titles were required to be recorded. Attention was also drawn to the fact that the paper produced as the *espediente* is without any number, which circumstance, it was insisted, furnished strong evidence that they were fabricated, or at least that they had never been completed. To support that theory, an index, prepared by the secretary, and found in the Mexican archives, was exhibited, containing a schedule of *espedientes* numbered consecutively from one to four hundred and forty-three, covering the period from the 10th day of May, 1833, to the 24th day of December, 1844, and including in the list one in favor of this petitioner for another parcel of land granted on the 7th day of November, 1844. Reliance was also placed upon the omission of the appellee to call and examine the secretary who prepared that index, and whose name purports to be signed to the grant set up in the petition. Another suggestion was that, from the nature of the property, it was highly improbable that any private person should desire such a grant in a department where there were vast tracts of fertile land to be obtained for the asking, and that it was past belief that the governor would have been induced to make the grant, especially after the receipt of the exposition of the military *commandante*, except upon the same conditions as those inserted in the decree of the preceding year. Every one of these suggestions is entitled to weight, and when taken together and considered in connection with the unsatisfactory character of the parol proof introduced by the petitioner, they are sufficient to create well-founded doubts as to the integrity of the transaction. But it is unnecessary to determine the point, as we are all of the opinion that the second objection to the confirmation is well taken, and must be sustained.

Nothing can be plainer than that the governor, in making the grant in question, did not assume to act under the colonization law of 1824, or the regulations of 1828. Were anything wanting beyond what appears in the terms of the grant to establish that proposition, it would be found in the deposition of the governor himself, in his answer to the fourth interrogatory propounded by the claimant. His answer was, that he *made the grant by an ex- [*283 press order in writing from the general government. He further states, that his predecessor had applied to the general government for such authority, but without success. On coming into office, he renewed the application, and, after considerable delay, he says he received the before mentioned dispatch by the hands of a courier.

Neither side, in this controversy, disputes the authority of the Mexican President to issue the order contained in the dispatch. From its date, it appears to have been issued during the administration of General Anastasio Bustamente. He succeeded to the Presidency, for the second time, on the 19th day of April, 1837, after the capture of Santa Anna, in Texas, and remained in office until the 6th day of October, 1841, when he was driven from the capital by the partisans of his predecessor.

At the beginning of his administration, he professed to be guided by the principles of the Contitution; and from the well-known antecedents of his cabinet, he could hardly have expected to adopt any different policy. His cabinet, however, shortly resigned, and a new one

was formed, believed to have had much less respect for the fundamental law. On the 9th day of March, 1838, the Minister of the Interior of the new cabinet resigned, when Joaquin Pesado, whose name is affixed to this dispatch, was appointed in his place.

After the new cabinet was organized, the policy of the administration was changed; and it cannot be doubted but that, at the date of this dispatch, the President had assumed extraordinary powers, and was, in point of fact, to a considerable extent, in the exercise of the legislative as well as the executive powers of the government.

Assuming that the dispatch was issued in pursuance of competent authority, it must be considered as conferring a special power, to be exercised only in the manner therein prescribed. In this view of the subject, it is immaterial whether the power to grant the islands on the coast was vested in the governor before or not, or in what manner, if the power did exist, it was required to be exercised, as the effect of this order, emanating from the supreme power of the nation, was to repeal the previous 284*] *regulations upon the subject, and to substitute a new one in their place.

Strong doubts are entertained whether the islands situated immediately in the Bay of San Francisco are either within the words of the dispatch or the declared purpose for which the power was conferred, but it is unnecessary to determine that point in this investigation.

Waiving that point at the present time, we come to consider the question whether, upon the proofs exhibited, the power was exercised in this case in a manner to give validity to the grant; and that inquiry necessarily involves the construction of the dispatch.

Omitting the formal parts, its effect was to authorize the governor, in concurrence with the departmental assembly, to grant and distribute the lands on the desert islands adjacent to the department to the citizens of the nation who might solicit the same. By the terms of the dispatch, the power to grant and distribute such lands was to be exercised by the governor, in concurrence with the departmental assembly; by which we understand, that the assembly was to participate in the adjudication of the grant. Whenever a petition was presented, the first question to be determined was whether the grant should be made and the title papers issued; and, by the plain terms of the dispatch, an affirmative adjudication could not be legally made, without the consent of the departmental assembly. Whether a subsequent ratification of the act by the assembly might not be equivalent to a previous consent is not a question that arises in this case, for the reason that no such ratification ever took place.

All we mean to decide in this connection is, that, by the true construction of the dispatch, the act of adjudication cannot be held to be valid without the concurrence of the departmental assembly, as well as that of the governor.

In this respect, the provision differs essentially from that contained in the regulations of 1828, under which the approval of the assembly was an act to be performed after the *espediente* had been perfected, and after the incipient title papers had been issued by the governor. His action preceded *that of the assembly, [*285 and in contemplation of law was separate and independent. After the grant was made and executed by the governor, and countersigned by the secretary, it was the duty of the governor to transmit it to the departmental assembly, for its approval; and if it was not so transmitted, it was the fault of the officer, and not of the party.

Other differences between regulations of 1828 and the provisions of that dispatch might be pointed out; but we think it unnecessary, as those already mentioned are deemed to be sufficient to show that the decisions of this court, made in cases arising under those regulations, have no proper application to the question under consideration.

From the words of the dispatch, we think it is clear that the power conferred was to be exercised by the governor in concurrence with the departmental assembly; and consequently that a grant made by the governor without such concurrence was simply void. This view of the question finds support in the Mexican law defining the functions and prescribing the duties of the governor, and those of the departmental assembly. That law was enacted on the the 20th day of March, 1837, and continued in force during the administration under which this dispatch was issued. 1 Arrillago, Recop. vol. I. pp. 202 and 210. Many duties were devolved, by that law, upon the governor, and also upon the departmental assembly, where each was required to act independently of the other. But other duties were prescribed, in the performance of which the governor and the assembly were required to act in concurrence. In the latter class, the governor could not act separately, though in some instances it was competent for the assembly to act in his absence.

Concurrent duties, it seems, were usually performed in open session, in which the governor, when present, presided; but he had no vote, except when, from absence or otherwise, the members present were equally divided. The assembly consisted of seven members, chosen by the electors qualified to vote for deputies to the General Congress.

Those in charge of the supreme government, or some of them, had been much in public life, and it must be presumed *that the dis- [*286 patch under consideration was not framed without some reference to that law. On examining the words employed in the law, to express and define concurrent action, and comparing them with the words of the dispatch translated "as in concurrence with," we find they are the same in the original language. Further support to the construction here adopted is derived from the declared purpose of the dispatch, as appears in its recitals. Mexican authorities had long dreaded the approach of foreigners to her western coast, and the language of the dispatch shows that its great and controlling purpose was to promote the settlement of the unoccupied islands by trustworthy citizens of the nation, with a view to ward off that apprehended danger. They feared that those islands, especially those further south and nearer to the track of commerce into the Pacific Ocean, might become the resort of military adventurers, and be se-

lected by those desirous of invading that remote department as places of rendezvous or shelter; and in the hope of averting that danger, or, in case of its approach, of supplying the means of timely information, they desired that their own citizens might preoccupy those exposed positions. In this view of the subject, the President, no doubt, regarded the power to be exercised under the dispatch, as one of importance and delicacy, and might well have desired to prescribe some check upon the action of the governor; and if so, it would have been difficult to have devised one more consonant with the then existing laws upon the general subject, or better suited to the attainment of the object in view, than the one chosen in this dispatch.

For these reasons, we are of the opinion that the governor, under the circumstances of this case, had no authority, without the concurrence of the departmental assembly, to make this grant. Whether the person specially designated in the dispatch as the fit subjects for the bounty of the government stand in any better situation or not, is not a question in this case. Having come to the conclusion that the grant is void, it does not become necessary to consider the evidence offered to prove possession. On that point, it will be sufficient to say, it is conflicting and unsatisfactory; and if true, is not of a character to show any right or title in the land under the Mexican government, or any equity in the claimant, under the act of congress requiring the adjudications to be made.

The decree of the District Court is, therefore, reversed, and the cause remanded, with directions to dismiss the petition.

THE UNITED STATES, *Appt.*,
v.
ANTONIO MARIA OSIO.

Argued Feb. 13, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

This is the same as the preceding case, and the same counsel appeared.

Mr. Justice **Clifford** delivered the following order:

This is an appeal from a decree of the district court for the northern district of California, affirming a decree of the land commissioners.

On examination of the transcript we find it is the same case as the preceding, in which the opinion has been delivered reversing the decree of the district court—by some mistake two transcripts of the record were taken out in the court below, and each has been docketed in this court.

Accordingly, the case is dismissed, but no *procedendo* will issue to the district court.

THE UNITED STATES
v.
JAMES NOE.

(See S. C. 23 How. 312-318.)

Specific performance—stale demand—laches—abandoned land claim.

It is a general principle of equity, to grant a decree of specific performance only in cases where there is a mutuality of obligation, and when the remedy is mutual.

It will not be rendered in favor of one who has been guilty of an unreasonable delay in fulfilling his part of the engagement or who has slept for a long period on his rights, and comes forward at last, when circumstances have changed in his favor, to enforce a stale demand.

It would be unjust to revive long antecedent covenants and dormant engagements in California, since the change in the condition of that country, where they were treated as abandoned.

Where, in a claim of a Mexican grant, nothing was done to place the claim of the applicants upon the records of the department, and the duty of a colonist was wholly disregarded, the claim must be treated as one abandoned prior to the date of the treaty of Guadaloupe Hidalgo, and not entitled to confirmation.

Argued Feb. 7, 1860. Decided Mar. 12, 1860.

CROSS appeals from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **E. M. Stanton,** for United States:

There is but one point in this case, and that is too simple to admit of any elaboration.

There was no grant. There was a petition with a marginal order, but that marginal order was not a grant, although Alvarado swears that it was. The court is bound to give it this proper legal construction, independent of all oral evidence. Alvarado did not swear to the truth when he said that he considered and regarded it as a definite grant, passing the title out of the nation and vesting it in Elwell. If he had so regarded it, why did he not make it in the proper form, and according to the laws and customs of the government under which he was acting? Why was it that he caused no record of it to be made on book, nor the *espediente* to be filed among the archives, as the law upon the subject expressly and positively commanded him to do? If the papers produced from the private custody of the claimant could for a moment be deemed regular, in other respects, the objection that they are not on record and that there is no record at all of the grant, would be fatal to the validity of the claim.

Messrs. **Calhoun Benham** and **F. Marbury,** for Noe.

The title is valid. The petition and concession, taken together, disclose proper parties, a definite object, a good and valuable consideration, and apt and competent words of grant operative *in præsenti*. These elements constitute a good grant. It is true there are two conditions expressed on the face of the grant to which it is subject. The grant is good under the colonization law of 1824 and the regulations of 1828.

NOTE.—*Specific performance, when decreed; inequitable contracts; certainty and mutuality; part performance; delay*—see note, 39 L. ed. U. S. 954.

The *informe* was not necessary in fact or law. Reg. 1828, art. 3.

Objection has been taken to the grant that it lacks formality; that it is not couched in the words usually employed by the Mexican authorities. This is immaterial. If the instrument contains words which express, or from which we can even collect, an intention or a promise to grant, it is good.

Larkin's Case, 59 U. S. (18 How.) 563.

The land was not occupied, but it was situated in a very remote quarter of the country, in the midst of hostile Indians. This rendered settlement impossible, for several years after the date of the grant, and until political disturbances arose which prevented the grantee from occupying it up to the change of flags.

In regard to this point, the case is stronger than *Frémont's*. Elwell's inability to make a *diseno* at the time the petition was presented, was stated as in that case, and as the evidence discloses it, for the same reasons. Here its preliminary production was dispensed with, as in that case, and the conditions usually imposed were not inserted in the grant. Yet, in the *Frémont Case*, where the conditions were imposed, the court expressed themselves as being encouraged in holding him excused for his default, because the Mexican governor had dispensed with the *diseno* for the reasons urged.

There could not, however, be default in this case, for no time was fixed for performance.

Arredondo's Case, 6 Pet. 745.

The presumption of abandonment cannot arise. There was no denouncement, and the right was unimpaired at the date of cession. Denouncement was necessary to devest the grant.

Frémont's Case, 58 U. S. (17 How.) 563.

The grant passes the whole island. The petitioner asks for the island, and the governor grants what is asked for; it is already segregated. The question of quantity is adjudicated. The court will not go behind the act of the governor. The act does not, nor with propriety can, show what the area is.

If the call for quantity is repugnant to metes and bounds, it must give way, especially when the call for metes and bounds is shown by the evidence to have been the one chiefly relied upon at the time the description was made.

Lodge's Lessee v. *Lee*, 6 Cranch, 237; 2 Mass. 380; 6 Mass. 131; 5 Pick. 135; 6 Wheat. S. C. R. 582; 8 Wend. 183; 6 W. S. Dig. "Boundaries," 474, and cases cited; *Cleveland* v. *Smith*, 2 Story, 278; *Nelson* v. *Hall*, 1 McLean, 518; *Sturgeon* v. *Floyd*, 3 Rich. 80; *Newsom* v. *Pryor's Lessee*, 7 Wheat. 7.

Mr. Justice **Campbell** delivered the opinion of the court:

Robert Elwell, in a petition to Governor Alvarado, that bears date in 1841, represents that he had resided in the country sixteen years, was married to one of the natives, and had a numerous family, and had been employed in commercial business: that his capital had been impaired, and he had been reduced to enlist as a private soldier in the militia, and had served in the year 1838, under the command of the governor, in the south, and had received no compensation. He solicits of the governor, as a generous recompense to his subordinate, and also with a view to promote the progress of agriculture, to confer upon him a concession of a parcel of land situated in the northern frontier, and forming an island in the Sacramento river, eighteen leagues from the establishment of Don Aug. Sutter, containing five square leagues.

The governor, in March, 1841, "in consideration of the services and merits specified," grants the land asked for, the claimant to abide the reports, as to whether the land is vacant, with whatever else that is proper, and that he shall furnish the *diseno* in order to commence the *espediente*.

Two days before the claim was presented to the board of commissioners in 1852, Elwell conveyed his claim to the appellee. He (Elwell) was examined as a witness, and testifies that he had presented a *diseno* some three months after he had exhibited his petition; that there was no information or formal report made to the governor, and that he had never *occupied the land or had judicial pos- [*315 session delivered to him; that there was no officer to perform these duties.

There is some testimony to show that Noe had a tenant on the land in 1851, who inhabited a small house, and that the whole region of the Sacramento above Sutter's fort was not in a situation to be occupied, owing to the dangerous character of the Indians.

The board of commissioners rejected this claim; but, on appeal, their sentence was reversed by the district court, and the claim confirmed to the entire island, provided it did not contain more than eleven leagues. From this decree cross appeals have been prosecuted to this court.

As an inducement to the allowance of his petition, the applicant refers to the services he had rendered to the governor in a military campaign; but the consideration of the grant is the proposed improvement of the department, by the settlement and occupation of its waste lands. The authority of the governor to make the grant is derived from the laws that provide for that object.

The decree of the governor indicates that the title was to be perfected in the usual manner; and consequently, that it was to be subject to the conditions of colonization. An interval of eleven years elapsed from the date of this decree till the presentation of the claim to the board of commissioners in 1852. During this time, the applicant took no step towards the completion of his title, or the fulfilment of the obligations it imposed. There is no *espediente* in the archives to show the segregation of this island from the public domain, nor report to the departmental assembly or the supreme government to testify that a citizen had been enlisted, "to give impulse to the progress of agriculture in the country." There was no delivery of judicial possession, nor any other assertion of right, by which the inhabitants could be charged with notice of this claim. A great change has taken place in the condition of the country, and other persons have assumed to settle and improve the land, which the applicant failed to do.

It is a general principle of equity, to grant a decree of specific performance only in cases where there is a mutuality of *obliga- [*316 tion, and when the remedy is mutual, and that it will not be rendered in favor of one who has

been guilty of an unreasonable delay in fulfilling his part of the engagement, or who has slept for a lengthened period on his rights and comes forward at last, when circumstances have changed in his favor, to enforce a stale demand. And it would be manifestly unjust to revive long antecedent covenants and dormant engagements in California, since the change in the condition and circumstances of that country, where it is evident that they were treated as abandoned, and imposing no obligation previously to that change.

The only explanation for the laches of the applicant is found in the testimony of the witnesses Castro and Combs, who say: "The whole of the region of country of the Sacramento above Sutter's fort, or New Helvetia, was not in a situation to be settled upon by individual grantees, owing to the hostilities of the Indians;" "that the Indians were numerous and hostile."

But this fact existed at the date of the decree in 1841, and will account for the abandonment of the purpose, that the applicant seems to have entertained at one time, of making a settlement. It is hardly probable that he could have anticipated the revolution that took place long afterwards in the condition of the country, and was then preparing to avail himself of the advantage to be derived from it.

In *The United States* v. *Kingsley*, 12 Pet. 476, the claimant sought to excuse the nonperformance of the condition, because "the country was in a disturbed and dangerous state, from the date of the grant, and for a long time previous, till the transfer of the province." The court says: "All the witnesses concur in stating there was no more danger after the appellee petitioned for the land than there had been before and at the date of the application. The appellee, then, cannot be permitted to urge as an excuse, in fact or in law, for not complying with his undertaking, a danger which applies as forcibly to repudiate the sincerity of his intention" to improve the land when he petitioned, as it does "his inability from such danger to execute it afterwards."

317*] *The court says that "concessions of land upon condition have been repeatedly confirmed by the court, and it will apply the principles of its adjudications to all cases of a like kind. It will, as it has done, liberally construe the performance of conditions precedent or subsequent in such grants. It has not nor will it apply, in the construction of such conditions in such cases, the rules of the common law. But this court cannot say a condition wholly unperformed, without strong proof of sufficient cause to prevent it, does not defeat all right of property in land, under such a decree as the appellee in this case makes the foundation of his claim."

In *De Vilemont* v. *United States*, 13 How. 261, the court says: "The only consideration on which such a title could be founded was inhabitation and cultivation, either by De Vilemont himself or his tenants; and having done nothing of the kind, he had no right to a title; nor can the excuse be heard, that he was prevented from a compliance with the conditions by the hostility of the Indians, as he took his concession subject to that risk."

In the cases of The *U. S.* v. *Frémont*, 17 How. 560, and *U. S.* v. *Reading*, 18 How. 1, the court has considered the effect of the condition usually accompanying the grants to land in California, and how far their fulfilment is to be exacted in determining the validity of those claims. The court says in the first case, "there is nothing in the language of the conditions, taking them altogether, nor in their evident object and policy, which would justify the court in declaring the lands forfeited to the government, where no other person sought to appropriate them, and their performance had not been unreasonably delayed."

In the latter case, it is shown that the grantee displayed good faith and reasonable diligence to perform the conditions annexed to his grant; and all presumptions of an abandonment of his claim were repelled by affirmative and satisfactory proof.

But, in the present instance, we find nothing to have been done to place the claim of the applicant upon the records of the department; and the duty of a colonist was wholly disregarded. *Within the doctrine of the cases [*318 we have cited, the claim must be treated as one abandoned prior to the date of the treaty of Guadaloupe Hidalgo, and is not entitled to the confirmation.

Decree of the District Court reversed; cause remanded; petition to be dismissed.

THE UNITED STATES, *Appt.*,
v.
FRANCISCO PICO *et al.*

(See S. C. 23 How. 321-326.)

When Mexican authority over public lands terminated—invalid claim.

In the act of Congress of 1851, and the decisions of this court, the 7th of July, 1846, is referred to as the epoch at which the power of the governor of California, under the authority of Mexico, to alienate the public domain, terminated.

Where, previously to that date, the claimant did not acquire a title to the land, nor has he acquired an equitable claim to it by any act done upon the land in the fulfilment of the colonisation policy of the state, the decree in his favor must be reversed and his petition dismissed.

Argued Feb. 16, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United Staates for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by the appellees, for the confirmation to them of a claim to a certain tract of land.

The board of land commissioners entered a decree dismissing the petition. The district court, on appeal, reversed this decree and entered a decree confirming the claim; whereupon the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **J. S. Black**, *Atty. Gen.*, and **E. M. Stanton**, for appellants:

This grant is not mentioned in any original index. Nor does it appear that any trace of the *espediente* or other paper pertaining to the grant existed among the archives earlier than 1853. The allegation that such a grant was made is, therefore, contradicted by the record.

In addition to that, an examination of the original papers will furnish occular demonstration that all of them, from beginning to end, are fabricated.

If we assume that the papers produced in this case are genuine and authentic, there is still no legal grant of the land, because—

1. There is no petition to the governor soliciting the land agreeably to the regulations of 1828.

2. The marginal decree made by Pico upon the 11th of June, 1846, was not a grant, and does not profess to be a grant.

3. The grant itself, which is dated July 20, 1846, was after the conquest of the country by the American arms, and when the Mexican authorities had been entirely displaced and expelled.

4. There being no record evidence of the grant, there could be no legal title in the grantee.

Messrs. **R. H. Gillet** and **Stanly & King**, for appellees:

Facts Proved in the Record.

The signatures to the title papers are proved to be genuine.

The grant and steps taken to procure it are proved.

Possession was not taken immediately, because of the hostility of the Indians and the unsettled state of the country.

Argument.

1. No evidence can be admitted in this court in cases on appeal, which was not offered and admitted in the court below.

2. No question can be raised or decided on appeal, which was not raised below.

3. When an equitable title is once vested under a grant by an officer having the power to make grants, it cannot be devested by the government except upon a legal denouncement by a third person.

4. Conditions subsequent, if not performed, do not render a grant void nor authorize the government to forfeit the grantee's rights for its own use.

5. By the laws, usages, and customs of Mexico, a grant is valid when by its terms it constitutes a conveyance, whether it conforms to the usual formalities or not.

6. It is to be presumed that in making the grant the governor performed his duty, and those who dispute that he did, must prove it.

7. The United States, as the subsequent grantee of Mexico, cannot deny the former recitals of the latter in relation to those contained in its previous grant of the same land to the claimant.

8. The regulations relating to the formalities in making the grants are directory, and not mandatory, and if not strictly conformed to, do not destroy the validity of the grant.

9. The grant having been made, in fact, June 11, 1846, and the final title papers ordered, an equitable right vested in the grantee which has not been devested; on the 11th of June the last act had been performed by the claimant which he could perform to perfect his title, and the governor had made his decree and conceded what had been asked. Everything had been done but a final act which the government was bound to perform, and this duty devolved upon the United States under the treaty. The claimant's rights became vested, and no neglect of officials after that, if there had been any, could deprive him of his right.

10. If the paper dated July 20, 1846, at Los Angeles, is held to be the origin of the title, such title is valid, and in no way affected by the American forces taking possession of Monterey only thirteen days previous thereto.

Monterey is on the Pacific coast, from one hundred to two hundred miles southerly of San Francisco, and near that distance southwest of the grant in question, and about four hundred miles northerly of Los Angeles.

Under such circumstances, the acts of the Mexican authorities at a distance from the places occupied by the American forces, and at points where they did not attempt to control, must be as valid and effectual as at any anterior period. The former laws remained in force, and these authorized the governor to make grants. These laws were not annulled and others made in their place; the former officials were not removed, nor others substituted.

The political branch of the government having fixed the date of the acquisition of California, this court cannot alter it or fix one for itself. That branch fixed the date of the American acquisition on the 2d of February, 1848, and agreed to protect those who had previously acquired rights under Mexico, not excepting those dated after February 7, 1846.

11. The title of the United States to lands in California, dates, not from the commencement of hostilities, but from the date of the treaty by which we acquired them.

Before the war with Mexico, we had no claim upon the lands in California or elsewhere. When the American flag was raised at Monterey, July 7, 1846, it was not done by order of our government, nor did those who took possession know the existence of the war for more than a month afterwards.

This court, in *Fleming* v. *Page*, 9 How. 614, expressly declared that the war was not one of conquest.

This decision shows that our rights in California were those of military power, and that the country still belonged to Mexico as a part of her dominions. The United States have never claimed it as a conquest, but simply as a purchase. They bought and paid for it, and their title dates with the agreement of purchase. Prior to that, although they had taken possession, the title was in Mexico.

The land commission act, § 11, makes no exceptions of the grants made after July 7, 1846, but extends to all cases alike, except city and village lots held by corporations. This exception (in § 14) proves that none was intended in the general provisions of the act. It shows what was intended by Congress as well as by the treaty. The war not having been prosecuted for conquest, the treaty provided the purchase, and Congress took measures for confirming rights which had not passed to our government, but remained with Mexican grantees. Consequently the present grant must be confirmed, because it was made and completed before the treaty under which our government claims.

Mr. Justice Campbell delivered the opinion of the court:

The appellee, a Mexican by birth, obtained a decree of confirmation in the district court for a parcel of land, known as Las Calaveras, containing eight square leagues, and situated in Tuolumne county, in California.

His testimony is an *espediente*, existing in the archives, in the custody of the surveyor general, from which it appears that the claimant presented, to the justice of the peace and military commandant at New Helvetia, a petition, representing that he desired to obtain a grant for the land described in his *diseno;* and, to expedite his purpose, he requested a favorable report. One was made, bearing date the 1st of May, 1846. A similar representation was made to the same officer in the district of Yerba Buena, who declined to act, because the place was not within his jurisdiction. The prefect of **325*]** that *portion of the department certifies, on the 18th of May, 1846, to the capacity of the claimant, and that the land was vacant. The governor, on the 11th of June, 1846, made an order for the issue of a *titulo* in form.

Here the *espediente* terminates; but the claimant produces from his custody a *titulo*, bearing date at Los Angeles, the 20th July, 1846.

To strengthen his case, he adduces the testimony of a witness, to the effect that the witness had built a house upon the land in 1847, and had occupied it as tenant from that date; that there were people who inhabited and cultivated the land for the claimant, and that before 1847 the disturbances in the country hindered any improvement or settlement.

This testimony is contradicted by a witness produced on the part of the United States, who testifies with precision, and seems to have had every opportunity of acquiring exact information. He says that he came to reside in the vicinity of the land in 1848, and that there had been no improvement or occupation of it, and that the cattle seen upon the land did not belong to the claimant; that he had never heard of a claim by the petitioner until 1853.

There are grave objections to the allowance of this claim. There is a departure from the regular and usual modes for securing lands under the colonization laws. There is some reason to believe that the governor was not at Los Angeles at the date of the order; and there is a failure to show, in any satisfactory manner, any assertion of claim or title under it, until the presentation of the claim, in 1853, to the board of commissioners. The claimant is a kinsman of the governor, and we should expect to find on the part of the governor the most exact attention to the laws prescribing rules for his guidance under such circumstances. Besides, the *titulo* bears date of a day when the conquest of upper California had been completed by the military occupation of Monterey, Sonoma, Bodega, Yerba Buena, and the region of the Sacramento and American rivers, by the forces of the United States.

The commandant in that portion of the department was making a rapid retreat to lower **326*]** California, leaving the country *to the control of the United States. From the capture of Monterey, on the 7th July, 1846, till the surrender of Los Angeles and the organization of a territorial government by Commodore Stockton, under the United States, there was scarcely six weeks. The Californian government, for all practical purposes, was subverted by the capture of Monterey and the country north of it.

In the act of Congress of 1851 (9 Stat. at L. 631), and the decisions of this court, that day is referred to as the epoch at which the power of the governor of California, under the authority of Mexico, to alienate the public domain, terminated. Previously to that date, the claimant did not acquire a title to the land, nor has he acquired an equitable claim to it by any act done upon the land in the fulfilment of the colonization policy of the state.

Upon the whole case, our opinion is that the appellee has not sustained the validity of his claim, and that the decree in his favor must be reversed, and his petition dismissed.

WILLIAM WISEMAN, *Plff. in Err.*,
v.
ACHILLE CHIAPPELLA.

(See S. C. 23 How. 368-380.)

What sufficient demand of payment of bill when the acceptors are absent—demand need not be personal—demand at residence or office—when made—prima facie evidence—when usage governs.

Going several times to the office of the acceptors of a bill in order to demand payment for the same, and finding the doors closed, and no person there to answer the demand, is a sufficient demand.

Further inquiry for them was not required by the custom of merchants.

From such an artifice the law will presume that they did not intend to pay the bill on the day when it had become due, and that further inquiries need not be made for them before a protest can be made for nonpayment.

A demand for payment need not be personal, and it will be sufficient if it shall be made at acceptor's house or place of business in business hours.

It is sufficient if the bill be taken to the residence of the acceptor, as that may be stated in the bill, for the purpose of demanding payment, and to show that the house was shut up, and that no one was there.

Presentment for payment must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored, and protested.

In the presentment of a bill for payment, the demand may be made of a merchant acceptor at his counting room or place of business.

If that be closed, so in fact that a demand cannot be made, or the acceptor is not to be found at his place of business and has left no one there to pay it, it will be considered as due diligence, and further inquiry for him is not necessary.

Presenting a bill under such circumstances at the place of business of the acceptor will be, prima facie evidence that it has been done at a proper time of the day.

The notary is protected where the protest was made in conformity with the practice and law of the place where the bill was payable.

Argued Feb. 28, 1860. Decided Mar. 12, 1860.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana.

This case arose upon a petition filed in the

NOTE.—*Certificate of notary, evidence of what facts. Demand, presentment, and notice. When drawer or indorser not entitled to notice*—see note to Fenwick v. Sears, 2 L. ed. U. S. 101.

Banking customs—see note, 21 L. R. A. 440.

Liability of notary in protest of paper, and of bank employing him.

A notary, by accepting the office and entering upon the discharge of its duties, contracts with

court below, by the plaintiff in error, to recover the amount of a foreign bill of exchange from the notary who had been employed to protest it, and through whose negligence, it was alleged, the drawers were discharged.

The case having been submitted to the court by the parties, a judgment was entered by the court in favor of the defendant on two grounds:

First. That the protest was sufficient.

Second. That the action was prescribed; whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **J. P. Benjamin,** for plaintiff in error:

1. The protest was insufficient. Calling at the office of the acceptors of the bill and finding it closed, is not such due diligence as will excuse the want of presentment and demand.

The necessity for due diligence is not questioned; but cases are cited in the opinion of the court, to show that the action of the notary was sufficient to constitute due diligence. These cases seem to us not to warrant the inference drawn by the court, but rather to establish the reverse.

In the case of *The Union Bank* v. *Fowlkes*, 2 Sneed, 555, the court held that want of presentment and demand was excused because the place of business was open, but no one had been left there to answer; the court expressly stated that if it had been closed, further diligence would have been necessary.

In the case of *Shed* v. *Brett*, 1 Pick. 413, the court held that plaintiff must be nonsuited if the demand at the place of business was not proven to have been made in business hours. The protest in the present case does not allege any visit in business hours.

In the case of *The Branch Bank at Decatur* v. *Hodges*, 17 Ala. 42, there was actual presentment and demand of the book-keeper of the acceptors at their counting room.

In the case of *Brown* v. *Turner*, 15 Ala. 832, there was actual demand of the agent of one partner, both partners being absent.

In *Watson* v. *Templeton*, 11 La. Ann. 137, the court held that, as against a partnership, the want of demand was excused where the bill was presented at the commercial domicil within the usual business hours, but reserved its opinion as to cases where a person does business alone, and has a dwelling as well as a place of business, which is found closed. In support of this distinction between bills accepted by a firm and those accepted by individuals, the court cites Story on Promissory Notes, § 235; but we have sought in vain in the authority referred to and elsewhere, for anything to sustain this distinction, which seems to be quite a novel doctrine in the law of bills and notes.

In *Williams* v. *Bank of U. S.* 2 Pet. 96, and the case of *Goldsmith* v. *Bland*, therein cited and approved, there was, in the former case, further inquiry and information received, that the party and his family had left town on a visit; and in the latter, there was no person in the counting-house in the ordinary hours of business; but the counting-room is not stated to have been closed, the implication being, on the contrary, that it was open.

The foregoing are all the authorities cited in the opinion of the circuit court, no one of which goes the length required to sustain the validity of the protest now in dispute.

The authorities, to show its insufficiency, are very numerous.

M'Gruder v. *Bank of Washington*, 9 Wheat. 601; *Granite Bank* v. *Ayres*, 16 Pick. 392; *Ellis* v. *Commercial Bank of Natchez*, 7 How. Miss. 294; *Follain* v. *Dupre*, 11 Rob. 470; *Collins* v. *Butler*, 2 Str. 1087.

The rule as laid down by all text writers is that, if the acceptors have absconded and cannot be found, presentment and demand being impossible, the want of them is excused; but even where the acceptor has become bankrupt, or has removed to another place within the same state, or is absent on a journey, yet, if he has a dwelling, demand must be made there, in order to hold the other party.

Story, Prom. N. §§ 237, 238; Story, Bills, §§ 351, 352; Byles, Bills, pp. 141, 159; Chit. Bills, pp. 355, 383.

The only cases where want of jurisdiction and effort to find a party have been excused, are those where a place of payment is designated in the bill or note.

Hine v. *Allely*, 4 Barn. & Ad. 624; *Buxton* v. *Jones*, 1 Man. & G. 83.

Mr. **Louis Janin,** for defendant in error:

The circuit court held: First, that the de-

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those who employ him that he will perform such duty with integrity, diligence and skill. Like other ministerial officers, he is liable in damages to any person specially injured by his omission to perform or by his unskilful performance of a ministerial duty. Fogarty v. Finlay, 10 Cal. 239; Kinnard v. Willmore, 2 Heisk. 619; Hover v. Barkhoff, 44 N. Y. 113; Sawyer v. Corse, 17 Gratt. 230.

The statute prescribing the powers and duties of notaries generally declares their liability to a private action for damages resulting from negligence. Fogarty v. Finlay, 10 Cal. 239; 2 N. Y. R. S. 284, § 48.

Notaries are usually employed by bankers to protest bills of exchange, and it is the well settled law of many of the states that a banker who employs a competent notary is not liable for the notary's neglect to perform his duty. Tiernan v. Com. Bank of Natchez, 7 How. (Miss.) 648, 7 M. & S. 592; Bowling v. Arthur, 34 Miss. 41; Jackson v. Union Bank, 6 Harr. & J. 146; Bellemire v. Bank of United States, 4 Whart. 105; 4 Rawle, 384; East Haddam Bank v. Scovill, 12 Conn. 303; Stacy v. Dane County Bank, 12 Wis. 629; Fabens v. Mercantile Bank, 23 Pick. 330; Hyde v. Planters' Bank, 17 La. 566; Frazier v. Gas Bank, 2 Rob. 296; Baldwin v. Bank of La. 1 La. Ann. 13. But see, *contra*, Thompson v. Bank of South Carolina, 8 Hill. (S. C.) 77; Allen v. Merchants' Bank, 22 Wend. 215; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489.

Party cannot recover from a notary for having neglected to protest a note legally, when, by his own laches, he has put it out of his power to subrogate the notary to his rights as they existed at the date of protest. Emmerling v. Graham, 14 La. Ann. 389; Frank'in v. Smith, 21 Wend. 624; Reed v. Darlington, 19 Iowa, 349.

A notary is liable for loss occasioned by his negligence in failing to discharge his duty in protesting and delivering, or mailing notices of protest as required by law. Want of diligence or skill on his part must be shown. He is not liable in a matter in which judicial construction was necessary to enable him to know what his duty was. Neal v. Taylor, 9 Bush, 380.

A notary is not presumed to be a lawyer who is to revise or reverse the decision of his employer, as to the character of a bill, and as to whether it is entitled to days of grace or not. If, therefore, a bill is delivered to him with directions to make demand, and protest upon the wrong day, a right of action does not arise against him on account of the error. He is not guilty of negligence in proceeding according to the instructions of the bank giving him the draft to protest. Commercial Bank of Ky. v. Varnum, 49 N. Y. 269, 7 Hun, 236.

mand was sufficient; second, that if it was insufficient, this action was barred by the prescription of one year under article 3501 of the Civil Code of Louisiana.

1. On the first point, the court cites *Union Bank* v. *Fowlkes*, 2 Sneed, 555; *Shed* v. *Brett*, 1 Pick. 413; *Branch Bank at Decatur* v. *Hodges*, 17 Ala. 42; *Brown* v. *Turner*, 15 Ala. 832; *Burbank* v. *Beach*, 15 Barb. 326.

The Louisiana case referred to by the circuit court, but not quoted, is the case of *Watson* v. *Templeton*, 11 La. Ann. 137.

Again in *Nott's Exr.* v. *Beard*, 16 La. 308. the notary certified that "at the request of the holder of the original draft, whereof a true copy is on the reverse hereof written, I demanded payment of said draft at the counting-house, etc." The counsel for the defendant contended that the protest should say that the bill was presented and payment thereof demanded. The court held that this was not necessary, and said: "we are disposed to give such meaning to terms used by public officers as will be understood by the mass of mankind."

"The act of the legislature passed in 1827, vests notaries with certain powers in relation to these matters and gives more authenticity to their acts than to private individuals. They are public officers and the presumption of law is that they do their duty."

The following English cases support the same doctrine: *Buxton* v. *Jones*, 1 Man. & G. 89; *Hine* v. *Allely*, 4 B. & Ad. 627, and 24 Eng. C. L. 127. It was shown that on the day when the bill became due it was taken to the place of payment. but the house was shut up and no further presentment could be made. The court held that there was a presentment. See, also, *Burbridge* v. *Manners*, 3 Campb. 193.

The counsel for the plaintiff, indeed, endeavors to distinguish these cases from the one before the court, because the number of the acceptor's residence was there stated in the face of the bill. But while the courts evidently speak of well-known places where the presentment is to be made, they lay no stress upon the manner in which they became known. The proper place to present a bill to a firm is undoubtedly their counting-house; and whether that be known to the notary by the number of the house stated in the bill, or in any other positive manner, the reason of the thing and the conclusion of the thing must be the same. Here the notary knew the counting-house so well and so positively that he went to it several times.

Mr. Justice **Wayne** delivered the opinion of the court:

The plaintiff in this action alleges that he is the holder and owner of a certain bill of exchange for $2,045.45, dated at Vicksburg, in the state of Mississippi, May 13th, 1855, and payable on the 23d November, 1855, which had been drawn by John A. Durden and A. Durden on William Langton & Co., of New Orleans, and accepted by them, payable to the order of 374*] Langton, Sears, & *Co. and by that firm indorsed in blank. He further declares that the bill, when it became due, was intrusted to the defendant, Achille Chiappella, a commissioned notary public for the city of New Orleans, to demand payment of it from the acceptors, and to protest the same for nonpayment, should the acceptors dishonor it; and that from his carelessness in not making a legal demand of the acceptors, and from not having expressed it in the protest, that the indorsers of the bill had been discharged from their obligation to pay it, by a judgment of the circuit court of the United States for the southern district of Mississippi. He further alleges that the acceptors, payees, and indorsers were insolvent, and that, from the insufficiency of the demand for payment to bind the drawers of the bill, the defendant had become indebted to him for its amount, with interest at the rate of five per cent from the day that it became due, the 23d November, 1855.

The defendant certifies in his notarial protest that the bill had been handed to him on the day it was due; that he went several times to the office of the acceptors of it, in Gravier street, in order to demand payment for the same, and he found the doors closed, and "no person there to answer my demand." It also appeared that one of the firm by which the bill had been accepted had a residence in New Orleans; that no demand for payment had been made individually upon him; and that no further inquiry had been made for the acceptors than the repeated calls which the notary states he had made at their office.

We think, under the circumstances, that such repeated calls at the office of the acceptors was a sufficient demand; that further inquiry for them was not required by the custom of merchants; and that the protest, extended as it had been, is in conformity with what is now generally considered to be the established practice in such matters in England and the United States. We say, under the circumstances, for, as there is no fixed mode for making such a demand in all cases, each case as it occurs must be decided on its own facts.

We have not been able to find a case, either in our own or in the English reports, in which it has been expressly ruled *that a mer- [*375 chant, acceptor of a foreign bill of exchange, having a notorious place of business, has been permitted to close it up during the business hours of the day, thus avoiding the obligation of his acceptance on the day of its maturity, and then that he was allowed to claim that the bill ought to have been presented to him for payment elsewhere than at his place of business. Though such conduct is not absconding, in the legal sense of that word, to avoid the payment of creditors, it must appear, when unexplained, to be an artifice inconsistent with the obligations of an acceptor, from which the law will presume that he does not intend to pay the bill on the day when it has become due.

The plaintiff in this case does not deny that the office of the acceptors was closed, as the notary states it to have been. The only fact upon which he relies to charge the defendant with neglect is, that one of the firm of Langton, Sears, & Co. resided in New Orleans, and that it was the duty of the notary to have made inquiry for him at his residence. No presumption, under such circumstances, can be made, that the acceptors had removed to another place of business, or that they were not intentionally absent from it on the day that they knew the bill was payable. This case, then, must be de-

termined on the fact of the designed absence of the acceptors on that day; and that inference is strengthened by no one having been left there to represent them.

All merchants register their acceptances in a bill book. It cannot be presumed that they will be unmindful of the days when they are matured. Should their counting-rooms be closed on such days, the law will presume that it has been done intentionally, to avoid payment, and on that account, that further inquiries need not be made for them before a protest can be made for nonpayment.

Cases can be found, and many of them, in which further inquiries than a call at a place of business of a merchant acceptor has been deemed proper, and in which such inquiries not having been made, has been declared to be a want of due diligence in making a demand for payment; but the rulings in such cases will be found to 376*] have been made on account of *some peculiar facts in them which do not exist in this case. And in the same class of cases it has been ruled that the protest should contain a declaration by the notary that his call to present a bill for payment had been made in the business hours of the day; but in no case has the latter ever been presumed in favor of an acceptor, whose place of business has been so closed that a demand for payment could not be made there upon himself or upon some one left there to attend to his business.

Lord Ellenborough said, in the case of *Crosse* v. *Smith*, 1 M. & S. 545: "The counting-house is a place where all appointments respecting business and all notices should be addressed; and it is the duty of the merchant to take care that proper persons shall be in attendance." It was also ruled in that case, that a verbal message, imparting the dishonor of a bill, sent to the counting-house of the drawer during the hours of business, on two successive days, the messenger knocking there, and making a noise sufficient to be heard within, and no one coming, was sufficient notice.

In this case the facts were, that Fea & Co. had a counting-house at Hull, where they were merchants, and one lived within one mile and the other within ten miles of Hull. The Monday after Smith & Co. received the bill, their clerk went to give notice, and called at the counting-house of Fea & Co. about half after ten o'clock. He found the outer door open; the inner one locked. He knocked so that he must have been heard, had anyone been there, waited two or three minutes, and went away; and on his return from the counting-room he saw Fea & Co.'s attorney, and told him. The next Monday he went again at the same hour, but with no better success. No written notice was left, nor was any notice sent to the residence of either of the parties. The court took time to consider, and then held, without any reference to the clerk having called at the counting-house two successive days, that going to the counting-house at a time it should have been open was sufficient, and that it was not necessary to leave a written notice, or to send to the residence of either of the parties.

In *Bancroft* and *Hall*, Holt, N. P. 476, the 377*] plaintiff received notice *of the bill's dishonor at Manchester, 24th May. The same day he sent a letter by a private hand to his agent at Liverpool, to give defendant notice. The agent called at the defendant's counting-house about 6 or 7 P. M.; but the counting-house was shut up, and the defendant did not receive notice of the dishonor of the bill until the morning of the 27th—Monday. Two points were ruled: 1st. That sending by a private hand to an agent to give notice was sufficient; 2d. that it was sufficient for the agent to take the ordinary mode to give notice—the ordinary time of shutting up was eight or nine. Where the indorser of a note shut up his house in town soon after the note was made, and before it became due, and retired to his house in the country, intending, however, only a temporary residence in the country, it was held that a notice left at his house, by having been put into the keyhole, was sufficient to charge him. *Stewart* v. *Eden*, 2 Caines, 121.

This court held, in *Williams* v. *Bk. of U. S.* 2 Pet. 96, that sufficient diligence had been shown on the part of the holder of the note to charge the indorser, under the following circumstances: a notary public employed for the purpose called at the house of an indorser of a note, to give him notice of its dishonor; and finding the house shut and locked, ascertained from the nearest resident that the indorser and his family had left town on a visit. He made no further inquiry where the indorser had gone, or how long he was expected to be absent, and made no attempt to ascertain whether he had left any person in town to attend to his business, but he left a notice of the dishonor of the note at an adjoining house requesting the occupant to give it to the indorser upon his return.

In making a demand for an acceptance, the party ought, if possible, to see the drawee personally, or some agent appointed by him to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business, but a demand for payment need not be personal, and it will be sufficient if it shall be made at one or the other place, in business hours. Chitty, 274, 367.

*It was formerly the practice, if the [*378 house of the acceptor was shut up when the holder called there to present the bill for payment, and no person was there to represent him, and it appeared that he had removed, that the holder was bound to make efforts to find out to what place he had removed, and there make a payment. Such, however, is no longer the practice either in England or the United States, nor has it been in the United States for many years. It is now sufficient if the bill shall be taken to the residence of the acceptors, as that may be stated in the bill, for the purpose of demanding payment, and to show that the house was shut up, and that no one was there. *Hine* v. *Allely*, 4 B. & Ad. 624. It has been decided by the supreme court in Tennessee, that the protest of a foreign bill of exchange, drawn upon a firm in New Orleans, with no place of payment designated, where it appeared that the deputy of a regularly commissioned notary had called several times at the office of the acceptors to make demand of payment, but found no one there of whom the demand could be made, was sufficient to excuse a demand, and to fix the liability of the indorsers to whom notice had been given. *Union Bank* v. *Fowlkes*, 2 Sneed, 555.

The supreme court of Louisiana, in *Watson* v. *Templeton*, 11 La. Ann. 137, declares "that a demand made within the usual hours of business, at the commercial domicil of a partnership, for the payment of a note or bill due by the firm, is a sufficient presentment; that it was not necessary to make a further demand at the private residences of individual persons. The place of business is the domicil of the firm, and it is their duty to have suitable persons there to receive and answer all demands of business made at that place." Going with a promissory note, to demand payment, to the place of business of the notary, in business hours, and finding it shut, is using due diligence. *Shed* v. *Brett*, 1 Pick. 413.

In the case of *The Branch Bk. at Decatur* v. *Hodges*, 17 Ala. 42, the supreme court of Alabama says: "The court below excluded the protest for nonpayment, because the presentment is stated thereon to have been made of the book-keeper of the drawees in their counting-room, they being absent. This was erroneous. 379*] *The bill was presented at the place of business of the firm, at their counting-room. If they had intended to pay the bill, it was their duty to have been present on the day of payment, or have left means for making such payment in charge of some one authorized to make it. The notary, finding them absent from their place of business, and their book-keeper there, might well make protest of the dishonor of the bill for nonpayment upon presentment to and refusal by him." When upon presentment for acceptance, the drawee does not happen to be found at his house or counting-room, but is temporarily absent, and no one is authorized to give an answer whether the bill will be accepted or not, in such case it would seem the holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the drawee. He may present the bill on the next day, but this delay is not allowable in a presentment for payment. This must be made on the day the bill falls due; and if there be no one ready at the place to pay the bill, it should be treated as dishonored, and protested. Story on Bills, § 250; Chit. on Bills, 9 ed. 400. The supreme court of New York has ruled that where a notary's entry case states that presentment and demand were made at the maturity of a bill, at the office of C. & S., the acceptors, this language imports that the office was their place of business, and it will be presumed in favor of the notary, that the time in the day was proper. *Burbank, President of Eagle Bank of Rochester*, v. *Beach*, 15 Barb. 326.

The preceding citation is in conformity with what the supreme court of New York had ruled thirteen years before, in the case of *The Cayuga Bank* v. *Hunt*, 2 Hill, 635. Its language is that where a notarial certificate of a protest of a bill of exchange stated a presentment for payment at the office of an acceptor, on the proper day, and that the office was closed, but was silent as to the hour of the day of doing the act, that it was sufficient, and that regularity in that particular should be presumed.

We infer, from all the cases in our books, notwithstanding many of them are contradictory to subsequent decisions, that the practice now, both in England and the United States, does *not require more to be done, in the [*380 presentment of a bill of exchange to an acceptor for payment, than that the demand should be made of a merchant acceptor at his counting-room or place of business; and if that be closed, so in fact that a demand cannot be made, or that the acceptor is not to be found at his place of business, and has left no one there to pay it, that further inquiry for him is not necessary, and will be considered as due diligence; and that presenting a bill under such circumstances at the place of business of the acceptor will be, prima facie, evidence that it had been done at a proper time of the day. If that shall be denied, it must be shown by evidence.

But whatever may have been the differences between cases upon this subject, both in England and the United States, there has always been a requirement in both countries, and everywhere acknowledged in the United States, which protects the defendant in this suit from any responsibility to the plaintiff. The requirement is this: that the protest was made in this case in conformity with the practice and law of Louisiana, where the bill was payable. *Rothschild* v. *Currie*, 1 Ad. & El. 43; 11 Sm. & M. 182.

We are aware of the contrariety of opinion which prevailed for many years in regard to what should be considered due diligence in making a presentment of a bill of exchange for payment to an acceptor of it, under such circumstances as are certified to by the notary in this case. We have carefully examined most of them, from the case of *Cotton* v. *Butler*, 2 Strange, 1086, to the year 1856, and we have adopted those of later years as our best guide, and as having a better foundation in reason for the practice and the commercial law of the present day, and because we think it has mostly prevailed in the United States for thirty years.

As the view which we have taken of this case disposes of it in favor of the defendant, we shall not notice another point made in the argument in his behalf, which was that the plaintiff's right of action, if he ever had one against the defendant, was excluded by the Louisiana law of prescription.

We direct the affirmance of the judgment of the Circuit Court.

THE UNITED STATES, *Appt.*,
v.
JAMES MURPHY;

and

THE UNITED STATES, *Appt.*,
v.
EMANUEL PRATT.

(See S. C. 23 How. 476, 477.)

Sutter's general title.

This court has already expressed the opinion upon the merits of the general title of Sutter to California lands in several cases, and this case is decided in accordance therewith.

Submitted Feb. 23, 1860. Decided Mar. 12, 1860.

APPEALS from the District Court of the United States for the Northern District of California.

These cases arose upon petitions filed before the board of land commissioners in California, by the appellees, for the confirmation to them of claims to certain tracts of land.

The board of land commissioners entered decrees confirming the claims in both cases.

The district court of the United States having affirmed said decrees, on appeal, the United States took appeals to this court. A further statement appears in the opinion of the court.

Messrs. **J. S. Black**, *Atty. Gen.*, and **E. M. Stanton** for appellants.

Mr. **A. Felch** for Emanuel Pratt.

Both cases were submitted on the records without argument in this court.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellees in these suits were respectively confirmed in their claims to land in the valley of the Sacramento river.

Their applications were made to Micheltorena in 1844; and upon a reference, Captain Sutter reported that the land was vacant. Upon the advice of the secretary, further action was deferred until the governor could visit that portion of the department, and leave was given to the petitioner to occupy the land until that time.

In December of that year, the "general title" to Sutter was issued, and in 1845 or 1846, after 477*] the deposition of Micheltorena *as governor, Sutter gave copies of that title to the petitioners. In the testimony of Sutter, in the case of *Pratt*, he says: "That he applied for the paper a few weeks before the couriers arrived with it; that duplicates were sent to him, and that it was designed as a bounty to the soldiers who had served under him, for their services in the war."

We have already expressed our opinion upon the merits of this title in several cases, during this and the last term; and it remains only to say that *the decrees of the District Court must be reversed, and the causes remanded, with directions to the district court to dismiss the petition in each.*

THOMAS J. GREEN, *Plff. in Err.*,
v.
WILLIAM CUSTARD.

(See S. C. 23 How. 484–487.)

Suit, when removable from Texas court to United States court.

By the 12th section of the judiciary act, a citizen of Massachusetts, when sued by a citizen of Texas, in a state court of Texas, no matter what the cause of action may be, provided it demand over $500, may remove the suit to the United States district court.

The exception of the 11th section could have no possible application to the case.

Argued Feb. 29, 1860. Decided Mar. 12, 1860.

IN ERROR to the District Court of the United States for the Western District of Texas.

The history of the case and the facts involved sufficiently appear in the opinion of the court.

Mr. **Fred. P. Stanton**, for plaintiff in error:

The court below properly acquired jurisdiction of the case as made by the original petition, which alleged that Custard was a citizen of Texas, and Green, a citizen of Massachusetts.

Act of 1789, ch. 20, § 12.

The assignee of a judgment does not stand upon the same footing as the assignee of a note or other "chose in action."

1 Bouv. L. Dict. 227; *Bobyshall* v. *Oppenheimer*, 4 Wash. C. C. 482; *Bean* v. *Smith*, 2 Mason, C. C. 268, 269.

When the note was set up in the amended petition, neither Arthur nor Green being a citizen of Texas, the case then became one over which the United States court had no jurisdiction.

Gibson v. *Chew*, 16 Pet. 315; *Dromgoole* v. *F. & M. Bank*, 2 How. 241.

The court below was right in dismissing the original petition and refusing to take jurisdiction of the amendments; but it had no authority to remand the case to the state court; the only alternative was to dismiss it altogether.

The right to have his case tried in the Federal court in a proper case for removal, is an absolute legal right in the party so removing it.

Ward v. *Arredondo*, 1 Paine's C. C. 410; *Beardsley* v. *Torrey*, 4 Wash. 286; *Gibson* v. *Johnson*, 1 Pet. C. C. 44; *Gordon* v. *Longest*, 16 Pet. 97.

It is only causes improperly removed which will be remanded.

Laws U. S. Courts, 147, which quotes *Pollard* v. *Dwight*, 4 Cranch, 421.

A party, after the removal of the cause, cannot amend so as to oust the jurisdiction of the Federal court.

Wright v. *Wells*, 1 Pet. C. C. 220.

It may not be amiss to refer to the principles controlling the practice of the courts in Texas, in cases like the present. While they are very liberal in allowing new causes of action to be introduced by way of amendment, they except cases where, in the "mean time," between the filing of the original and amended petition, the statute of limitations had run, or some other defense valid in law "had accrued to the defendant, and which could have been set up had the original action been discontinued, or a new one commenced."

"The matter brought into the bill by amendment, will not have relation to the time of filing the original bill, but the suit will so far be considered as pending from the time of the amendment."

Henderson v. *Kissam*, 8 Tex. 53; *Pridgin* v. *Strickland*, 8 Tex. 427; *Williams* v. *Randon*, 10 Tex. 74; *Kinney* v. *Lee*, 10 Tex. 153.

The subsequent promises alleged were a new and distinct cause of action.

Coles v. *Kelsey*, 2 Tex. 541; *Grayson* v. *Taylor*, 14 Tex. 675; *Bell* v. *Morrison*, 1 Pet. 360; *Van Keuren* v. *Parmelee*, 2 N. Y. 425.

Mr. **G. W. Paschal**, for defendant in error, made no argument in this court.

Mr. Justice **Grier** delivered the opinion of the court:

This case originated in the district court for

the county of McLennan, in the state of Texas, where Custard had instituted his suit against Green by attachment, claiming to recover from him the balance due on a judgment entered on a mortgage given by Green to one Arthur, on lands in California. Green appeared, and moved to have his cause removed to the district court of the United States, he being a citizen of Massachusetts, and Custard a citizen of Texas —the case coming clearly within the provisions of the 12th section of the judiciary act of 1789 (1 Stat. at L. 72).

It is probably because this case originated in a state court, that the court below permitted the counsel to turn the case into a written wrangle, instead of requiring them to plead as lawyers, in a court of common law. We had 486*] occasion already to notice *the consequences resulting from the introduction of this hybrid system of pleading (so called) into the administration of justice in Texas. See *Randon* v. *Toby*, 11 How. 517, and *Bennett* v. *Butterworth*, 11 How. 669, with remarks on the same in *McFaul* v. *Ramsey*, 20 How. 525. This case adds another to the examples of the utter perplexity and confusion of mind introduced into the administration of justice, by practice under such codes.

Without attempting to trace the devious course of demurrers, replications, amendments, etc., etc., which disfigure this record, it may suffice to say that the plaintiff, beginning, after some time, to discover that he could not recover on his original cause of action, among other amendments set forth an entirely new cause of action, to wit: a note given by Green, payable to "Arthur or order," for $5,000, without any indorsement or assignment by Arthur to plaintiff, but which Custard alleged he had obtained "in due course of trade."

After further demurrers, exceptions, etc., etc., and after taking testimony in California, wholly irrelevant to any possible issue in the case, the record exhibits the following judgment:

"And now on this day came the parties by their attorneys, and the court being now sufficiently advised upon the questions submitted, is of opinion that the judgment, the original cause of action in this case, is not conclusive—in fact, is a nullity; but because the parties plaintiff have amended their petition herein, setting forth the note the base of said judgment, and as it has become a part of the pleadings in this case, and the court being of the opinion that, upon the note, the court is debarred from entertaining the case further in this court, for want of jurisdiction, it is therefore considered by the court that the cause ought to be remanded. It is, therefore, ordered and decreed that this case, with all the papers belonging to the same, be, and is hereby remanded to the district court of McLennan county for further action."

So far as this judgment treats the original cause of action "as a nullity," it could not be objected to; and perhaps the same remark might have equally applied to the amended por-487*] tion. *But the conclusion, that the court had no jurisdiction to proceed further, and the order to remand the case to the state court to try the other half of it, is a clear mistake, for which the judgment must be reversed.

If Green had been a citizen of Texas, and Custard had claimed a right, as indorsee of a citizen of Texas, to bring his suit in the courts of the United States, because he (Custard) was a citizen of another state, the case would have occurred which is in the proviso to the 11th section of the act which restrains the jurisdiction of the court. But the United States court had jurisdiction of this case, by virtue of the 12th section. It is a right mainly conferred on Green, a citizen of Massachusetts, when sued by a citizen of Texas, in a state court of Texas, no matter what the cause of action may be, provided it demand over $500. The exception of the 11th section could have no possible application to the case.

Let the judgment be reversed, and the case remanded for further proceedings.

JOHN YONTZ, Administrator of Jose Dolores Pacheco, Deceased, *Appt.*,
v.
THE UNITED STATES.

(See S. C. 23 How. 495-499.)

In Spanish claims, the petition and concession must be construed together.

In cases coming up by appeal from the district courts of Missouri and Florida, which adjudicated Spanish claims under the act of 1824, the petition to the governor for land and his concession must be taken as one act. The decree usually proceeded on the petition, which described the land as respected locality and quantity.

Where the grant refers to the previous steps (including the petition, asking for only two leagues), and carries them along with the grant, the decree of the district court, restricting the quantity to two square leagues, must be affirmed.

Argued Mar. 1, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by Jose Dolores Pacheco, for the confirmation to him of a claim to a certain tract of land. The board of land commissioners entered a decree against the validity of the claim. The district court on appeal reversed this decree, and entered a decree in favor of the claimant to the extent of two square leagues, if such quantity be contained within the boundaries claimed, or for so much thereof as shall be therein contained; whereupon the administrator of the claimant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **V. E. Howard, William C. Jones,** and **E. L. Goold,** for appellant:

In the construction of grants, well ascertained natural or artificial boundaries are to prevail over course, distance and quantity.

Lessee of Nelson v. *Hall*, 1 McLean, 518; *Mayhew* v. *Norton*, 17 Pick. 357; *Frost* v. *Spaulding*, 19 Pick. 445; *Massengill* v. *Boyles*, 4 Humph. 205; *Newman* v. *Foster*, 3 How. Miss. 383.

It is universally admitted, that of all the de-

scriptions in a deed, quantity is the least reliable and the last to be resorted to.

Littlefield v. *Littlefield*, 28 Me. 180.

"In the construction of grants, it is a well-settled rule that course, and distance, and quantity must yield to natural or artificial monuments or objects; that where these monuments or objects are known, certain, and unquestionable, and neither course, distance, nor quantity correspond with them, the monuments, natural or artificial, shall prevail, and courses must be varied and distance lengthened or abridged, in order to harmonize them."

Surget v. *Little*, 5 Smedes & M. 332; *Campbell* v. *Clark*, 8 Mo. 553; *Hough* v. *Horn*, 4 Dev. & B. 231; *Hare* v. *Harris*, 14 Ohio, 536; *Pernam* v. *Wead*, 6 Mass. 132; *Preston* v. *Bowmar*, 2 Bibb, 495; *Folger* v. *Mitchell*, 3 Pick. 401; *Hoice* v. *Bass*, 2 Mass. 382.

It is, at least, but a mere question of intention. Certainly Pacheco intended to get that place, and the governor intended to bestow it upon him; for the governor knew all that it was important for him to know touching the quantity, viz.: that it was not over eleven leagues, and he, therefore, said nothing as to quantity when he made the grant. The intention of Pacheco is abundantly made manifest by the fact that for thirty years he has occupied and cultivated the whole of it—acts of interpretation both prior and subsequent to the date of the grant.

"Where the intention is doubtful, the manner in which the contract has been executed by both or one of the parties, furnishes a rule of interpretation."

Millikin v. *Minnis*, 12 La. 546; *Wells* v. *Compton*, 3 Rob. 171; *Farrar* v. *Rowly*, 2 La. Ann. 475; *D'Aquin* v. *Barbour*, 4 La. Ann. 441.

Messrs. **J. S. Black**, *Atty. Gen.*, and **E. M. Stanton** for appellees.

Mr. Justice Catron delivered the opinion of the court:

Yontz prosecutes this appeal as administrator of Jose Dolores Pacheco, who died pending the suit below.

There is no controversy in relation to the validity of the grant, but only as respects the quantity confirmed by the district court, being two square leagues. The claimant insists that he is entitled to a survey and patent from the United States corresponding to the out-boundaries embraced in his *diseno*, and the description given of the *rancho* in the governor's grant, which recites: "Whereas citizen Jose Dolores Pacheco has sought to obtain for his personal benefit and that of his family the place lying between the 'creek or ravine' of La Tasajera and the place of 'San Ramon' bounded by the house of the same place of San Ramon down to the 'dead trees' (palos secos), and from this point, taking by the 'Tular,' to the 'high hill' (Loma Alta) along the creek or ravine of said Tasajera, and along the range of hills (sierra) and the land of citizen Bartolo Pacheco." After which the conditional clause follows, to wit: "The tract of which grant is made is of the extent mentioned in the plan, which goes with the *esnediente*, with its respective boundaries. The officer giving the possession shall cause it to be measured according to the *ordinance to [*497 mark boundaries; the surplus to remain for the nation, for its uses."

Pacheco petitioned Governor Figueroa for two leagues of land, in June, 1834, lying within the boundaries set forth in the foregoing description and plan. He then failed to have his petition favorably considered by the governor, because opposition was made by the mission of San Jose.

On the 30th of November, 1837, Pacheco again petitioned Governor Alvarado to grant him the same land; he says: "At this time I confine the application for two leagues, more or less, according to the boundaries of said mission of San Jose to the south; the plan of which I inclose herein again." The governor referred this second petition to the Council of San Jose, and they reported the land to be vacant, and that it could be adjudicated for colonization. On this report the governor made the grant. It was confirmed by the departmental assembly, May 12th, 1840, with directions, "that the *espediente* be returned to his excellency the governor, for the proper ends." No final document in consummation of a perfect title issued to the grantee; nor was judicial possession given of the land, and in this unsurveyed condition the claim stood when the United States acquired the country.

If we are bound to take the last paper issued by the governor as concluding all reference to preceding steps in the progress of obtaining a complete title, then we find the grant inconsistent on its face. The argument urged on our consideration is that there are specific boundaries given as to the extent of the land granted, so that it is clearly a grant of all the land within these prescribed limits. In contravention of this assumption, the clause above recited directs that the officer giving judicial possession shall cause the land to be measured, according to the ordinance, and to mark boundaries; "the surplus to remain for the nation, for its uses." If it be true that the boundaries are conclusively defined in the grant, then no surplus could be thrown off by the survey. But if two leagues are to be surveyed within the larger limits, then the clause is consistent.

In the next place, it is insisted that the clause is a condition, *usual in all these grants, [*498 and amounts to little more than a mere formality. Ascribing to the clause usually declaring quantity only this degree of credence, then we are thrown on the recitals of the grant, and bound to look behind it, to the incipient steps, and to other title papers referred to, and from all these to ascertain how much land was intended to be conceded.

The claimants come before us, presenting an equity, their title not being completed, because the land has never been surveyed, and severed from the public domain. *U. S.* v. *Hanson*, 16 Pet. 200; *Rosa Pacheco's Case*, now decided.

We are called on to adjudge what the equities of claimants are; and to do this, it is proper "to look at all the several parts and ceremonies necessary to complete the title, and to take them together as one act." *Landes* v. *Brant*, 10 How. 372.

This court has uniformly held, in cases coming up by appeal from the district courts of Missouri and Florida, which adjudicated Span-

ish claims under the act of 1824, that the petition to the governor for land and his concession must be taken as one act, and the decree usually proceeded on the petition, which described the land as respected locality and quantity. This was necessarily so, as the concession was often a mere grant of the request, without other description than the petition contained.

And this is manifestly one of the rules of decision governing the tribunals in California, prescribed by the 11th section of the act of March 3d, 1851 (9 Stat. at L. 631). In this case the grant refers to the previous steps (including the petition, asking for only two leagues), and carries them along with the grant.

From all the acts, taken together, it is manifest that the decree of the district court, restricting the quantity to two square leagues, must be affirmed, if so much land is found within the out-boundaries of the tract of country set forth in the grant and *diseno;* otherwise, the less quantity.

499*] *THE UNITED STATES, *Appt.*,
v.
THE WIDOW AND HEIRS of Jose E. Berreyesa, Deceased.

(See S. C. 23 How. 499, 500.)

This court will not direct as to location of grant before the court below acts upon it.

Where the genuineness of this grant and the fulfillment of the conditions are fully established, and the validity on the claim is unquestionable, and where no question was decided in the court below upon the location of the lines of the tract, it would be irregular for this court to assume that the action of that court will not conform to the established rules on the subject.

As the decree of the district court has not been called in question by the appellees, should any difficulty arise in the location of the grant, it will be competent for the appellees to invoke the aid of that court.

Argued Feb. 28, 1860. Decided Mar. 12, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **E. M. Stanton** for appellants.

Mr. **E. L. Goold** for appellees.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellees were confirmed in their claim to a parcel of land in the county of Santa Clara, known by the name of San Vicente, and being a part of the Cañada de los Capitancillos, containing one square league, and adjoining the lands of Justo Larios.

They are the widow and heirs at law of Jose E. Berreyesa, who became possessed of the land in 1834, under the authority of the governor, Figueroa, and occupied it, with his family, until 1842. In that year he presented a petition to the governor, representing these facts, and complained that his neighbor Larios had disturbed his enjoyment and repose, and desired that there might be granted to him two *sitios*, from the house of Larios to the Matadera, with all the hills that belong to the Cañada. He says that he served the country in the army for twenty-four years and upwards, without receiving pay, and that he had with him eleven children.

A reference was made of the petition to the justice of the *pueblo*, who called Larios before him, and an agreement was then made between the parties in reference to the division line.

*This report was returned to the gov- [*500 ernor, who directed that a title should issue to the applicant, and that the *espediente* be remitted to the departmental Junta, for its approval. The decree and *titulo* describe a parcel of land included within natural boundaries; but in the conditions, it is confined to a single league in quantity.

Subsequently to this, Berreyesa complained to the governor of the limitation, insisting that his petitions had been for two leagues, and that he had returned the grant, to have it corrected. The governor directed the proper inquiries, and the result was to concede the prayer of the petitioner; but for some reason the grant did not issue.

The board of commissioners confirmed the claim of the petitioners for one square league; and this decree was confirmed by the district court on appeal, and it ordered the land to be located, according to the description and within the boundaries set out in the original grant, and delineated in the map contained in the *espediente*, to both of which reference is made for a more particular description. The genuineness of this grant and the fulfillment of the conditions are fully established, and the validity of the claim is unquestionable.

The appellees have requested the court to give instructions relative to the location and survey of this grant, similar to those found in the case of *The United States* v. *Fossat*, 20 How. 413. But no question was decided in the court below upon the location of the lines of the tract, and it would be irregular for this court to assume that the action of that court will not conform to the established rules on the subject. The decree of the district court has not been called in question by the appellees; and should any difficulty arise in the location of the grant, it will be competent for the appellees to invoke the aid of that court.

Decree affirmed.

ANDREW LAWRENCE, *Appt.*,
v.
HIRAM A. TUCKER.

(See S. C. 23 How. 14-28.)

Mortgage as security for future advances—new partners—variance in stating indebtedness.

Mortgage to secure future advances by firm, can stand as security for advances made after the admission of new partners into the firm.

A mortgage bona fide made, may be for future

NOTE.—*Mortgages for future advances, their validity and priority.*

Mortgages may be given as well to secure future advances or contingent debts as those which al-

advances by the mortgagee, as well as for present debts and liabilities.

If, upon investigation, the real transaction shall appear to be fair, the variance between the alleged indebtedness and the advances which were to be made afterwards, gives no additional equity.

Argued Feb. 29, 1860. Decided Mar. 19, 1860.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below, by the appellant, to redeem the furniture of a hotel in the city of Chicago, upon which the appellee had a mortgage.

The court entered a decree allowing redemption upon payment of $9,689.56.

The complainant, insisting that nothing was due upon the mortgage, or, if anything, a much less sum, took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **B. R. Curtis,** for appellant:

The question is, as against the complainant, a bona fide purchaser for a valuable consideration, with notice only of what appears of record, For what amount does the recorded mortgage to Tucker stand as security?

I. H. A. Tucker, individually, cannot set up this note against a subsequent incumbrance, as intended to cover future advances.

It is true that a mortgage may be taken to secure future advances; and perhaps, where no fraud is intended, a note for a sum of money may be given in consideration of such expected advances. But this mortgage, in effect, asserts that the note is not to stand for future advances. For it makes a specific and distinct provision for future advances, and expressly and clearly distinguishes between them and the note, which is in so many words declared not to have been given for future advances, but for that amount of money already due.

If H. A. Tucker, individually, had actually made advances subsequent to the mortgage, he could not have a lien by virtue of it, to secure advances by himself and his firm beyond the amount of $6,000, without being allowed to contradict the express and clear terms of the deed, which limits the future advances to that sum.

But he has advanced nothing. And the question is whether a mortgage to one partner, purporting to secure a debt due to him, individually, can, as against a bona fide purchaser, without notice of any parol understanding between mortgagor and mortgagee, be set up as a security for advances made by the firm, of which he is a member.

II. The mortgage expressly declaring that it was to stand as security for future advances only to the extent of $6,000, it cannot stand as security for any greater amount of such advances as against a junior incumbrancer, who has no notice of any parol agreement between the mortgagor and mortgagee, that it shall stand as security for a greater sum.

III. Upon the face of the mortgage and the whole evidence, it is not made out with the requisite certainty, that here was an original agreement between the mortgagors and mortgagees that the $5,500 note should stand as a continuing security for all future advances; and when advances to that amount had been made and repaid, that part of the security, if ever applicable to advances, was extinguished.

Truscott v. *King,* 6 N. Y. 147.

IV. This mortgage to H. A. Tucker, to secure future advances by the firm of H. A. Tucker & Co., cannot stand as security for advances made after the admission of new partners into the firm. A junior incumbrancer is affected only by the precise terms of the mortgage itself, which provides only for advances to be made by the then firm of H. A. Tucker & Co. Either the admission or retirement of a partner puts an end to the right to make further advances upon the credit of the security as against the junior incumbrancer, and if the amount due at the time of such change of the firm is afterwards balanced by payments on account, nothing remains due on the mortgage.

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ready exist and are certain and due. Conrad v. Atlantic Ins. Co. 26 U. S. (1 Pet.) 387, 447; Leeds v. Cameron, 3 Sumn. 448; U. S. v. Hooe, 7 U. S. (3 Cranch) 73; Hubbard v. Savage, 8 Conn. 215; Walker v. Snediker, Hoff. Ch. 145; Com. Bank v. Cunningham, 24 Pick. 270; Lyle v. Ducomb, 5 Binn. 585; Monell v. Smith, 5 Cow. 441; Lansing v. Woodworth, 1 Sandf. Ch. 43; Barry v. Merch's Ex. Co. 1 Sandf. Ch. 280, 314; Brinckerhoff v. Marvin, 5 Johns. Ch. 320; Bank of Utica v. Finch, 3 Barb. Ch. 297; Livingston v. McInlay, 16 Johns. 165; Truscott v. King, 6 N. Y. 160; Robinson v. Williams, 22 N. Y. 383; Shirras v. Calg, 11 U. S. (7 Cranch) 34; Garber v. Henry, 3 Watts, 57; Irwin v. Tabb, 17 S. & R. 423; Gordon v. Preston, 1 Watts, 385; Ackerman v. Hunsicker, 85 N. Y. 43.

If no sum is mentioned, but the purpose of the mortgage is stated to be to secure the payment of all future advances, or of all liabilities of a certain kind to be thereafter incurred, this will be sufficient, and if the instrument is sufficiently certain to be valid against the mortgagor it will be equally valid against all persons claiming under him. Youngs v. Wilson, 27 N. Y. 351; Robinson v. Williams, 22 N. Y. 380; Miller v. Lockwood, 32 N. Y. 299; Monell v. Smith, 5 Cow. 441; Kramer v. Trustees of Farm. Bank, 15 Ohio, 253; Merrills v. Swift, 18 Conn. 266; Loews v. De Forest, 20 Conn. 442; Ketchum v. Jauncey, 23 Conn. 127.

Where the mortgage is in form an absolute deed, and the defeasance is in parol, it is competent as between the parties that the transfer should be allowed to stand as security for further advances, even though the terms of redemption contemplated when conveyance was made did not provide for them; but where the mortgage recites the debt which it is made to secure, there is no implication of any intention to secure any futher debt. Jarvis v. Rogers, 15 Mass. 389; James v. Johnson, 6 Johns. Ch. 429; Odell v. Montross, 6 Hun, 115; Stoddard v. Hart, 23 N. Y. 556.

An equitable mortgage by deposit of deeds may be extended beyond the original purpose by implication or parol. Kensington, *ex parte,* 2 Ves. & B. 79, 2 Rose, 138.

A mortgage to secure future advances will not operate as a security for costs subsequently incurred. Shaw v. Neale, 6 H. L. Cas. 581, 4 Jur. N. S. 665, 27 L. J. Ch. 444.

A further sum agreed to be secured by pledge of property equitably mortgaged, is also tantamount to a further equitable mortgage; and possession of the deeds by the first mortgagee is a possession by the second. Factor v. Philpott, 12 Price, 197.

Where there is a mortgage for present and future advances and a subsequent mortgage of the same description, further advances made by the prior mortgagee, with notice of the subsequent mortgage, have no priority over antecedent advances made by the subsequent mortgagee. Rolt v. Hopkinson, 3 De G. & J. 177, 4 Jur. N. S. 1119, 28 L. J. Ch. 41.

Where it is part of the contract under which the mortgage is made, that the advances shall be made at certain fixed periods, and that the mortgagor shall then accept them and pay interest upon them, the rights of the parties become fixed at the date of delivery of the security, and the mortgage will be a protection against subsequent encumbrancers whose rights are acquired before the advances were actually made, except against purchasers for value

Bank of Scotland v. *Christie*, 8 Clark & F. 214; *Spiers* v. *Houston*, 4 Bligh, N. S. 515; *Pemberton* v. *Oakes*, 4 Russ. 154; *Cremer* v. *Higginson*, 1 Mas. 323; *Simson* v. *Cooke*, 1 Bing. 441, 452.

Without an agreement by the mortgagors to extend the operation of the security to the new firm, which binds only the debtor and his representatives, there is believed to be no case which holds that the right to make advances on the credit of the security continues after a change in the members of the firm.

See *Ex parte Oakes*, 2 Mont. D. & D. 234; *Ex parte Marsh*, 2 Rose, 239.

If there was such an agreement in this case, the complainant had no notice of it and is not bound by it.

The firm of H. A. Tucker & Co. was changed by the admission of new partners January 1, 1857, and all advances made previous to that date have been repaid.

Messrs. **S. F. Vinton** and **Thos. Hoyne**, for appellee:

1. What was the mortgage to Tucker intended to secure?

We claim that it was intended to secure any indebtedness that might arise in the manner specified therein, to an amount not exceeding at any one time the sum of $11,500; and that the actual knowledge of defendant's claim by the subsequent incumbrancers and by Lawrence, the purchaser, made them chargeable with what was in fact due on the mortgage not exceeding that sum, as the only condition on which they or any of them would be allowed to redeem the property. In other words, they can only redeem subject to the satisfaction of Tucker's prior equity, whatever that may be.

2. The cases which affirm the doctrine that a mortgage may be given to secure future advances or future liabilities, are very numerous.

Shirras v. *Caig*, 7 Cranch, 34; *Leeds* v. *Cameron*, 3 Sumn. 492; *Lyle* v. *Ducomb*, 5 Binn. 590; *Collins* v. *Carlisle*, 13 Ill. 256; and some of the leading American cases on this head.

In *Leeds* v. *Cameron*, Judge Story said: "Nothing can be more clear, both upon principle and authority, than that at the common law a mortgage bona fide made, may be for future advances and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities." He cites 3 Cranch, 73; 1 Pet. 448.

During the continuance of the dealing, the mortgage and the note for $5,500 were treated as, and understood by the parties to be, a continuing security for whatever advances might be made during the two years the contract was to last. And neither subsequent incumbrancers nor purchasers could suffer any prejudice, if due inquiry were made, from a mortgage the record of which was notice to all persons of an incumbrance to the extent of $11,500. They were interested in knowing what was in fact due when the subsequent incumbrance was taken and when the subsequent purchase was made, and they were interested no further.

The note of $5,500 states on its face that it was given for an actual loan of money, and consequently the mortgage, to the extent of that note, appears to have been given to secure a debt then due, and this presents the question.

As between the parties to the mortgage, there can be no question but that parol evidence can be given to show that the note and mortgage were taken as collateral security for advances thereafter to be made, and that, in fact, such advances were subsequently made on the faith of that security. It is one of the most ancient principles of a court of equity, that if a deed be absolute on its face, it may be proved by parol in a court of equity, that it was a conditional conveyance given to secure a loan of money.

Whether such proof will be let in against third persons will depend upon the fact whether the mis-statement or misrepresentation in the deed was made for a dishonest purpose, or

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without notice from the public records or otherwise. In such a case, the debt is present, and the security is as valid as if the advances were made at its date. Crane v. Deming, 7 Conn. 387; Boswell v. Goodwin, 31 Conn. 74; Rowan v. Sharpe Rifle Mfg. Co. 29 Conn. 329; Griffin v. Burnett, 4 Edw. 637.

Where the mortgagee is not obligated to make the advances, he holds a lien upon the land, at any given time, for the actual amount of his advances at that time, and if with knowledge of a subsequent lien he makes further advances, his rights as to the new advances would be inferior to the subsequent lien. Robinson v. Williams, 22 N. Y. 380; Bissell v. Kellogg, 60 Barb. 617; Brinckerhoff v. Marvin, 5 Johns. Ch. 320; Craig v. Tappin, 2 Sand. Ch. 90; Lansing v. Woodworth, 1 Sand. Ch. 45; Kramer v. Trustees Farm. Bank, 15 Ohio, 253; Merrills v. Swift, 18 Conn. 266; Lewis v. De Forest, 20 Conn. 442; Ketchum v. Jauncey, 23 Conn. 127; Carpenter v. Blote, 1 E. D. Smith, 491; Bank of Montgomery Co. Appeal, 36 Penn. St. 172; Bell v. Fleming, 1 Beasley (N. J.) 1; Frye v. Bank of Illinois, 11 Ill. 367; Ketcham v. Wood, 22 Hun, 64.

As to what is notice, the decisions vary. See McDaniels v. Colvin, 16 Vt. 300; Truscott v. King, 6 Barb. 346, Rev'd, 6 N. Y. 147; Spader v. Lawler, 17 Ohio, 371; Ten Hoven v. Kerns, 2 Penn. St. 96; Parmentier v. Gillespie, 9 Penn. St. 86; Boswell v. Goodwin, 31 Conn. 74.

If the mortgage be nominally for a certain sum, it cannot be shown to have been intended as a lien for a greater sum, and moneys not mentioned in the mortgage cannot be covered by it to the prejudice of subsequent liens. Truscott v. King, 6 N. Y. 147; St. Andrews' Ch. v. Tompkins, 7 Johns. Ch. 14; Bank of Utica v. Finch, 3 Barb. Ch. 293; Walker v. Snediker, Hoff. Ch. 146; Pettibone v. Griswold, 4 Conn. 158; Stoughton v. Pasco, 5 Conn. 442; Shepard v. Shepard, 6 Conn. 37; Hubbard v. Savage, 8 Conn. 215; Hart v. Chalker, 14 Conn. 77; Garber v. Henry, 6 Watts, 57; Townsend v. Empire Stone Dressing Co. 6 Duer, 208.

A mortgage duly recorded, given to secure future indorsements or advances, has a preference over subsequent judgments against the mortgagor, as well as to advances or indorsements upon the faith thereof subsequent to the rendition of judgment, without notice thereof, as to those previously made; and this without regard to the question whether the indorsements or advances were optional or obligatory. The docketing of a judgment is not, under the registry laws of New York, constructive notice to the mortgagee of its existence. Record of such a mortgage is notice to subsequent encumbrancers. Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621, 12 Week. Dig. 265, 21 Hun, 53, apv'd. A mortgage is only a prior lien, as against an intervening judgment, to the extent of the advances at the time of entering the judgment. Wilder v. Butterfield, 50 How. Pr. 385.

National bank has no power under the act of Congress to take a mortgage to secure future indebtedness. Crocker v. Whitney, 71 N. Y. 161.

A mortgage intended as a security for a present and continuing indebtedness is valid between the parties; and if free from fraud, as to creditors also. Brown v. Keefer, 71 N. Y. 610.

A mortgage to secure payment for services to be rendered in future by the mortgagee and a third person, is valid as against intervening encumbrances. Hall v. Crouse, 13 Hun, 557.

whether such third person has been deceived or injured by it.

Shirras v. *Caig*, 2 Pet. Cond. 410.

The misrepresentation in Tucker's mortgage, if it may be called such, has neither injured nor deceived the subsequent incumbrancers nor the purchasers under them, nor was it made for an unfair or dishonest purpose. If the complainant could prove any of these facts, he had the right and an opportunity to do it. And they are not to be presumed in the absence of proof.

Judge Curtis in his brief has raised the question whether the mortgage can stand as a security for advances made by the firm of H. A. Tucker & Co., after the admission of new partners into that concern.

The complainant comes into court asking for equity, and praying that the defendant's legal title to the property mortgaged may be taken from him by a decree of the court. That being his attitude, he will not be likely to meet with much encouragement in setting up technicalities to deprive the defendant of his honest rights.

Lyle v. *Ducomb*, 5 Binn. 590, was a case where defendant, Ducomb, gave a bond for $18,000 conditioned to pay $9,000, with a mortgage on real estate. By an indorsement on the mortgage it was stated that it was made to secure the plaintiff for notes drawn and to be drawn by him, and by Lyle and Newman, for Ducomb's accommodation.

Objection was made that a mortgage intended as an indemnity against acts to be performed at a subsequent time ought not to have any effect against third persons.

Tilghman, Justice, said: "This point was very properly abandoned. There cannot be a more fair bona fide and valuable consideration than the drawing and indorsing of notes at a future period, for the benefit and at the request of the mortgagor, and nothing is more reasonable than the providing a sufficient indemnity before hand."

In that case, six months after the making of the mortgage, and after a builder's lien had attached to the property, the mortgagor and mortgagee entered into an agreement that a description of notes not before embraced by the mortgage, and made by a different drawer than the drawers named in the mortgage, should be embraced therein. Held, that the parties had a right to make such agreement, as between themselves, and that it was also good as to third parties who were intervening incumbrancers, if the amount of the mortgage incumbrance were not thereby increased beyond the amount which the mortgage was intended to secure.

5 Binn. 589.

This doctrine would seem to dispose of the objection we are now considering. In the case of *The Commercial Bank* v. *Cunningham*, 24 Pick. 270. the mortgagors, who were a firm under the name of Edgarton, Whitcomb, & Co., made a mortgage to secure their existing debt, and also future debts they might owe mortgagees, and afterwards mortgagors admitted a new partner into the firm, which assumed a new name. Held, that notes given by the new firm were covered and secured by the mortgage.

Upon no known principle of equity can the defendant be deprived of his legal and equitable lien upon the property mortgaged to him, until he is paid the full amount equitably covered by the mortgage, and due to him and to the other parties named in the deed.

Mr. Justice Wayne delivered the opinion of the court:

We have been unable to find anything in this record to authorize us to change or modify the decree made by the circuit court in this case.

Andrew Lawrence filed his bill in that court, for the northern district of Illinois, against Hiram A. Tucker, to redeem the furniture of a hotel in the city of Chicago, called the Briggs House, upon which Tucker has a mortgage.

On the 1st of September, 1856, John J. Floyd and George *H. French, who then were the [*23 keepers of that hotel, wishing to have a current business credit with Tucker and the firm of H. A. Tucker & Co., and the bank named in the mortgage, executed, under the firm of Floyd & French to Hiram A. Tucker, a mortgage of the furniture of the hotel, to secure a note of Floyd & French, made to Tucker, for $5.500, and such advances of money as there had been or might be made within two years, by H. A. Tucker, H. A. Tucker & Co., or the Exchange Bank of H. A. Tucker & Co., not to exceed in all an indebtment of $6,000 in addition to the sum for which their note was given. The note was dated on the 1st of September, the day on which the mortgage was made, payable one day after date, with interest at the rate of ten per cent per annum. The note was to be held by Tucker, as a collateral security for such advances as have just been stated, and the amount of the note also. Under his arrangement, successive advances were made to Floyd & French, on their checks, or by discount of their notes, until some time in October, 1857, when they ceased.

Tucker, during this time, continued to hold the note for $5,500. He also held several other promissory notes of Floyd & French, as appears by the exhibits, C, D, E, G, H, annexed to Tucker's answer to the complainant's bill All of these notes, except that for $2,000, are drawn payable to H. A. Tucker; all of them are prior in dates to other mortgages upon the same furniture, except the note just mentioned for $2,000, and that was a renewal of a note for a loan made on the 26th September, 1857, prior to the date of the mortgages made to Briggs & Atkyns. The mortgage to Briggs was made on the 19th November, 1857, by Floyd & French, and one Ames, who had been taken into their firm. It was given to secure debts due to Briggs, and liabilities he had assumed for them, and also for such advances of money as Briggs might thereafter make to them, with a power of sale on default. When Briggs took this mortgage, he knew that Tucker had a prior mortgage on the same furniture, and he states in his evidence that he knew advances of money had been made upon it by Tucker, for which he knew it stood as a security.

*On the 12th of January, 1858, Floyd & [*24 French and Ames made a third mortgage of the same property to Henry Atkyns, as trustee, with a like power of sale, to secure debts mentioned in it. Both of these mortgages refer to Tucker's mortgage as an existing encumbrance upon the furniture, etc., etc. Briggs and Atkyns had then, of course, notice of Tucker's mortgage.

Atkyns sold the furniture under his power

of sale on the 27th February, 1858; Briggs sold under his power of sale on the 12th March following. Lawrence became the purchaser at both sales. Briggs sold to him expressly, subject to the mortgage of Floyd & French to H. A. Tucker; and Lawrence admits, by a stipulation in the record, that when he purchased the property under the mortgages, he had notice that either the defendant Hiram A. Tucker or H. A. Tucker & Co. held the notes against Floyd & French, as they are set forth in the defendant's answer, and that the amount was claimed to be due upon them, as it is set out in the answer.

Upon referring to that answer, and its exhibits, C, D, E, G, H, we find that the only securities now claimed to be due are, with one exception, notes of hand given by Floyd & French, payable to the order of H. A. Tucker alone, precisely within the mortgage, and that the note of December 18th, 1857, payable to H. A. Tucker & Co., for the sum of $2,000, payable at the counting-house of H. A. Tucker & Co. in Chicago, was for an actual loan of money, and that it was the renewal of a former note for the same sum, dated the 26th September, 1857.

We have, then, the admission of the complainant, that when he purchased under the mortgages of Briggs & Atkyns he knew the particular items constituting the outstanding unpaid debt of Floyd & French to Hiram A. Tucker and H. A. Tucker & Co. for advances. One of these notes, dated the 14th October, 1857, was for $1,000, exhibit C; another, dated 22d October, 1857, exhibit D, was for $3,000; the third, exhibit E, dated July 11, was for $450; exhibit G, of the same date, was a note for the sum of $5,000; and exhibit H, dated the 18th December, 1857, was for $2,000.

Floyd, who did the financial business of the 25*] firm of Floyd *& French, testifies that the notes just mentioned were given for advances; but he claims a credit of $1,500 on the note, exhibit D; and states that the note for $450, exhibit E, had not been given for money advanced, but that it and another note for the same amount were given for the interest for one year on the note for $5,500. Floyd also states that the note marked exhibit I, for $5,500, was signed by himself when he signed the mortgage, and that he personally made the negotiation with H. A. Tucker & Co.

It is further stated by him, that the aggregate amount of all the advances which had been made by the defendant to his firm upon the faith of the note and the mortgage, since the first of September, 1856, amounted to "from fifty to a hundred thousand dollars," and that the sum now remaining due was "somewhere in the vicinity of $10,000." He verifies the notes named in the exhibits, C, D, E, G, H, with the originals; confirms the statement in exhibit A of the discounts which his firm had received under the note and mortgage; and adds, that when the note and mortgage were given, his firm then owed to H. A. Tucker & Co. $2,500, which was paid on the 7th September, 1856; and repeats in his cross-examination what he had said in his examination in chief, concerning the amount of the discounts and cash received from H. A. Tucker & Co. under the note and mortgage.

It must have been upon the testimony of this witness that the court below gave its decree.

But we have not referred to it with the view of testing the correctness of the sum allowed to the defendant, as the condition upon which the complainant might redeem the mortgage—though, having made the computation, we find it to be correct, with a small mistake. Our object has been to show that the parties to the original transaction understood it alike, and acted upon it accordingly; that there never was a difference between them as to the character of the mortgage and its purpose; and that it was intended to be a security for and a lien upon the property mortgaged for future advances, to the extent of the sum provided for in it. So, also, Floyd & *French represented [*26 it to be in their transactions with others, when they found it convenient to their business to give other mortgages upon the same property for the security of other creditors.

We consider it to be a mortgage for future advances, that they were subsequently made in conformity with its provisions, and that the proofs that they were so, were rightly received by the court below to substantiate them. There is neither indirectness nor uncertainty in the terms used in the mortgage, to make it doubtful that it was intended to cover the note for $5,500 and for future advances. It is stated in terms that it was intended for that purpose. The note, though expressed to be an existing indebtedness at the date of the mortgage, secured to be paid by a promissory note, payable one day after date, is associated with the advances to be made to Floyd & French to the amount of $6,000; but it is proved that the note and mortgage were in fact taken as a security for advances thereafter to be made, and that it was done without any other purpose than to get a credit extended to them of $11,500, instead of advances only to the amount of $6,000. It is objected that the difference makes the transaction subsidiary.

An objection of this kind was made in the case of *Shirras* v. *Caig*, 7 Cranch, 34; but this court then said, it is true the real transaction does not appear on the face of the mortgage; the deed purports to have been a debt of £30,000, due to all of the mortgagees. It was really intended to have different sums due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be encountered to an uncertain amount. After remarking that such misrepresentations of a transaction are liable to suspicion, Chief Justice Marshall adds: "But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." In this case, the complainant has not been *deceived, and the variance [*27 between the alleged indebtedness and that advances were to be made afterwards gives to his suit no additional force or equity.

No proof was given by the complainant that he had been injured or deceived by it into making his purchase under the mortgages of Briggs

and Atkyns, and that cannot be presumed in his behalf. In fact, there is not an averment in the complainant's bill in favor of the equity of his demand, which is not met and denied in the defendant's answer, and which has not been disproved by competent testimony. We do not think there is anything in the objection that the mortgage to H. A. Tucker to secure future advances by the firm of H. A. Tucker & Co. cannot stand as security for advances made after the admission of new partners into that firm. The cases cited in support of this objection do not sustain it, and we have not been able to find any one that does. They relate exclusively to stipulations for an advancement of money to a copartnership after a new member has been taken into the firm.

In respect to the validity of mortgages for existing debts and future advances, there can be no doubt, if any principle in the law can be considered as settled by the decisions of courts. This court has made three decisions directly and inferentially in support of them: *U. S.* v. *Hooe*, 3 Cranch, 73; *Conard* v. *Atlantic Insurance Company*, 1 Pet. 448; *Shirras* v. *Caig*, 7 Cranch. 34. Tilghman, Ch. J., says, in *Lyle* v. *Ducomb*, 5 Binn. 590, "there cannot be a more fair, bona fide, and valuable consideration than the drawing or indorsing of notes at a future period, for the benefit and at the request of the mortgagors; and nothing is more reasonable than the providing a sufficient indemnity beforehand." Mr. Justice Story declared, in *Leeds* v. *Cameron*, 3 Sumn. 492, that nothing can be more clear, both upon principle and authority, than that at the common law a mortgage, bona fide made, may be for future advances by the mortgagee as well as for present debts and liabilities. I need not do more upon such a subject than to refer to the cases of *The U. S.* v. *Hooe*, 3 Cranch, 73, and *Conard* v. *The Atlantic Insurance Company*, 1 Pet. 448.

28*] **We affirm the decree of the Circuit Court in this case, and shall remand it there for execution.*

LEWIS TEESE and Lewis Teese, Jr., *Plffs. in Err.*,

v.

C. P. HUNTINGDON and Mark Hopkins.

(See S. C. 23 How. 2-14.)

Counsel fees, not damages—patent right—notice of special defense—order not necessary—second notice—depositions—credit of witness, how impeached.

Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right.

In such action, the act of Congress requires that notice of special matter to be offered in evidence at the trial shall be in writing, and be given to the plaintiff, or his attorney, more than thirty days before the trial.

This is a right conferred upon the defendant; and he may exercise it in the manner and upon the conditions therein pointed out, without any leave or order from the court.

When the notice is drawn, served and filed in court, nothing further is required to give the defendant the full and unrestricted benefit of the provision.

The defendant is required to specify in such notice the persons on whose prior knowledge of the alleged improvement he relies to disprove the novelty of the invention, and the place or places where the same had been used.

Compliance with this provision, on the part of the defendant, is a condition precedent to his right to introduce such special matter under the general issue.

He may give the requisite notice without any leave or order from the court.

If the first notice served is defective, or not sufficiently comprehensive, he may give another, more than thirty days before the trial.

Depositions taken before the notice was served, as well as those taken afterwards, are admissible, provided the statements of the deponents are applicable to the matters thus put in issue between the parties.

A witness, to impeach the credit of another, must know what is generally said of the witness whose credit is impeached by those among whom the last named witness resides, to be able to answer the inquiry, either as to his general character, or as to his general reputation for truth and veracity.

He is not required to speak from his own knowledge of the act from which the reputation of the witness has been derived, nor is he allowed to do so.

But he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant.

Any question that does not call for such knowledge is an improper one, and ought to be rejected.

The question, "What is the reputation of the witness for moral character?" was properly excluded.

Such testimony may also be excluded by the court, when it applies to a period of time so remote as to become entirely unsatisfactory and immaterial.

As the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court.

When the witness had already stated that he was not able to answer the question, the discretion of the court was not unreasonably exercised by excluding it.

Argued Mar. 15, 1860. Decided Mar. 26, 1860.

IN ERROR to the Circuit Court of the United States for the District of California, in and for the Northern District of California.

This was an action on the case brought in the court below, by the plaintiffs in error, to recover damages resulting from an alleged infringement of certain letters patent.

The trial below having resulted in a verdict and judgment in favor of the defendants, the plaintiffs sued out this writ of error:

NOTE.—*Competency of witness as to general reputation*—see note, 53 C. C. A. 109.

Impeaching witness by proof of character. Scope of the inquiry as to character and time.

An impeaching or sustaining witness is not to speak of the reputation unless he knows it, and such knowledge must be founded upon an acquaintance and intercourse with the neighbors and acquaintances of the individual whose character is in question, and that intercourse must be of some length of time—sufficient at least to enable him to gather the general estimation in which he is held in the community in which he resides. Curtis v. Fay, 37 Barb. 64; State v. Boswell, 2 Dev. 209; People v. Rector, 19 Wend. 569.

Particular facts cannot be inquired into. A witness is never permitted to speak of his knowledge of particular facts from which he draws an opinion of the witness examined. Particular instances of want of veracity or destitution of moral principle or particular immoral conduct is not admissible. Anon. 1 Hill, 257; Boyd v. Lewis, 13 Johns. 504; Evans v. Smith, 5 Mon. 263; State v. Collins, 3 Dev. 117; Kimmel v. Kimmel, 3 Serg. & R. 336; Wike v. Lightner, 11 Serg. & R. 198; Rex v. Hodgson, Russ. & Ry. 209; Rex v. Clark, 2 Stark. 241; Greaton v. Smith, 1 Daly, 380; Patriotic Bank v. Coote, 3 Cranch, C. C. 169; United States v. Millasters, 4 Cranch, C. C. 479; United States v. White, 5 Cranch, C. C. 38; Corning v. Corning, 2 Seld. 97; Varona v. Socarras, 8 Abb. Pr. 302.

General character for drunkenness is not admissible (Brindle v. McIlvaine, 10 Serg. & R. 282); nor that the witness has been indicted, no conviction

A further statement of the case appears in the opinion of the court.

Mr. **P. Phillips,** for plaintiffs in error:

By the 15th section of the act of July 4, 1836, it is provided that "whenever the defendant relies, in his defense, on the fact of a previous invention, knowledge or use of the thing patented, he should state in his notice of the special matter, the names and places of the residence of those whom he intends to prove to have possessed prior knowledge of the thing, and where the same had been used.

The object of the notice is to prevent surprise, to enable the patentee fully to vindicate his rights. The notice is, therefore, to be strictly construed, and no evidence variant from it is admissible.

Phil. & T. R. Co. v. *Stimpson,* 14 Pet. 459; *Silsby* v. *Foote,* 14 How. 222; *Seymour* v. *McCormick,* 60 U. S. (19 How.) 107.

If the evidence was inadmissible under the first notice, it could not be made good by a notice subsequent to the filing of the depositions.

Evidence was offered to impeach the character of one of the defendants' witnesses, by showing his "general reputation for moral character." It was objected that "the inquiry should be limited to his general reputation for truth and veracity;" and the objection was sustained.

The authorities on this point are to be found carefully collated in 21 Amer. L. J. N. S. 145, where it is said that so far as the decisions in England are concerned, "they are unanimous to the point that the true criterion of the credit of a witness is his general character and conduct, and not his general character for truth and veracity. The English books will be examined in vain for a single authoritative case which, in any respect, limits the examination upon this point to the character for truth and veracity."

Upon examination it will be found that this rule obtains in most of our states.

Other evidence was then offered to prove the reputation of the witness from 1850 to 1853, for truth and veracity. To which it was objected that "the dates named were too remote, and that the reputation of the witness at a period less remote from the time of trial, could be alone put in issue." This objection, also, was sustained.

Four years is certainly a short statute of limitations in favor of reputation. Whatever influence the question of time was entitled to was for the jury to consider. The judge could not exclude the evidence as incompetent, for there is neither common-law rule nor statute to justify it.

Messrs. **Charles O'Conor and George Gifford,** for defendants in error:

1. The objection to the introduction of evidence of Haight to prove what would be a reasonable counsel fee, was properly sustained.

No recovery can be had in an action for the infringement of a patent, for counsel fees.

Stimpson v. *The Railroads,* 1 Wall. Jr. 164; 2 Robb. 595; *Arcambel* v. *Wiseman,* 3 Dall. 306; *Whittemore* v. *Cutter,* 1 Gall. 429; 1 Robb. 29, 36.

As to the meaning of actual damages, see *Seymour* v. *McCormick,* 16 How. 489, 490.

2. The objection to the inquiry as to Jesse Morrill's reputation for "moral character," was properly sustained.

It is not in any case proper to seek to impeach a witness by proving what was his reputation for moral character. The inquiry should be as to his reputation for truth and veracity.

U. S. v. *Van Sickle,* 2 McLean, 219; *Gass* v. *Stinson,* 2 Sumn. 610; *Gilbert* v. *Sheldon,* 13 Barb. 623; *The People* v. *Rector,* 19 Wend. 569; *Jackson* v. *Lewis,* 13 Johns. 504; *The State* v. *Bruce,* 24 Me. 71, 72; *Phillips* v. *Kingfield,* 19 Me. 375; *Commonwealth* v. *Moore,* 3 Pick.

having followed (Gibbs v. Osborn, 2 Wend. 555); nor that he has heard witness accused of petit larceny. Barton v. Morphes, 2 Dev. 520.

The scope of the inquiry seems to be: 1. What is the general character of the witness? 2. What is his general character for veracity? 3. Is he to be believed under oath from his general character? General character and common reputation must never be departed from, though the question need not be restricted to an inquiry as to truth and veracity. Wilke v. Lightner, 11 Serg. & R. 199; Noel v. Dickey, 3 Bibb, 268; Blue v. Kibby, 1 Mon. 195; Hume v. Scott, 3 Marsh. 260; State v. Stallings, 2 Hayw. 300; State v. Boswell, 2 Dev. 209; Anon. 1 Hill, 251, 258, 259; People v. Mather, 4 Wend. 257, 258; 1 Starkie, Ev. 146; 1 Phil. Ev. 212; Rex v. Bispham, 4 C. & P. 392; Fulton Bank v. Benedict, 1 Hill (N. Y.) 558, 559.

The impeaching witness may be cross-examined as to the grounds of his opinion, and how long the unfavorable reports have prevailed, and from what particular individuals he heard them, and as to his opportunity of knowing the character of the impeached witness. State v. Boswell, 2 Dev. 212; Fulton Bank v. Benedict, 1 Hall (N. Y.) 558; People v. Mather, 4 Wend. 257, 258; Lower v. Winters, 7 Cow. 265; Bakeman v. Rose, 18 Wend. 146.

The general character of the impeaching witness may be assailed in the same way as that of the first. Noel v. Dickie, 3 Bibb, 268; Starks v. People, 5 Denio, 106.

The character of a witness may be impeached by persons in whose neighborhood the attacked witness has resided until within *four* years of the trial, though they know nothing of the character borne by the witness at the place to which he had removed. Sleeper v. Middleworth, 4 Denio, 431.

The law does not presume that a person of mature age, whose general character has been notoriously bad up to within a period of five years, has so reformed as to have acquired an unimpeachable reputation since that time. Rathbun v. Ross, 46 Barb. 127.

The inquiry is not, in its nature, limited as to time. People v. Abbot, 19 Wend. 192.

The law lays down no certain limit to inquiries as to the general reputation of a witness. A limitation to a period of five years before trial, held to be error. Stevens v. Rogers, 25 Hun, 54.

A person is not a competent witness to testify to the general character of another witness unless he knows it. It is not sufficient, that he has heard a number of people, on a single occasion, speak ill of such witness, without proof that they knew his character; but the knowledge to make him competent must be acquired by time and by the general speech of people who know or have had an opportunity to know and form an opinion. Cheritree v. Roggen, 67 Barb. 124.

To discredit a witness it is not competent to prove general bad character disconnected with the inquiry concerning his veracity. United States v. Van Sickle, 2 McLean, 219; United States v. Dickinson, 2 McLean, 325; see Teese v. Huntingdon, *supra.*

The usual questions asked in United States courts to discredit a witness are, What is the witness's general reputation for truth? Is it good or bad? Gass v. Stinson, 2 Sumn. 605.

It is not improper to ask the person on the stand, What is the general "reputation" for truth of the witness sought to be impeached. It is even more proper than to ask what is his general "character" for truth. Knode v. Williamson, 84 U. S. (17 Wall.) 586.

194, 196; *Morse* v. *Pineo*, 4 Vt. 281; *State* v. *Smith*, 4 Vt. 141, *Spears* v. *Forrest*, 15 Vt. 435; *State* v. *Randolph*, 24 Conn. 363; *State* v. *Howard*, 9 N. H. 485; *Gilchrist* v. *McKee*, 4 Watts, 380; *Chess* v. *Chess*, 1 Pa. 32; *Uhl* v. *Commonwealth*, 6 Grat. 706; *Ward* v. *The State*, 28 Ala. 53; *Ford* v. *Ford*, 7 Humph. 92; *Jones* v. *The State*, 13 Tex. 168; *Perkins* v. *Mobley*, 4 Ohio St. 668; Tayl. Ev. § 1083.

3. The testimony was properly excluded, as to what was the reputation of Jesse Morrill in 1852 or 1853—about five years before the trial.

It does not appear that said Morrill was a witness called by the defendants. He is not named in the notices of special matter of defense as one of the defendants' witnesses, and he is not named in the lists of witnesses examined by the defendants.

It must appear by the record that he was called by the defendants, or this objection for that reason must fall.

The mere assertion of facts in the assignment of errors to show error, cannot be substituted for the record.

Judiciary act of 1789, § 22; Conkl. Tr. 3d ed. 689; *Stevens* v. *Gladding*, 60 U. S. (19 How.) 64; *Parsons* v. *Bedford*, 3 Pet. 433, 445.

A party cannot impeach a witness called by himself, by proving him unworthy of belief.

Grah. & Wat. N. T. 953.

The court below ruled out the evidence offered to impeach Morrill, and except so far as the record shows, this court has no means of knowing why. All presumptions are in favor of the correctness of the ruling.

2 Grah. & Wat. N. T. 596 to 599, and cases.

There must be a limit of time, back of which a party cannot go to prove the reputation of a witness to impeach him; else to impeach a man on a trial to-day, it might be proved what his reputation was, for truth and veracity, fifty years ago.

There is no specific time fixed by law, and it must be left to the discretion of the judge at the trial.

V. The only object of granting a new trial in any case is to prevent injustice, and where the court sees that substantial justice has been done, it will not order a new trial, although there has been some irregularity or error at the trial.

See *Horford* v. *Wilson*, 1 Taunt. 12; *Doe* v. *Tyler*, 6 Bing. 561; *Stiles* v. *Tilford*, 10 Wend. 338; *Smith* v. *Harmanson*, 1 Wash. Va. 6.

The record in this case shows that, without the evidence objected to, if there had been a verdict for the plaintiff, the court would have set it aside as being against evidence.

Corbett v. *Brown*, 8 Bing. 33; *Kohne* v. *Ins. Co.* 1 Wash. C. C. 123.

The court will not grant a new trial for the plaintiff to try for a verdict which they would set aside, if rendered.

Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the northern district of California. According to the transcript, the declaration in this case was filed on the 18th day of March, 1856. It was an action of trespass on the case for an alleged infringement of certain letters patent purporting to have been duly issued to the plaintiffs for a new and useful improvement in a certain machine or implement called a sluice fork, used for the purpose of removing stones from sluices and sluice boxes in washing gold. As the foundation of the suit, the plaintiffs in their declaration set up the letters patent, alleging that they were the original and first *inventors of the improvement [*7 therein described, and charged that the defendants, on the 2d day of July, 1855, and on divers other days and times between that day and the day of the commencement of the suit, unlawfully and without license vended and sold a large number of the improved forks made in imitation of their invention. To this charge the defendants pleaded the general issue, and in addition thereto, set up in their answer to the declaration two other grounds of defense. In the first place, they denied that the plaintiffs were the original and first inventors of the improvement described in the letters patent, averring that the supposed improvement was known and used by divers other persons in the United States long before the pretended invention of the plaintiffs. They also alleged that the improvement claimed by the plaintiffs, as their invention, was not the proper subject of a patent within the true intent and meaning of the patent law of the United States.

By the 15th section of the patent act of the 4th of July, 1836 (5 Stat. at L. 117), the defendant, in actions claiming damages for making, using, or selling, the thing patented, is permitted to plead the general issue, and for certain defenses, therein specified, to give that act and any special matter in evidence which is pertinent to the issue, and of which notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. Within that provision, and subject to that condition, he may, under the general issue, give any special matter in evidence tending to prove that the patentee was not the original and first inventor or discoverer of the thing patented, or a substantial and material part thereof claimed as new, or that it had been described in some public work anterior to the supposed discovery by the patentee, or had been in public use, or on sale, with the consent and allowance of the patentee, before his application for a patent. But whenever the defendant relies in his defense on the fact of a previous invention or knowledge or use of the thing patented, he is required to "state in his notice of special matter the names and places of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."

*Two written notices were accordingly [*8 given by the defendants of special matter to be offered in evidence by them at the trial, in support of the first ground of defense set up in the answer to the declaration. One was dated on the 28th day of August, 1856, and the other on the 19th day of September of the succeeding year, but they were both duly served and filed in court more than thirty days before the trial. Upon this state of the pleadings the parties, on the 20th day of October, 1857, went to trial, and the jury, under the rulings and instructions of the presiding justice, returned their verdict for the defendants. After the plaintiffs had intro-

duced evidence tending to prove the alleged infringement of their patent, they claimed that counsel fees were recoverable as damages in this action, and offered proof accordingly, in order to show what would be a reasonable charge in that behalf.

That evidence was objected to by the defendants, upon the ground that counsel fees were not recoverable as damages in actions of that description, and the court sustained the objection, and excluded the evidence. To which ruling the plaintiffs excepted. Little or no reliance was placed upon this exception by the counsel of the plaintiffs, and in view of the circumstances, one or two remarks upon the subject will be sufficient. Suppose it could be admitted that counsel fees constituted a proper element for the consideration of the jury, in the estimation of damages in cases of this description; still the error of the court in excluding the evidence would furnish no ground to reverse the judgment, for the reason that the verdict was for the defendants. For all purposes connected with this investigation, it must be assumed, under the finding of the jury, that the plaintiffs were not entitled to any damages whatever; and if not, then the evidence excluded by the ruling of the court was entirely immaterial. But the evidence was properly rejected on the ground assumed by the presiding justice.

Counsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right. The point has been directly 9*] *ruled by this court, and is no longer an open question. Jurors are required to find the actual damages incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has caused unnecessary expense and injury to the plaintiff, the court may render judgment for a larger sum, not exceeding three times the amount of the verdict. 5 Stat. at L. p. 123; *Day* v. *Woodworth*, 13 How. 372. To maintain the issue on their part, the defendants offered three depositions, each tending to prove that the plaintiffs were not the original and first inventors of the improvement described in their letters patent.

Objection was seasonably made by the plaintiffs to the introduction of each of these depositions on two grounds: (1) Because the first notice of special matter to be introduced at the trial did not accord with the proof offered, as contained in these depositions; (2) because the second notice of special matter to be thus introduced was served and filed without any order from the court and, therefore, should be disregarded.

Exceptions were duly taken to the respective rulings of the court, in admitting each of these depositions; but as they all depend upon the same considerations, they will be considered together.

It is conceded by the defendants that the first notice was, to some extent, insufficient. On the other hand, it is admitted by the plaintiffs that the terms of the second notice were sufficiently comprehensive and specific to justify the rulings of the court, in allowing the depositions to be read to the jury. They, however, insist upon the objection, taken at the trial, that it was served and filed without any order of the court, and that it was insufficient, because it was served and filed subsequently to the time when the depositions were taken and filed in court.

But neither of these objections can be sustained. All that the act of Congress requires is, that notice of the special matter to be offered in evidence at the trial shall be in writing, and be given to the plaintiff, or his attorney, more than thirty days before the trial. By the plain terms of the law, it is a *right conferred [*10 upon the defendant; and of course he may exercise it in the manner and upon the conditions therein pointed out, without any leave or order from the court. When the notice is properly drawn, and duly and seasonably served and filed in court as a part of the pleadings, nothing further is required to give the defendant the full and unrestricted benefit of the provision.

Such notice is required, in order to guard patentees from being surprised at the trial by evidence of a nature which they could not be presumed to know or be prepared to meet, and thereby subject them either to delay or a loss of their cause. To prevent such consequences, the defendant is required to specify the names and places of residence of the persons on whose prior knowledge of the alleged improvement he relies to disprove the novelty of the invention, and the place or places where same had been used. *Wilton* v. *Railroads*, 1 Wall. Jr. 195.

Compliance with this provision, on the part of the defendant, being a condition precedent to his right to introduce such special matter under the general issue, it necessarily follows that he may give the requisite notice without any leave or order from the court; and for the same reason, if he afterward discovers that the first notice served is defective, or not sufficiently comprehensive to admit his defense, he may give another, to remedy the defect or supply the deficiency, subject to the same condition that it must be in writing, and be served more than thirty days before the trial.

Having given the notice as required by the act of Congress, the defendant at the trial may proceed to prove the facts therein set forth by any legal and competent testimony. For that purpose, he may call and examine witnesses upon the stand, or he may introduce any deposition which has been legally taken in the cause. Under those circumstances, depositions taken before the notice was served, as well as those taken afterward, are equally admissible, provided the statements of the deponents are applicable to the matters thus put in issue between the parties.

After the defense was closed, the plaintiffs offered evidence *to impeach one of the wit- [*11 nesses, who had given material testimony for the defendants. When called, the impeaching witness stated that he knew the witness sought to be impeached, and knew other persons who were acquainted with the witness, and that they both resided in the city of Sacramento; whereupon, the counsel of the plaintiffs put the question, "What is the reputation of the witness for moral character?" To that question, the counsel of the defendants objected, on the ground that the inquiry should be limited to the general reputation of the witness for truth and veracity, with the right to put the further inquiry whether the witness testifying would believe the

other on his oath; and the court sustained the objection, and rejected the testimony.

No reasons were assigned by the court for the ruling; and of course the only point presented is, whether the particular question propounded was properly excluded.

Courts of justice differ very widely, whether the general reputation of the witness for truth and veracity is the true and sole criterion of his credit, or whether the inquiry may not properly be extended to his entire moral character and estimation in society. They also differ as to the right to inquire of the impeaching witness whether he would believe the other on his oath. All agree, however, that the first inquiry must be restricted either to the general reputation of the witness for truth and veracity, or to his general character; and that it cannot be extended to particular facts or transactions, for the reason that, while every man is supposed to be fully prepared to meet those general inquiries, it is not likely he would be equally so without notice to answer as to particular facts.

According to the views of Mr. Greenleaf, the inquiry in all cases should be restricted to the general reputation of the witness for truth and veracity; and he also expresses the opinion that the weight of authority in the American courts is against allowing the question to be put to the impeaching witness whether he would believe the other on his oath. In the last edition of his work on the law of evidence, he refers to several decided cases, which appear to support 12*] these positions; *and it must be admitted that some of these decisions, as well as others that have since been made to the same effect, are enforced by reasons drawn from the analogies of the law, to which it would be difficult to give any satisfactory answer.

1 Greenl. Ev. § 461; *Phillips* v. *Kingfield*, 19 Me. 375, per Shepley, J.; *Gass* v. *Stimpson*, 2 Sumn. 610; *Wood* v. *Mann*, 2 Sumn. 321; *Craig* v. *The State*, 5 Ohio N. S. 605; *Gilbert* v. *Sheldon*, 13 Barb. 623; *Jackson* v. *Lewis*, 13 Johns. 504; *U. S.* v. *Van Sickle*, 2 McLean, 219; *State* v. *Bruce*, 24 Me. 72; *Com.* v. *Moore*, 3 Pick. 196; *Gilchrist* v. *McKee*, 4 Watts, 380; *State* v. *Smith*, 7 Vt. 141; *Frye* v. *Bank of Illinois*, 11 Ill. 367; *Jones* v. *The State*, 13 Tex. 168; *State* v. *Randolph*, 24 Conn. 363; *Uhl* v. *Com.* 6 Gratt. 706; *Wike* v. *Lightener*, 11 S. & R. 338; *Kimmel* v. *Kimmel*, 3 S. & R. 336; *State* v. *Howard*, 9 N. H. 485; *Bucklin* v. *The State*, 20 Ohio, 18; *Ford* v. *Ford*, 7 Humph. 92; *Thurman* v. *Virgin*, 18 B. Mon. 792; *Perkins* v. *Mobley*, 4 Ohio, N. S. 668; *Bates* v. *Barber*, 4 Cush. 107.

On the other hand, a recent English writer on the law of evidence, of great repute, maintains that the inquiry in such cases properly involves the entire moral character of the witness whose credit is thus impeached, and his estimation in society; and that the opinion of the impeaching witness, as to whether he is entitled to be believed on his oath, is also admissible to the jury. 2 Taylor, Ev. §§ 1082, 1083.

That learned writer insists that the regular mode of examining into the character of the witness sought to be impeached is to ask the witness testifying whether he knows his general reputation; and if so, what that reputation is, and whether, from such knowledge, he would believe him upon his oath. In support of this mode of conducting the examination, he refers to several decided cases, both English and American, which appear to sustain the views of the writer.

Rex v. *Watson*, 32 How. St. Tr. 496; *Mawson* v. *Hartsink*, 4 Esp. 104; *Rex* v. *Rookwood*, 13 How. St. Tr. 211; *Carpenter* v. *Wall*, 11 Ad. & El. 803; *Anonymous*, 1 Hill (S. C.) 259; *Hume* v. *Scott*, 3 A. K. Marsh. 262; *Day* v. *The State*, 13 Mo. 422; 3 Am. Law. Jour. N. S. 145.

*Both Mr. Greenleaf and Mr. Taylor [*13 agree, however, that the impeaching witness must be able to state what is generally said of the other witness by those among whom he resides, and with whom he is chiefly conversant, and in effect admit, that unless he can so speak, he is not qualified to testify upon the subject, for the reason that it is only what is generally said of the witness by his neighbors that constitutes his general reputation. To that extent they concur, and so, as a general remark, do the authorities which on the one side and the other support these respective theories; but beyond that, the views of these commentators, as well as the authorities, appear to be irreconcilable.

In referring to this conflict of opinion among text writers, and judicial decisions, we have not done so because there is anything presented in this record that makes it necessary to choose between them, or even renders it proper that we should attempt at the present time to lay down any general rule upon the subject. On the contrary, our main purpose in doing so is to bring the particular question exhibited in the bill of exceptions to the test of both theories, in order to ascertain whether under either rule of practice it ought to have been allowed. Under the first mode of conducting the examination, it is admitted that it was properly rejected, and we think it was equally improper, supposing the other rule of practice to be correct. Whenever a witness is called to impeach the credit of another, he must know what is generally said of the witness whose credit is impeached by those among whom the last named witness resides, in order that he may be able to answer the inquiry either as to his general character in the broader sense, or as to his general reputation for truth and veracity. He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness had been derived, nor, indeed, is he allowed to do so, but he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant; and any question that does not call for such knowledge is an improper one, and ought to be rejected. No case has been cited *authorizing such a [*14 question, or even furnishing an example where it was put, and our researches in that direction have not been attended with any better success. For these reasons, we think the question was properly excluded. Some further attempts were made by the plaintiffs to impeach this witness, and with that view they called another witness, who testified that he knew the one sought to be impeached, and had had business transactions with him during the years 1852-'53 in the city where they resided. On being asked by the counsel of the plaintiffs what was the

reputation of the witness for truth and veracity, he replied that he had no means of knowing what it was, not having had any dealings with him since those transactions; thereupon the same counsel repeated the question, limiting it to that period.

Objection was made to that question by the counsel of the defendants on the ground that the period named in the question was too remote, and the court sustained the objection and excluded the question. To this ruling the plaintiffs excepted. Such testimony undoubtedly may properly be excluded by the court when it applies to a period of time so remote from the transaction involved in the controversy, as thereby to become entirely unsatisfactory and immaterial; and as the law cannot fix that period of limitation, it must necessarily be left to the discretion of the court. Considering that the witness had already stated that he was not able to answer the question, we do not think that the discretion of the court in this case was unreasonably exercised.

None of the exceptions can be sustained, and the judgment of the Circuit Court is, therefore, affirmed, with costs.

JOHN BAPTISTE BEAUBIEN *et al.*, *Appts.*,
v.
ANTOINE BEAUBIEN *et al.*

(See S. C. 23 How. 190–209.)

Limitations in equity—same as at law—Michigan law—fraud or concealment, to avoid statute, how set up—fifty years' exclusive possession.

Where the common ancestor, and defendants claiming under them, have been in the exclusive possession of the premises in question sixty-two years before the commencement of this suit, and no right has been set up by the plaintiffs, or by those under whom they claim, to the title or the possession of the premises, until the filing of this bill; held, that the case is one in which courts of equity follow the courts of law, in applying the statute of limitations.

There are two acts of limitation in the state of Michigan, either of which bars the claim of the plaintiffs: (1) The act of May 15, 1820, which limits the right of action to twenty years after the same has accrued; and (2) the act of November 15, 1829, which limits the right of entry to ten years, if the cause of action has then accrued.

When the plaintiffs seek to avoid the operation of the limitation, by an averment of concealment and fraud on the part of the defendants and those under whom they claim, the particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made.

When no acts of fraud or concealment are stated, and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession of the defendants and those under whom they claim, had commenced; and this, although the plaintiffs lived in the neighborhood of the premises; held, that the statute of limitations applies.

Submitted Feb. 17 and Mar. 9, 1860. Decided Mar. 26, 1860.

APPEAL from the Circuit Court of the United States for the District of Michigan.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **R. H. Gillet** and **Platt Smith**, for appellants:

The bill sets forth a complete title executed in strict compliance with the previous edict of the King.

See White's Land Laws, fol. 1, p. 668.

The title papers in this case are executed by the proper officers, and in strict compliance with the above law. By virtue of this grant the lands in question became, and forever remained, private property, and consequently were never transferred by France to Great Britain, nor by Great Britain to the United States, as government property. The treaty of 1794 between the United States and Great Britain, confirmed the rights of all parties, and their legal representatives, in the titles which they held at the time Great Britain ceded that country to the United States.

See art. 9 of the treaty; *Shanks* v. *Dupont*, 3 Pet. 262.

The facts charged in the bill are admitted by the pleadings. Part of the defendants demur, the others plead in confession and avoidance. Thereby the authority of the officers making the grant, the reasons for taking the case out of the statute of limitations, the fraud and dishonesty of the defendants, and those under whom they hold—are all admitted.

Even if it were not admitted, the authority of officers making the grant would be presumed.

See *Strother* v. *Lucas*, 12 Pet. 410, 411.

Lapse of time is not made a question by the pleadings; the court will not presume for the defendants what they do not claim for themselves.

In *Weatherhead's Lessees* v. *Baskerville*, 11 How. 329, the suit was brought fifty-eight years after the death of the ancestor; fifty-three years after the partition among the girls; forty-five years after that among the boys. The suit was maintained. See pages 359, 360.

In *Stackpoole* v. *Davoren*, an account of rents and profits of an estate was decreed after an adverse possession of 50 years.

1 Bro. P. C. 9, referred to in Hill on Trustees, 265.

In a recent case, Sir C. Pepys, the *M. R.*, set aside a purchase by a steward at an undervalue after an interval of forty-seven years, 2d June, 1835; Affirmed 11 Clark & F. 714; Hill on Trustees, 265, where reference is given to many other cases of like tendency.

A case is reported in 5 Sim. 640. There the defendants had been in possession seventy years; and to a bill filed by the remainderman to recover the estate, a plea was put in, stating that adverse possession of the property had been held during the whole time, and that the rents and profits had been received. The Vice-Chancellor overruled the plea, and on an appeal taken, his decision was affirmed by Chancellor Brougham.

NOTE.—*Limitations in equity; relief denied from lapse of time*—see note to 3 L. ed. U. S. 627, and note to 6 L. ed. U. S. 287.

Length of time as bar to relief in cases of fraud; state claims; cases of undiscovered fraud; when laches bars remedy—see note to 36 L. ed. U. S. 135.

Mylne & K. 738; cited in 16 Pet. 468; see, also, *Doe, d. Fenwick*, v. *Reed*, 5 Barn. & Ald. 232; *Swayze* v. *Burke*, 12 Pet. 11; *Brush* v. *Ware*, 15 Pet. 93.

The grant by the governor and intendant severed the tract from the public domain, and it could not be reannexed without process by or before them.

Declaration Du Roi, 1 White's Land Laws, 669.

Contrary to the Roman law, the French law did not hold to a strict forfeiture when a condition was not performed within a time limited.

Pothier on Obligation, § 349; Domat, vol. I. § 222.

The King is bound by the law equally with the subject.

Œuvres Duplessis, vol. I. p. 679; see 1 White Land L. 639.

By the English, as well as the French law, an action or "office" was necessary to reannex a concession to the public domain.

Greenl. Cruise, vol. p. 32, §§ 39, 41.

It has been repeatedly held that a perfect title needs no confirmation.

9 How. 445.

If the title had not been perfect, the confirmation would merely have made good the old and would have made no new title.

See act of Congress, March 3, 1807, § 2 (2 Stat. at L. 438).

This provides that the party in possession, in his own right, under a claim filed under the former acts, shall be confirmed in the title to the same, as in the state of inheritance. No other title is intended to be granted by the act. The confirmation is inoperative, except in favor of those in whom the right of possession is.

Antoine Beaubien's possession was that of a son and brother, not that of an adverse claimant; he was not in possession in his own right, but only for himself and his brothers and sisters.

Ang. Lim. 403, note.

There is equity in the bill. The matters in controversy could not be investigated at law without a multiplicity of suits. A court of equity will not hesitate to look behind a patent, especially when it appears that fraud was used in obtaining.

Reeder v. *Barr*, 4 Ohio, 446; *Ware* v. *Brush*, 1 McLean, 533.

The plea is no bar to the matters set up in the bill. The plea of a purchaser for valuable consideration without notice, should aver that the person from whom he purchased had such an interest in the property as entitled him to convey it to the defendant.

2 Dan. Ch. Pr. 687; *Head* v. *Egerton*, 3 P. Wms. 281; *Daniels* v. *Davison*, 16 Ves. 252; *Craig* v. *Leiper*, 2 Yerg. 196.

The plea traces title from the United States. But this is not enough, for a pre-existing title is distinctly averred and set forth in the bill; and it has been repeatedly held that a patent from the United States does not affect a pre-existing title in a third person.

New Orleans v. *Armas*, 9 Pet. 236; *U. S.* v. *Arredondo*, 6 Pet. 738.

The bill charges that this patent was obtained by the fraud of Antoine Beaubien, the patentee; that the patent was based on the French titles under which plaintiffs claim, which patent, so far as it purports to convey anything to said Antoine, is fraudulent and void as against complainants. The bill also charges that defendants, or some of them, have possession of the documents of the original title. The plea does not undertake to deny the fraud, or that the patent was obtained on the claim founded on the original French titles, or that the defendants have not the original title papers. All these should be negatived by averment in the plea.

2 Daniels' Ch. Pr. 691.

Possession, to be adverse, must be in good faith, and not a precarious possession, such as a *possessio fratris* or a fraudulent possession.

Domat, Ang. on Lim. 402; *Cook* v. *Nicholas*, 2 Watts & S. 27; *Dowdall* v. *Byrne*, Batty, Irish, 373.

Messrs. **J. M. Carlisle, Geo. P. Russell,** and **H. H. Emmons,** for appellees:

1. The claim of the complainants is barred by the acts of Congress and the action under them, by which Antoine Beaubien obtained a patent.

The following are the statutes under which the proceedings were had:

2 Stat. at L. March 26th, 1804; act of 1805, March 3d (Stat. at L. 343, § 5); act of March 3d, 1807 (2d Stat. at L. 437).

Among all the statutes creating boards, whose decisions this court has declared to be judicial and final, none are more comprehensive than these.

We insist that the statute having in express terms barred all rights not presented and proved before the board, every right which is in hostility to the decision of the board, is forever cut off.

The following cases we submit in full to sustain these views:

Bernard v. *Bougard*, 1 Harr. (Mich.) 130; *Hickey* v. *Stewart*, 3 How. 750; *Strother* v. *Lucas*, 12 Pet. 454, 458; see 6 Pet. 770; *Robinson* v. *Minor*, 10 How. 627; *Landes* v. *Brant*, 10 How. 348; *Laroche* v. *Jones*, 9 How. 155; *West* v. *Cochran*, 58 U. S. (17 How.) 414; *U. S.* v. *Arredondo*, 6 Pet. 729, 730.

2. The claim in this case is barred by the statute of limitations.

This defense, as well as lapse of time generally, may be taken by demurrer.

Rhode Island v. *Massachusetts*, 15 Pet. 233; Story, Eq. Pl. §§ 503. 506, 761; 4 Wash. 631, 632; 2 Sch. & Lef. 637; 6 Sims, 51; 4 Johns. Ch. 299; 2 Ves. Jr. 294; 1 Johns. Ch. 46; 1 Bald. 418; 19 Vesey, 180; 7 Paige, 195; 11 Eng. Ch. 68.

The bill in this case contains no sufficient averment to avoid the application of the statute.

The two acts of May 15, 1820 (R. Laws of Mich. 1833, p. 570, § 6), and of November 15, 1829 (R. Laws 1833, p. 408), and especially the latter, bar all claim in this case.

For the application of the act of 1829 to past causes of action, see Laws of Michigan 1843, p. 43, declaring that all causes shall be determined by the law applicable to them, when the Revised Statutes of 1838 were passed.

See, also, judicially so holding, *Lastly* v. *Cramer*, 2 Doug. (Mich.) 307.

It is hardly necessary to cite the following cases, to show that where the statute commences to run, no subsequent disability will arrest it.

15 Johns. 169; Adams, Eq. 69, note 1; 1 Sug. Vend. 389; 3 Brod. & Bing. 217; 3 Johns. Ch. 140, and cases cited; Plowd. 353; 4 Mass. 282; C. & Hills Notes, 320.

And most particularly do we ask attention to the decisive fact, that in this statute of 1829 there is no saving clause. The bar is general and universal. The nonresident is bound equally with the resident, the infant with the adult, and we therefore need not stop to discuss the particular circumstances of each complaint.

That where the legislature have made no exceptions, the courts can make none.

See 1 Sug. Vend. 389; 4 Tenn. 307, per Shippen, *arguendo*, and many other cases cited elsewhere in this argument.

This court has repeatedly recognized this rule.

Bank of the State of Alabama v. *Dalton*, 9 How. 522; *McIver* v. *Ragan*, 2 Wheat. 25; *Bacon* v. *Howard*, 61 U. S. (20 How.) 25.

If, then, this action may be said to have arisen at any time before 1828, it was barred November 10, 1839.

When, within the meaning of this rule, did it arise?

The bill says that Antoine Beaubien was in possession with his brother before 1800; that he presented a sole claim before the board in 1804, and did not succeed because he failed in his attempt to prove a conveyance to himself under the French title. He then, in 1804, claimed sole ownership, attempted to prove it. This was open and notorious. A public record is made of it. All had notice of it. There is no denial that all the coheirs had such notice; and there is no pretense that he agreed expressly to take in trust for them. This, then, was a hostile sole claim. But the bill further says that again, in 1807, he presented another sole claim as sole occupant and improver. He procured witnesses to swear he was such. It was judicially determined he was such in a proceeding *in rem*, which impleaded all the world. Not only is there no averment that he had agreed to hold for the other heirs, but there is not one fact or circumstance stated which could lead them to believe so. He could not, without the aid of perjury, have proved in his own name if he were not the sole occupant.

See *Bernard* v. *Bougard*, 1 Harr. (Mich) 130.

We submit the act of 1829 is a complete bar.

But the act of May 15, 1820, is equally a bar. In the circumstances of this case the disabilities of nonresidence, infancy, and coverture are wholly immaterial. There can be no successive disabilities, either in the same person or set up in succeeding heirs. If the disabilities of the first takers are removed, the heirs must sue within ten or twenty years (according to the statute) thereafter. Thus, if A, an heir, be a nonresident and dies, and his heir is also a nonresident, the disability of the latter cannot be added to that of his ancestor, but he must sue within the time limited after the death of the first taker; otherwise statutes of limitation would be perpetual.

The act of 1820 limits the right of action to 20 years, and the saving section is as follows:

"This act shall not extend to bar any infant, persons imprisoned, beyond seas, etc., etc., from bringing either of the actions before mentioned within the term before set and limited for bringing such actions, calculating from the time such impediment shall be removed."

Whitney v. *Webb*, 10 Ohio, 513.

Plaintiff resided out of, and had never been within, the state of Ohio, and his ancestor and those under whom the ancestor claimed, had in their lifetime been in the same situation, and the question was, whether the exception in the law (which was like ours) saved the rights of the plaintiff, who and whose ancestors had been successively and continually under the technical disability of nonresidence.

The court cites and analyzes Plowd. 358; 6 East, 80; 4 Miss. 182; 2 Conn. 27; and 3 Johns. Ch. 129—which is an elaborate review of all the old cases—and holds that the action was barred immediately on the death of the ancestor or first taker, provided twenty years had then elapsed; that as the statute provided for no period after that for the heir to sue, and saved the rights only of the person to whom the right accrued, there was no mode in which by mere construction the heir could be allowed any time after the lapse of twenty years; that the person to whom the right accrued might have sued within twenty years after his disability removed. But this right did not accrue to the heir. On page 517 it says, successive disabilities cannot be set up where they exist in the same person, any more than when one man attempts to protect himself by one in himself, after the removal of one in his ancestor.

The doctrine was strictly applied in a case in equity in the same volume, *Ridley* v. *Hettman*, 10 Ohio, 524.

See, also *Thorp* v. *Raymond*, 16 How. 247.

The court will not fail to perceive the vagueness with which the bill is drawn.

It makes no averments that these complainants have been continuously out of the territory and the state of Michigan. Such, it is notorious, is not the fact. They all reside within half a mile of Detroit, and though in Canada, are and have for years, as have all their ancestors, been weekly there. Hence the statement that they have "resided" in Canada.

This may be true, and still, if they have been within the state, the running of the statutes will be conceded. No authority need be cited for this. The bill should have averred that the complainants had not been within the state. See the common precedents of pleadings, the old exception of "beyond seas."

This answers the pretense that some of the complainants are within the exceptions of the statute of 1820.

Still we repeat that of 1829 has no exceptions.

That our holding is adverse, so as to start the running of the statute, whether it be said there is a trust or a tenancy in common, we cite a few decisions. They show equally what we cannot take time distinctly to argue, that this is a case where the presumption of a grant is full and clear.

Still, the main object is to show an adverse holding within the statute of limitations.

Prescott v. *Nevers*, 4 Mason, 326; 2 Smith L. C. 450; notes to *Taylor* v. *Horde*, 1 Burr. 60; *Nepean* v. *Doe*, 2 Mees. & W. 910.

If a party holds in a character incompatible with the idea of a freehold in another, his holding is adverse. In order to ascertain the char

acter of the holding, courts will look at the party's conduct while in possession. The cases are very fully cited in *Davies* v. *Lowndes*, 5 Bing. N. C. 161; see, per Tindal, Ch. J., p. 71; also, 72, 73, 74. For the evidence in the case, see p. 66.

A patent from the government invests the patentee with seizure in law, so that he is considered in actual possession until an ouster by a third person. 2 Smith, L. C. 469.

The patentee's conveyance transfers a like possession to his grantee.

See *Barr* v. *Gratz*, 4 Wheat. 215; 2 Smith, L. C. 469.

Page 472 cites the cases fully, to show that one tenant in common, by claiming to hold as owner of the whole, will constitute an ouster of his cotenant.

See, also, *Humbert* v. *Trinity Ch.* 24 Wend. 601, 602.

3. The statute of limitations of Michigan, relied on in this case, is broader than the English statute, and it is equally a bar in a court of equity as at law; this court under this statute, can make no exception in cases of undiscovered fraud.

Our statute does apply equally to a court of equity as to that of law. Its language is, "no real or possessory action, of whatever name or nature," shall be sustained after ten years from 1829. So is the act, also, of 1820.

Farnam v. *Brooks*, 9 Pick. 242; *Johnson* v. *Ames*, 11 Pick. 182, are directly in point, holding that a statute like this bound *ex directu*, both courts of equity and law, alike.

Beckford v. *Wade*, 17 Ves. 87.

4. If it is held that this act is to receive the same construction as those which simply bar specifically enumerated legal actions, and that this court will, therefore, admit the same exceptions to its applications, such as trust and undiscovered fraud, then we say the bill does not set up facts to bring the case within these exceptions, and the remedy is barred by the statute under the general principle applicable to all statutes of limitations.

Moore v. *Greene*, 60 U. S. (19 How.) 69; *Butane* v. *Vairian*, 1 Eng. V. Ch. 343; *Wagner* v. *Baird*, 7 How. 234; *Boone* v. *Chiles*, 10 Pet. 221; *Cholmondeley* v. *Clinton*, 1 Turn. & R. 107; 11 Eng. Ch. 68; *Decouche* v. *Savetier*, 3 Johns. Ch. 216; *Beckford* v. *Wade*, 17 Ves. 88.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the district of the state of Michigan.

The bill was filed by the plaintiffs against the defendants, claiming to be tenants in common with them in a tract of land now lying in the city of Detroit, each party deriving title from a common ancestor, who made the settlement as early as the year 1745, under a concession from the French government. The tract contained five arpents in front on Lake Erie, and eighty arpents back. The ancestor, John Baptiste Beaubien, died in 1793, having had the uninterrupted possession of the property from the time of the concession in 1745, leaving a widow and several children. Two of the sons, Antoine and Lambert, resided with their father at the time of his death, and continued in the possession and occupation with their mother till her death, in 1809.

In 1804, Antoine, one of the heirs in possession, applied to *the board of commis- [*206 sioners to adjust land claims, under the act of Congress of 1804, to confirm his claim to the land; and which was confirmed accordingly, and a patent issued in 1812. Acts of Congress, 26th March, 1804 (2 Stat. at L. 277); 3d March, 1805 (2 Stat. at L. 343); 3d March, 1807 (2 Stat. at L. 437).

Lambert, the other brother, continued in the joint occupation of the tract till his death, in 1815, and subsequently, in 1818, Antoine conveyed to the heirs of Lambert a moiety of the premises; and the present occupants and defendants are the descendants of the two brothers, or purchasers from them under this title.

The tract constitutes a portion of the city of Detroit, and is averred in the bill to have been worth, at the time of the filing of it in 1855, from a half a million to a million of dollars, exclusive of the improvements.

The case was presented to the court below on demurrer to the bill, and on pleas by some of the defendants, as bona fide purchasers for valuable consideration, without notice.

The plaintiffs aver in the bill, in addition to the facts already stated, that they are the descendants of the brothers and sisters of Antoine and Lambert, from whom the title of the defendants is derived; and that Antoine and Lambert and their descendants possessed and occupied the tract in subordination to the right and title of their cotenants; and that they were permitted to possess and occupy the same in confidence, that they so held the premises for the common benefit of all parties interested. They further aver, that they verily believed that the brothers, Antoine and Lambert, and their legal representatives, were acting in good faith in this respect, until about the year 1840 they discovered, after examination and inquiry into the facts and circumstances, that they intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises.

The bill further states that Antoine, in his lifetime, and his son, who is one of the defendants, and the heirs of Lambert, have conveyed to divers individuals, rights in the said tract; that, in some instances, they made donations without consideration; in others, conveyances for a pretended consideration; *and that [*207 there now are in possession, as heirs, donees, and purchasers of different portions of the premises, several hundred persons, most of whose names are unknown to the plaintiffs, which persons set up claims and pretended rights and interests therein. And further, that neither Antoine nor Lambert's heirs, down to the year 1834, committed any open or notorious act, inconsistent with the rights of the plaintiffs, or in any way disavowed the trust and relation as cotenant, or of brothers or coheirs, nor in any manner asserted any title to the land, to the exclusion of their rights.

The court decreed upon the demurrer to the bill, and also upon the pleas, in favor of the defendants.

The case comes before us on an appeal from this decree. Antoine and Lambert, the two sons of J. B. Beaubien, the common ancestor,

and those claiming under them, have been in the exclusive possession of the premises in question since 1793, a period of sixty-two years before the commencement of this suit. The plaintiffs and those under whom they claim, during all this time, as averred in the bill, resided in Canada, and as appears, most of them in the county of Essex, in the neighborhood of the premises. The four hundred arpents which, in 1793, were worth some six or seven thousand dollars, now embrace a portion of the city of Detroit, and are worth, with the improvements, over a million of dollars; and, for aught that is averred in the bill or appears in the case, no right has been set up by them, or by those under whom they claim, to the title or the possession of the premises, until the filing of the bill; no claim to the rents and profits, or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any right as coheirs.

The case is one, so far as the title of the plaintiffs is concerned, which depends upon the establishment of an implied trust to be raised by the evidence, and hence falls within that class of cases in which courts of equity follow the courts of law, in applying the statute of limitations. *Kane* v. *Bloodgood*, 7 Johns. Ch. 91; *Hovenden* v. *Annesley*, 2 Sch. & Lef. 607.

There are two acts of limitation in the state of Michigan, either of which bars the claim of the plaintiffs:

208*] *1. The act of May 15, 1820, which limits the right of action to twenty years after the same has accrued; and,

2. The act of November 15, 1829, which limits the right of entry to ten years, if the cause of action has then accrued.

The language is: "No writ of right or other real action, no ejectment or other possessory action, etc., shall hereafter be sued, etc., if the cause of action has now accrued, unless the same be brought within ten years after the passage of this act, any law, usage, or custom to the contrary notwithstanding."

There is no saving clause in this as to infants, *femes covert*, or residents beyond seas.

The pleader has sought to avoid the operation of the limitation, by an averment of concealment and fraud on the part of the defendants, and those under whom they claim. The plaintiffs aver "that, until within the last few years, your orators and oratrixes, and those under whom they claim, verily believed and supposed that the said brothers, Antoine and Lambert, and their legal representatives, were acting in good faith towards them, but that, about the year 1840, they discovered by information, after examination and inquiry into the facts and circumstances of the case, that the said brothers Antoine and Lambert, and their legal representatives, intended to cheat and defraud them, and those under whom they claim, of their just rights in the premises."

This averment is too general and indefinite to have the effect to avoid the operation of the statute. The particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made. *Stearns* v. *Page*, 7 How. 819; *Moore* v. *Greene*, 19 How. 69.

Here, no acts of fraud or concealment are stated; and the time when even an intention to defraud, which is all that is averred, was discovered, was some fifty years after the exclusive possession, of the defendants and those under whom they claim, had commenced; and this, although the parties lived in the neighborhood, and almost in sight of the city, which has, in the mean time, grown up on the premises.

**We think the statute of limitation* [*209 *applies, and that the decree of the court below should be affirmed.*

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*CHRISTIAN A. ZABRISKIE, *Appt.*, [*381

v.

THE CLEVELAND, COLUMBUS, AND CINCINNATI RAILROAD CO., and John A. Butler, *et al.*

(See S. C. 23 How. 381–401.)

Bill may be filed by stockholder, to restrain corporation from performing contract which is ultra vires—who may voluntarily become defendants—more approved form of suit—assent of stockholders to contract, when it estops them—when corporation and stockholders are estopped to deny validity of contract.

A bill may be filed by stockholder to restrain a railroad company from paying the interest on bonds which it had guarantied of another railroad company, and to enjoin the corporation from applying any of its effects to their redemption, on the ground that the contract is *ultra vires* of the corporation, and cannot be confirmed against a dissenting stockholder.

Holders of the bonds may avail themselves of the invitation of the bill, to become defendants, to all their class, who assert that they are bona fide holders, and that their securities are valid obligations of the company.

The usual and more approved form of such a suit is that of one or more stockholders, to sue in behalf of the others.

Where the stockholders at a meeting, without a dissenting vote, resolved: "That the indorsement be approved, as the act of the company," although there was dissatisfaction openly expressed by a majority who declined to vote,—Held, that the resolution complied with the law of Ohio, which provided that no such aid should be furnished nor any arrangement perfected until, at a meeting of the stockholders, they shall have assented thereto.

A court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being broken.

Where these negotiable securities had been placed on sale in the community, accompanied by the resolution and vote inviting public confidence, and had circulated without an effort on the part of the corporators to restrain them, and men had invested their money on the assurance they afforded, the corporation was held liable.

A corporation is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims which their own conduct had superinduced.

Argued Mar. 14, 1860. Decided Mar. 26, 1860.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The bill in this case was filed in the court below, by the appellant, a stockholder of the C., C. & C. R. Co., to enjoin the said corporation from applying any of its effects to the redemption of certain bonds of another corporation which it had indorsed.

The court below allowed a temporary injunction, pending the suit. Subsequently a final decree was entered, dissolving this injunction and

dismissing the bill with costs, whereupon the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **J. P. Benjamin, W. S. C. Otis,** and **E. M. Stanton,** for appellant:

The record presents the following questions for the decision of the court:

I. Had the directors of the Cleveland, Columbus, & Cincinnati Railroad Company the power to indorse the bonds of the Columbus, Piqua, & Indiana Railroad Company?

II. Were said bonds and the indorsement thereon void in the hands of Niel & Dennison, and of those claiming under them?

III. Are the defendants, Butler, Belknap, and Callender, bona fide holders of said indorsement, without any notice, actual or constructive, of the circumstances under which the indorsements were made, or of the want of power on the part of the directors of the Cleveland, Columbus, & Cincinnati Railroad Company to make the same?

IV. Has the complainant forfeited his right to the relief which he seeks, by any neglect on his part?

1. The power to bind must be found, either in the charter of the C., C. & C. R. Co., or in some general law of the state, which has been accepted by the entire body of the stockholders of the company, and has thereby become a part of its charter, or the indorsement is *ultra vires*, and therefore void. The only laws of the state in which it is claimed by any of the defendants such power can be found, are those of March 3, 1851, 49 Ohio Laws, 94, and March 1, 1852, 50 Ohio Laws, 274.

In all questions of power arising under a grant of corporate privileges, the test of the existence of the power is to be found in the inquiry whether the same is expressly granted or whether it is incidental to any express grant of power, and necessary to its accomplishment.

State of Maryland v. *B. & O. R. Co.* 6 Gill, 363; *Perrine* v. *C. & D. Canal Co.* 9 How. 172; *N. Y. Firemen Ins. Co.* v. *Ely*, 2 Cow. 678, 709; see also, *Dartmouth College* v. *Woodward*, 4 Wheat. 636; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Bank of Chillicothe* v. *Swayne*, 8 Ohio, 257; 8 Gill & J. 248; 22 Conn. 502; 29 Me. 123; 2 Kent's Com. 350; Ang. & A. Corp. 111, 256–258.

The counsel then examined the powers of the C., C. & C. R. Company under its original act of incorporation of March 14, 1836, and the act to revive the original act of March 12, 1845, referring especially to §§ 1, 3, 9, 12, 14, 16 and 17, of the act of 1836, and § 6 of the act of 1845.

It is seen that no power was expressly conferred upon the directors of this company by the acts incorporating the same, to indorse the bonds of individuals or other railroad companies for any purposes whatever, nor was any such authority necessary to the construction or operation of said road. The president and directors are merely the agents of the corporation, whose powers are conferred by the acts of incorporation, and are subject to the same strict rules of construction as those of the body over which they preside.

Beatty v. *Knowler*, 4 Pet. 152; Ang. & A. Corp. §§ 280, 291, 299.

If the directors could indorse the bonds of the C., P. & I. R. Co., in order to bring business over the road of that company to Columbus, thence to be carried over their own road to Cleveland, they could, for the like purpose, indorse the bonds of any steamboat or transportation company, or incur any other pecuniary liability, in order to bring the business over Lake Erie to Cleveland, thence to be carried over their road to Columbus, or they could indorse the bonds of manufacturing companies, to enable them to erect manufacturing companies, along the line of their road, because such establishments would necessarily increase the business and income of the same.

No subtilty of argument, no force of intellectual power, no degree of professional reputation, are adequate successfully to maintain such a doctrine, for it is opposed to the principles of public policy, and the uniform authority of adjudicated cases.

62 U. S. (21 How.) 442; 5 Ohio State, 59; 4 Eng. R'y Cases, 513; 5 Eng. R'y Cases, 741; 6 Eng. R'y Cases, 289; 3 Eng. L. & Eq. 144; 7 Eng. L. & Eq. 505; 16 Eng. L. & Eq. 180; 5 Barb. 218; 3 N. Y. 430; 8 Gill & J. 248; 1 Md. Ch. 542; 22 Conn. 1, 502; 5 Den. 557; 7 N. Y. 328; 22 Conn. 552.

The act of March 3, 1851, conferred no power upon the C., C. & C. R. Co. to indorse the bonds of the C., P. & I. R. Co., for the following reasons:

1. Because said act has been repealed by the act of May 1, 1852, passed in accordance with art. 13 of the Constitution, which took effect Sept. 1, 1851.

The act of May 1, 1852, created a new, entire and independent system of railroad law, and was designed, and did in fact operate, as a substitute for said acts, and thereby repealed them.

It is well established on principle and authority, that where a subsequent act revises antecedent acts, and is intended as a substitute for them, such subsequent act repeals the antecedent act, although it contains no express words to that effect.

7 Mass. 140; 12 Mass. 537, 545; 10 Pick. 37; 20 Pick. 407, 410; 16 Barb. 15; 5 Tex. 418; 7 Md. 151, 159; 8 Tex. 62; 14 Ill. 334.

2. Because the general assembly intended to repeal said act of March 3, 1851.

The principal objection to the argument in favor of the repeal of the act of March 3, 1851, is founded upon § 16, art. 2, Constitution, 1851:

"No law shall be revised or amended, unless the new act contain the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed."

The counsel referred to the case of *Pine* v. *Nicholson*, 6 Ohio St. 176, and asserted of his own personal knowledge, as well as from information derived from the judges of the supreme court of Ohio, that the courts of the state of Ohio uniformly hold that the foregoing provision does not forbid the repeal of the statute by implication.

See old Const. of La. title 6, § 119; the new Const. title 6, § 116; the Const. of Texas, art. 7, § 25; the Const. of California, art. 4, § 25; Const. of Maryland, art. 3, § 17; Const. of Mich. art. 4, § 25; Const. of Indiana, art. 4. §

21; *Commercial Bank of Natchez* v. *Markham*, 3 La. Ann. 698; *Bryan* v. *Sundburg*, 5 Tex. 418; *Rogers* v. *Watrous*, 8 Tex. 62; *Davis* v. *The State*, 7 Md. 151, 159; *Spencer* v. *The State*, 5 Ind. 41; 4 California, 186.

The act of March 3, 1851, did not create any vested right in the C., C. & C. R. Company, because there had been no acceptance of said act by the stockholders of the company. It was a mere license to the company, and the legislature could repeal it at any time.

C. & L. R. Co. v. *Kenton County Court*, 12 B. Mon. 160.

3. Because the indorsement was not made for any of the objects authorized by said act.

Only those contracts could be made, and only those companies could enter into them, which were expressly authorized by the act, and even the mode of making the contract prescribed by the act must be strictly observed.

Head v. *Providence Ins. Co.* 2 Cranch, 127.

4. Because the indorsement was not made in reference to said act of March 3, 1851, as the source of power, but with reference to the charter. Although the directors of the C. C. & C. R. Company, in their resolution of June 16, 1854, proposed to submit their action in incurring the liabilities mentioned in said resolution, to a vote of the stockholders for their approval, under the 4th section of the act of March 3, 1851, all the liabilities mentioned in said resolution were incurred by said board without any reference to said act as the source of their power, but the reference made in said resolution to said section was a mere afterthought on the part of said directors, adopted after the propriety of their conduct had begun to be called in question, with a view to give to their illegal and unauthorized acts the semblance of legal authority, and thereby wrest from the stockholders a vote of approval.

5. Because in making said indorsement there was no compliance with the imperative prerequisite conditions of said act.

See the 4th section of said act; also, *Commissioners of Kensington* v. *Keith*, 2 Pa. 218; *Webster* v. *French*, 12 Ill. 302; *Weaver* v. *Cherry*, 8 Ohio St. 564; *Voorhees* v. *Bank*, 10 Pet. 449; *Stayton* v. *Hulings*, 7 Ind. 144; *Southampton Dock Company* v. *Richards*, 1 Scott, N. R. 219, 238; *Rex* v. *Loxdale*, 1 Burr. 447; *Pearse* v. *Morris*, 4 Nev. & M. 48; *Feversham* v. *Cameron*, etc., 5 Eng. R'y Cas. 492.

6. Because neither the complainant nor any considerable number of the stockholders of said company, ever consented to said indorsement, either directly or by implication.

7. Because said act of March 3, 1851, is unconstitutional. The several acts incorporating the C., C. & C. R. Co. constitute a legislative contract, not only between the state and the members of the company as an organized body, but also between each individual member of the company on the one hand, and the aggregate numbers of the company on the other—between the individual stockholders and the "legal entity." This contract is as completely under the protection of the supreme law of the land, as a contract between the state and a corporation.

See *Bronson* v. *Kinzie*, 1 How. 311; *McCracken* v. *Hayward*, 2 How. 608; *Dartmouth College* v. *Woodward*, 4 Wheat. 614; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Bank* v. *Knoop*, 16 How. 369; *Dodge* v. *Woolsey*, 59 U. S. (18 How.) 331; 4 Barb. 64; 17 Johns. 195; 9 Wend. 351; 4 Harrington, 389; 5 Hill, 383; 27 Miss. 517; see, also, 30 Pa. 42; 29 Pa. 146, 159; 28 Pa. 339, 352; 11 Ga. 438; 39 Me. 571; 1 N. H. 44; 8 Mass. 268; 10 Mass. 384; 10 Mass. 390; 2 Gray, 543.

Every individual who became a member of the corporation in question by subscribing to its capital stock, undertook and promised to pay the amount of his subscription for the purpose of constructing and equipping said road; and the company undertook and promised to appropriate the same to the construction and equipment of said road, and to pay in dividends to such member his ratable share of the earnings of said road, beyond what might be necessary to maintain said road and its equipment, and to meet the necessary current expenses of operating and running the same; and each party acquired an indefeasible interest in the undertaking and promise of the other party. Whether this contract was expressed or implied, is immaterial. It will not be contended that the legislature possessed the power to exonerate such a subscriber from paying his subscription. How, then, can the legislature, after such person has paid his subscription and become entitled to his dividends, authorize the company to withhold the same and invest the money in other railroad schemes?

A brief inquiry into the nature and extent of the authority which the legislature may lawfully exercise over railroad companies, and also into the nature and extent of the changes which the legislature may make in the charter of such companies, with the consent of the organized bodies respectively, without any well-founded legal objection on the part of any individual stockholder, will throw much light upon the particular subject now under consideration, and tend to confirm the conclusion that the act of March 3, 1851, was an unconstitutional enactment.

Grants to railroad companies are strictly construed. Corporations take no rights from the public beyond what the natural import of the words used in their acts of incorporation rationally and properly convey. These grants are never construed to embrace public rights and duties; nor can it be presumed that the legislature intended to part with the power of accomplishing the very object for which railroad companies are created. This object is the comfort and convenience of the public, and whatever regulations tend to secure or promote that object, the legislature may enact, even though these regulations may abridge the value of the rights previously granted. It is upon this ground that railroad companies may be lawfully required to fence their roads, construct cattle guards, diminish the speed of their trains, and generally submit to such police regulations in respect to the management of their respective roads as will most effectually secure the safety of the persons and property transported over the same; and so long as the legislature shall confine its action to the due exercise of the rights granted, no question can arise as to the lawfulness of such legislation.

The second branch of the inquiry depends upon a very different principle. A railroad charter once accepted becomes a contract; and though the charter is an entirety, it is in fact a two-fold instrument, both in regard to its subject and the parties thereto. So far as the charter relates to the object of the grant, the mode of carrying the same into execution, or the organs through which the company may act, it constitutes a contract between the state and the organized body; and it is competent for the company acting in the manner prescribed in its charter, to accept of any amendments touching these subjects which the legislature may propose, even though these amendments are evidently less beneficial to the company than the original act. To this contract the individual stockholder is not a party, except as a member of the organized body. And as it is a fundamental principle of all associations of this kind, that the act of the majority is the act of all, the organized body will be bound by the action of the majority, however vehemently a minority of individual stockholders may dissent therefrom. It is upon the ground that the contract is one between the state and the corporation as the sole parties thereto, and not upon any implied assent on the part of individual stockholders, on becoming members of the corporation, to such changes as shall be auxiliary to the object of the grant, that all the stockholders are bound by such legislation. But, so far as the charter relates to the obligation of the company to expend all its subscriptions solely for the specified purposes of the grant, or, in other words, in the construction and equipment of its road, or to the right of each individual stockholder to his ratable share of the net earnings of the company in the shape of dividends, or to his right to vote upon each share of stock owned by him in the election of a board of directors, it is a contract between each individual stockholder and the organized body, made in pursuance of the authority conferred by the state. To this contract the state is not a party; but the individual stockholder on the one hand, and all the other stockholders forming the organized body on the other, are the sole parties to the contract. And although the nature of this contract is such that it cannot be changed even by the consent of the parties to it, without legislative permission, such permission does not confer upon either party the authority to make such change without the consent of the other party. This contract between the individual stockholder and the corporation is essentially like a contract of copartnership, and can no more be changed than any other private contract, without the consent of the parties thereto.

Natusch v. *Irving*, Gow. Part. Appendix, p. 576; *Livingston* v. *Lynch*, 4 Johns. Ch. 573; Ang. & Ames, Corp. §§ 536-538.

There are no difficulties connected with this question in its relation to this case, except those which have arisen from the illogical mode of treating it. If the act of March 3, 1851 was intended to confer upon a majority of the stockholders of the Cleveland, Columbus, & Cincinnati Railroad Company, authority to take the money due to the stockholders as dividends, and to appropriate it to any of the purposes mentioned in the 4th section of said act, against the consent of a single stockholder, though owning but a single share of stock, the enactment transcended the constitutional power of the legislature and was void.

The obligation of the contract which relates to a single share of the capital stock of a railroad company, can no more be impaired by legislative interference than the obligation of the contract which relates to the entire capital stock. The protecting power of the Constitution extends to both alike.

Where a charter has been accepted, a subsequent amendment is nothing more than a proposition to change the original contract in that particular. If the proposed change relates to the contract between the state and the organized body, it must be accepted by the organized body before it will have any binding force; but if the proposed change relates to the contract between the individual stockholder and the organized body, it must be accepted by both the parties thereto, before it will have any binding force. If the proposed change be not clearly beneficial to the individual stockholder or to the company, or if it extends the objects or increases the liabilities of the company, or enlarges the powers of the company over the stockholders, as in the present case, the acceptance of such amendment by the party to be affected thereby, must be clearly made out by the party seeking to establish the same. It should be established by clear affirmative proof, that knowledge of such change and of its effects upon their interest was brought to the stockholders, and with such knowledge they deliberately assented thereto. Any rule short of this will expose to imminent hazard the property invested in the railroads in this state, and seriously impair the character of our legislation.

The foregoing argument against the constitutionality of the act of March 3, 1851, cannot be overthrown or in the least degree shaken by any reference to the decisions of the English courts. That country has not any constitutional check upon the supremacy of the law-making power. An act of parliament, of which the terms are explicit, cannot be questioned in any court of judicature.

Dwar. on Stat. 484; *Stevens* v. *The South Devon R'y Co.* 2 Eng. L. & Eq. 138; and *The Great Western R'y Co.* v. *Rushout*, 10 Eng. L. & Eq. 72, are cases illustrative of this feature of English law.

See, also, an article in the Edinburgh Review, October, 1854.

The act of May 1, 1852, does not extend to companies already incorporated, unless such companies shall accept the provisions of said act. To make such acceptance legal and obligatory, the mode therein prescribed, § 76, must be strictly pursued.

Ang. & Ames, Corp. § 291.

And it is sufficient to say that the learned judge who decided this case in the circuit court was unable to find any such acceptance, and held that the C., C. & C. R. Co. did not derive any power to make said indorsement from said act.

2. The bonds in question were void in the hands of Niel & Dennison, and as the indorsement is merely accessary to the obligation of

the bond, it is void also. It is of the essence of a guaranty, that there should be the valid obligation of a principal debtor. If there be no valid obligation, the guarantor is not bound.

Warren v. *Crabtree*, 1 Me. 169; *Huntress* v. *Patten*, 20 Me. 28; *Gaither* v. *F. & M. Bank*, 1 Pet. 37; *Harrison* v. *Hannel*, 5 Taunt. 780.

The indorsement, which bears date six days after the date of the bonds, is in form a guaranty, and is, in its legal effect by the laws of this state, collateral to the obligation of the bonds.

Bright v. *Carpenter*, 9 Ohio, 139; *Robinson* v. *Abell*, 17 Ohio. 36.

The counsel also argued that Dennison was a director of the company when the purchase and sale were made, and that hence, under the 2d section of the act of December 15, 1852, the paper became void in his hands. Notes and other commercial paper, when declared absolutely void by statute, are void even in the hands of innocent holders.

Root v. *Goddard*, 3 McL. 102; *Bridge* v. *Hubbard*, 15 Mass. 96; *Lucas* v. *Waul*, 12 S. & M. 157; 3 Kent's Com. 97; 1 Har. & G. 377.

As the bonds are void, so also is the indorsement, because given to enforce such bonds.

3. The defendants, Butler, Belknap, and Callender, are not bona fide holders of said indorsement. The simple fact that the indorsement was made by a railroad company, which had no power to indorse the bonds of another company unless such power be expressly granted and strictly pursued, constituted a circumstance of itself sufficient to put the purchasers upon inquiry.

Under this head the counsel referred to 14 Ohio, 542; 12 Pick. 545; 8 Conn. 336; 4 Mass. 370; 12 Johns. 306; 3 C. & P. 325; 2 Barn. & C. 466; 3 Kern. 309, 321.

The acts incorporating the company, though local, are nevertheless public acts, and are notice to all parties of the powers thereby conferred.

16 Eng. L. & Eq. 180; 11 Ohio, 276; 3 McL. 102; 7 Eng. L. & Eq. 505.

It is a well-settled rule of law, that a purchaser under a power is bound to see that the power exists.

18 Johns. 441; 2 Hill. 566; 1 Kern. 61, 76.

4. The complainant has forfeited no right to relief by any neglect on his part. To constitute such an estoppel, three requisities are indispensable:

1st. Wilful silence or misrepresentation by a party who has knowledge of the fact.

2d. That the party alleging the estoppel was ignorant of the truth and without the means of information, and relied upon the faith of such acts or declarations.

3d. That injury will result to the other party by their denial.

11 Humph. 433; 7 Barb. 407; 10 Barb. 527; 5 Met. 478; 8 Wend. 483; 1 Story, Eq. 191, 204, 384, 394; 20 Conn. 98, 563; 24 Conn. 538, 546; 1 Kern. 61, 73.

A party who acts in ignorance of his own rights shall not be prejudiced thereby.

33 Me. 438; 3 Shep. 327; 7 Tex. 288; 25 Pa. 409; 17 Conn. 355; 11 Humph. 183.

An estoppel is not to be favored or extended by construction.

1 Dev. & B. 464; 3 Hill, 226; 3 Miss. 529.

An admission or assertion of a conclusion of law upon undisputed facts can never raise an estoppel.

6 Blackf. 389; 2 N. Y. 119.

If we apply the foregoing principles to the contract of the complainant, we shall not find in it a single requisite of an equitable estoppel. It follows, therefore, that the complainant has not forfeited in any degree his claim to the aid of this court in the protection of his rights of property, by anything which he has done or omitted to do.

Messrs. **T. Ewing** and **H. Stanbery**, for bondholders:

We claim that the acts of the company were legal, but if not, the complainant is bound by his acquiescence therein. There is nothing to invalidate the title of the bondholder, even in strict law; much less in court of equity.

This guaranty is valid in the hands of the present holders, independently of the act of March 4, 1851.

1. The subject-matter of the contract of which the guaranty was part was within the legitimate powers of the corporation. The usage began with the organization of the company, and we find it continued to within about ten months of the time of taking our last testimony.

2. But if the object for which the guaranty was made was without the legitimate powers of the corporation, yet the guaranty in form, as it exists, was clearly within them. By the mere fact of incorporation, this railroad company is vested with all the powers necessary to carry into effect the object of its creation—the ordinary powers of corporations applied to and controlled by that object.

It has the general power to contract and be contracted with. Ang. & Ames, Corp. 100.

The guaranty which a court of equity is asked to compel the railroad company to repudiate is clearly within the general power to contract. The company might make a bond, it might take a bond, it might guarantee and sell the bond which it had taken. These are correlative powers, and the possession of the one implies the other. There is, therefore, nothing, in the mere fact or form of the guaranty, which is out of or beyond the general powers of the corporation. It is quite immaterial whether there be one bond or four hundred, whether the same be large or small, provided it do not exceed the sum to which the utmost indebtment of the corporation is limited by its charter. The bona fide holder for a valuable consideration of a bond or contract, the execution of which is within the power of the corporation, has nothing to do with the object or purpose of its execution. It is good in his hands, no matter what the purpose for which it was given, unless some positive statute declare it void. If the object be unauthorized, the directors may be enjoined from entering into the contract or making the indorsement, as in the case of *Colman* v. *Eastern Counties R'y Co.* 4 Eng. R'y Cas. 513, 529, and *Cohens* v. *Wilkinson*, 5 Eng. R'y Cas. 741, where the court specially confined their action to restrain an illegal purpose not consummated, while it impliedly admits the binding effect of actual contracts, legal on their face, though made in furtherance of an unauthorized object. P. 760.

We can find no case in which the negotiable paper of a private corporation, legal upon its face, in the hands of a bona fide holder for valuable consideration, without notice, has been holden void at law, or set aside in chancery, because the object for which it was given was without the power of the corporation giving it. Can it be doubted that the corporation had power to make this identical guaranty in form and substance, if made for a proper object? Then, as the corporation had power to make this very paper in form and substance as we now have it, neither the corporation nor any of its members can object that they made it for an unauthorized object. It is the legality of the act of which we must inquire, not the wisdom or purity of the motive. We cannot conceive a case in which a court of equity will compel a private corporation to repudiate a contract legal on its face, the benefit of which it has received and retains, and on which innocent third persons have relied.

See *Graham* v. *Birkenhead, etc., R. Co.* 6 Eng. L. & Eq. 132.

2. But we contend that the end and aim, the object and purpose to be effected by this contract, was legitimately within the powers of the corporation under and by virtue of the act of March 3, 1851.

The 4th section of that act was re-enacted *in haec verba*, by § 24 of the act of May 1, 1852; but the last-named act has no repealing clause. If, then, it applies to and covers all the cases to which the 4th section of the act of 1851 applies, it is immaterial whether that section is repealed or not. If it does not extend to the same cases, then it is not a repeal. The Constitution of the state, however, art. 2, § 16, settled the question that it is not a repeal.

III. But it is contended on the other side that the 4th section of the act of 1851, and its re-enactment in 1852, so far as it applies to pre-existing corporations, impairs the validity of the contract of subscription, and is, therefore, as to them, unconstitutional and void.

We do not readily perceive how a law, permissive merely, not compulsory, authorizing this corporation to do an act which we admit, *argumenti gratia*, it was not authorized to do before, violates the contract of incorporation, or the contract between corporation and corporators. The mere extension of privileges by law is not a violation of the contract of incorporation.

Gray v. *The Monongahela Nav. Co.* 2 Watts & S. 152.

The decision in the case of *The Hartford & N. H. R. Co.* v. *Croswell*, 5 Hill, 383, relied on by the complainant's counsel, bears strongly on this case.

In the case, we have no doubt that a stockholder might, by bill in chancery presented in due time, have enjoined and prevented the acceptance of the new power and the action under it. But he could not, thereby, suffer the directors to accept the newly conferred privileges, employ workmen and build boats, and then enjoin the corporation from paying for them. If he consent to the contract, or acquiesce in it until third persons have become involved, his remedy is gone. The powers granted by the act of 1851, do not extend to a new undertaking, but to a more full and perfect means of executing the original charter; and it is the purpose of the corporator to see that the additional powers are not exercised to their injury.

If they neglect this, they, and not innocent third persons, must suffer the consequence of their laches.

M'ess v. *Rossie Lead Min. Co.* 5 Hill, 141; *Jackson* v. *Lamphire*, 3 Pet. 291; *Mumma* v. *The Potomac Co.* 8 Pet. 286.

If we be not sustained under the general powers of the corporation, and if the legality of the power for which the guaranty was made must be shown in order to sustain it, then we claim and will endeavor to show, that the transaction out of which the guaranty arises, comes within the provisions of the 4th section of the act of March 4, 1851. Under this law, the purpose with which the aid is to be furnished to another road, must be that of forming a running connection with the road aided. This gives the power, and it is no matter whether it be wisely exercised or not; and if such be its apparent object and the connection actually exist, it is quite immaterial, so far as innocent third persons are concerned, whether the aid was so applied in good faith or not. We suppose that in order to make out the *casus fœderis* it is not essential that the road granting the aid should connect immediately with the road aided. If they connect through an intermediate road, it is sufficient. The contract, so far as it affects the Indianapolis & Bellefontaine R. Co., has been complied with by change of gauge, so as to make perfect running connection from Cleveland to Indianapolis by the Columbus and Piqua road. It has been complied with by the removal of the injunction by them obtained against the requisite change of gauge, and by forming the required connection at Columbus, and the C. C. & C. R. is enjoying the full benefits of the contract, of which this guaranty is the consideration. The arrangement entered into in this case is quite within the powers of the company. It may be viewed in two aspects, as it evidently was done with a double purpose.

The bonds issued by the C., P. & I. R. Co. were stated by the bill to have been issued to raise money to complete the road. That road connects directly with the C., C. & C. road. This makes a *casus fœderis*. The object in extending the aid to the C. P. & I. was to form a connection with the last-named road. But there was also another contract with other parties, which formed one of the motives for the guaranty, and which comes under the second clause of this section, namely, an arrangement between two railroad companies whose lines were so connected for their common benefit, consistent with and calculated to promote the object for which they were created. The C., P. & I. R. Co. had a contract with the I. & B. R. Co., by which the two roads were to connect on the state line at Union with a gauge of 4 feet 8½ inches, and thus run in connection from Columbus to Indianapolis. The gauge of the defendant was 4 feet 10 inches, and it connected Galion with the I. & B. R. of like gauge, which gauge terminated at Union, on the state line. The gauge being there broken, cars coming on this road could not pass on to Indianapolis without a change of gauge in the

Indianapolis road. That road entered into a contract with the defendant, the C., C. & C. R., by which it agreed to change its gauge to conform with theirs, and run in connection with them. The parties were proceeding to carry out this contract, when the C., P. & I. R. Co. filed its bill in chancery and enjoined the change. To get rid of this injunction, and get a continuous line to Galion, and thence to Indianapolis and westward, was one of the leading objects of this guaranty. This running connection is proved to have been of great value to the defendant railroad, and all parties connected with it ought to be grateful to the complainant for abstaining to file his bill until the change of gauge and the running connection were completed. It can now injure none but the bondholders. Had he filed his bill and obtained an injunction twenty months earlier, it would have greatly injured the road and depreciated the value of his own stock.

These arguments we supposed to be fully sustained by the two clauses of the statute above cited.

V. The counsel on the other side further contend that the whole transaction is void under the 4th section of the act of March 3, 1851, because the directors of the company acted in the matter before they convened the stockholders to vote upon it.

The statute does not say who shall take the initiative, the directors or the stockholders, but that "no such aid shall be furnished," or "arrangement perfected," without a vote of the stockholders. There is no provision in the act that the vote of the stockholders shall be first in order. The reverse is implied in the language of the statute, and its sole requisition is that no such act of the directors shall be valid without this sanction of the stockholders. All the sales of bonds appear to have been made after, and upon the faith of, the resolutions of the stockholders.

VI. But it is contended that the contract under which those bonds were guaranteed is not obligatory on this company, because it does not appear to have been sanctioned by a vote of the stockholders of the other companies.

The contract was sanctioned by a vote of the stockholders of the B. & I. R. Co. on July 20, 1854, and it has been fully complied with by that company and also by the C., P. & I. Co. The stockholders of this company cannot now make this an objection, for performance is in equity equivalent to consent. On each of the above grounds we resist the prayer of the bill, and we think a court of equity cannot grant the injunction asked. The complainant road had received, and is daily receiving, the benefit of the contract which it is required to repudiate. The contract cannot be rescinded; indeed, there is no case made of prayer inserted for rescission. It is simply a prayer to compel it to repudiate, and to permit it to enjoy the benefit of the contract. The railroad company does not ask this. It is fully impressed with the obligation of its contract, and will not violate its faith unless compelled to do so. It is a stockholder who wants a larger dividend, who comes into equity to compel repudiation—a stockholder who, by his proxy, was present at the meeting which voted the contract, and who made no objections—a stockholder who, with a full knowledge of all the facts, lay by till a contract was irrevocably executed by the other parties thereto, and until the guaranty bonds were in the hands of bona fide purchasers, and then filed his bill. If every act of the directors was unauthorized and illegal, we think equity could afford him no relief. There is a superior equity on the other side.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellant is a stockholder of the Cleveland, Columbus, & Cincinnati Railroad Company, a corporation existing by the law of Ohio, and empowered to construct a railroad from Cleveland south, and having a capital of more than $4,300,000 distributed among above nine hundred stockholders. The appellant complains, that this corporation, in April, 1854, illegally indorsed a guaranty upon four hundred bonds of $1,000 each, with interest coupons at the rate of seven per cent per annum, payable to Elias Fossett or bearer in New York, in 1869, that had been issued in that month by the Columbus, Piqua, & Indiana Railroad Co., and which were also indorsed by the Bellefontaine & Indiana Railroad Co., and the Indianapolis & Bellefontaine Railroad Co., to the prejudice of the stockholders, and the burden of the resources of the said Cleveland corporation. The object of the bill was to obtain a decree to restrain the company, pending the suit, from paying the interest, and upon a declaration of the illegality of the bonds, to enjoin the corporation from applying any of its effects to their redemption.

The three defendants are holders of five of the bonds, who have availed themselves of the invitation of the bill to all their class to become defendants, and who assert that they are bona fide holders, and that their securities are valid obligations of the company. This issue of the obligations of these four corporations originated in a negotiation among their officers, in *1854, to determine upon a uniform [*391 gauge for all their roads, and to promote intimate connections in their transit operations.

The Piqua road and the Indianapolis road were projected to extend from Columbus to Indianapolis (one hundred and eighty-five miles), and were partially finished at a gauge of 4 feet 8½ inches, and had agreed to maintain this gauge for their common interest. At Columbus they were to connect with roads of the same gauge, leading through Ohio and Pennsylvania to Philadelphia.

The Cleveland and the Bellefontaine railroads were constructed upon the Ohio gauge, of 4 feet 10 inches, and the companies were interested to detach the other corporations from their Pennsylvania connection, and to combine them with their own and other companies, whose roads passed through Cleveland, along the shores of the lakes into New York, and connected there with the railroad and canal communications of that state. The Piqua road was at this time finished only 46 miles, and the company was embarrassed, and their work suspended for want of money. The Indianapolis company were willing to change the gauge of their road to the Ohio pattern, but were withheld by their contract with the Piqua company. In January, 1854, the Piqua company appointed

a committee from their board of directors to negotiate for money or securities sufficient to complete their road, and to discharge their debts, other than bond debts, and were authorized to prepare six hundred bonds of $1,000 each, of the usual form, to be secured by a mortgage, being the third mortgage of their franchises and road. They were also empowered to determine the gauge of the road, and either to maintain their existing connections, or to consent to the adoption of the Ohio gauge in conjunction with the Indianapolis company.

This committee opened their negotiations in Philadelphia, but pending these the vice-president of the company (Dennison) "sounded the inclinations" of the Cleveland company, by intimating that if that company would indorse a portion of the bonds, and take some of the stock of the Piqua company, the Pennsylvania connection would be abandoned. Some assurance having been given by the president of the Cleve- [*392] land *company to him, he, with the financial agent of the company (Niel) arranged a contract with the committee of the Piqua company to purchase the six hundred bonds, to guaranty a subscription for $50,000 of their stock at par, and to assume the control of the settlement of all controversies and questions concerning the gauge of the road. These negotiations were pending from the first week in February until the 25th of the month, when the contract was reduced to writing, and the price to be paid settled at $305,000. On the 7th of March, 1854, Dennison and Niel concluded a contract with the three corporations, Cleveland, Indianapolis, and Bellefontaine, by which they consented to the permanent adoption of the Ohio gauge for the Piqua and Indianapolis roads, and those corporations agreed to guaranty four hundred of the bonds of the Piqua company before mentioned, and to subscribe for $30,000 of their stock. This contract was reported shortly after to the boards of the several corporations, and approved, and the bonds were issued and indorsed, and the stock subscribed for in April, 1854. The tracks of the several roads were altered to conform to this arrangement shortly after. The negotiations and contracts of Dennison and Niel were for their own account and benefit. The testimony is conclusive of the fact that the members of the Piqua board were ignorant of the assurances they had received of the disposition of the Cleveland and other companies to enter into such engagements. Dennison had been a director of this company from its organization; but before signing the contract of the 25th February, with the Piqua company, he exhibited a written resignation, and that resignation was entered upon the minutes of the board before the approval of the contract or the issue of the bonds to him and his associate.

This transaction was reported to the stockholders of the indorsing corporations in July, 1854, and accepted by them as the act of the company. The board of directors of the Cleveland company, on the 16th June, resolved, that there should be submitted to a vote of the stockholders, at a meeting on the 1st July *proximo*, four propositions for the aid of other roads desiring to form a connection with that company, under the *4th section of a statute of [*393] Ohio, passed 3d March, 1851. Among these was the indorsement of four hundred bonds of the Piqua company. Notice was given of this meeting by advertisement in the daily papers of Cleveland and Columbus, and a daily paper in New York, but it did not disclose the object of the meeting. Above eighteen thousand shares of stock were represented, and the following resolution was adopted without a dissenting vote:

Resolved, "That the indorsement jointly and severally with the Bellefontaine & Indiana Railroad Company, and the Indianapolis & Bellefontaine Railroad Company, of $400,000 of the third mortgage bonds of the Columbus, Piqua, & Indianapolis Railroad Company, by order of the board, March 6th, 1854, be, and the same is approved, adopted, and sanctioned, by this meeting, as the proper act of this company." But, although there was no dissent in the vote, there was dissatisfaction openly expressed by the proxy of the appellant, and of a majority of the stockholders represented at the meeting, and who declined to vote on the resolution. The bonds were offered for sale in the city of New York in the summer of 1854 and the spring of 1855, under an uncontradicted representation of their validity through the votes above mentioned, and were freely purchased at fair prices. The interest was paid by the Piqua company until October, 1855, when the instalment due in that month was discharged by the indorsers in equal proportions. In the spring of 1856, the Piqua company having become insolvent, the appellant served a notice upon the Cleveland company not to pay any portion of the principal and interest that might become due on the bonds, and required them to sue for the cancelation of their guaranty, and demanded his share of the profits of the company, without the reservation of any part for the payment of the bonds, and immediately after filed the bill in this cause.

He contends that the sale by the Piqua company to Dennison and Niel is void, under a statute of Ohio that prohibits any director of a railroad company to purchase, either directly or indirectly, any shares of the capital stock, or any of the *bonds, notes, or other se- [*394] curities, of any railroad company of which he may be a director, for less than the par value thereof; and it declares: "That all such stocks, bonds, and notes, or other securities, that may be purchased by any such directors for less than the par value thereof, shall be null and void."

He insists that the indorsement of the bonds of the Piqua company was of no advantage to the Cleveland company, but was merely to consummate the success of a speculation of Dennison and Niel—a speculation reprobated by the law of Ohio; that the Cleveland company were not empowered by their charter to guaranty the contracts of corporations or individuals; that this indorsement was not required for the construction of the road, or in the course of the business of the company, or to promote an end of the incorporation; and that none of the acts of the general assembly of Ohio authorize it.

He denies any efficacy to the vote of the stockholders in July, 1854, because the notice was insufficient, in the length of the time and in the failure to disclose the purpose of the call; that

more than one half of the stock of the company was not represented, and two-thirds of that present did not vote, for the want of proper information and counsel on the subject. That the meeting were ignorant of material facts; they were not advised of the relations of Dennison and Niel to the Piqua company, and their connection with the bonds, when the vote was taken; and were deceived as to the condition of the Piqua company. He avers that the bondholders are chargeable with notice of the fact that the indorsement was made before the meeting of the stockholders, and by the authority of the directors only.

The testimony does not convict the defendants—the bondholders—of complicity in the negotiations or contracts that preceded the issue of the bonds, nor does any equivocal circumstance appear in their purchase of those securities. It is proved that it is a common practice for railroad corporations to make similar arrangements to enlarge their connections and increase their business. The Cleveland company had encouraged this practice by precept and example. In a report of their board of directors, 395*] in January, 1854, the company *were informed of their establishment of a line of first-class steamboats between Cleveland and Buffalo, and of their guaranty of the bonds of other companies for $300,000; of subscriptions for stock to the extent of $100,000, and of promised aid to still another company. They say: "These companies may need additional assistance, and others proposing to intersect ours may, by a moderate loan of money or credit, be enabled to finish their roads, and establish with us business relations, for the mutual benefit of both parties, while the advances on our part may be made safe and remunerative. Unless advised of your disapprobation, the board will continue to pursue this policy."

No such disapprobation was expressed as to check the board of directors until the guaranty of these bonds had been sanctioned, in July, 1854, at a meeting of the stockholders. The discussion was confined to the circle of the corporation, until after the failure of the Piqua company to pay a second instalment of interest. Then the appellant filed this bill.

The frame of the bill implies that this contract exceeds the power of the corporation, and cannot be co[illegible]ed against a dissenting stockholder. His authority to file such a bill is supported upon this ground alone.

Dodge v. *Woolsey*, 18 How. 331; *Mott* v. *Penn. R. Co.* 30 Pa. 1; *Manderson* v. *Commercial Bank*, 28 Pa. 379.

The usual and more approved form of such a suit being that of one or more stockholders to sue in behalf of the others.

Beman v. *Rufford*, 1 Sim. N. S. 550; *Winch* v. *Birkenhead H. Railway Co.* 5 De G. & S. 562; *Wosley* v. *Uston*, 1 Phil. 790; *Wood* v. *Draper*, 24 Barb. 187.

A court of equity will not hear a stockholder assert that he is not interested in preventing the law of the corporation from being broken, and assumes that none contemplate advantages from an application of the common property that the constitution of the company does not authorize.

The powers of the Cleveland company are vested in a board of directors chosen from the company. They are authorized to construct and maintain their road, and for that purpose can employ the resources and credit of the company, and execute *the requisite securi- [*396 ties, and are required to exhibit annually a clear and distinct statement of their affairs to a meeting of the stockholders. In the year 1851 a general law relating to railway companies empowered them "at any time, by means of their subscription to the capital stock of any other company, or otherwise, to aid such company in the construction of its railroad, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid; . . . and empowered any two or more railroad companies, whose lines are so connected, to enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created: Provided, that no such aid shall be furnished nor any . . . arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate; and the holders of at least two thirds of the stock of such company represented at such meeting in person or by proxy, and voting thereat, shall have assented thereto."

This section was re-enacted in the following year, in a general act for "the Creation and Regulation of Incorporated Companies in Ohio," which last act provides that "any existing company might accept any of its provisions, and when so accepted, and a certified copy of their acceptance filed with the secretary of state, that portions of their charters inconsistent with the provisions of this act shall be repealed." Curwen's Ohio Laws, 949, 1110.

It is contended that neither of these acts was accepted by the Cleveland company; that the act of 1852 superseded that of 1851, and that the former could be accepted and become obligatory upon the company only in the mode it prescribed. Both of these are general acts, and were designed to enlarge the faculties of these corporations, so as to promote their utility, and to enable them to accomplish with more convenience the objects of their incorporation. This act of 1851 does not devest any estate of the company, or make such a radical change in their constitution as to authorize the members *to say that its adoption without their [*397 consent is a dissolution of the body. But for an intimation in an opinion of the supreme court of Ohio (*Chapman* v. *M. R. & L. E. R. Co.* 6 Ohio St. 119) to the contrary, we should have been inclined to adopt the conclusion, that the act of March, 1851, might be operative without the specific or formal assent of the corporations to which it refers, and was not superseded by the act of 1852, as to pre-existing corporations.

Everhart v. *P. & W. C. R. Co.* 28 Pa. 340; *Gray* v. *Monongahela N. Co.* 2 W. & S. 116; *Great W. R. Co.* v. *Rushout*, 5 De G. & S. 290.

The jurisprudence of Ohio is averse to the repeal of statutes by implication; and in the instance of two affirmative statutes, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode

of interpretation. *Cass* v. *Dillon*, 2 Ohio St. 607.

The learned compiler of the laws of Ohio retains the act of 1851 as valid, in respect to the corporations then existing. But as between the parties on this record, the acceptance of those acts may be inferred from the conduct of the corporators themselves. The corporation have executed the powers and claimed the privileges conferred by them, and they cannot exonerate themselves from the responsibility, by asserting that they have not filed the evidence required by the statute to evince their decision. The observations of Lord St. Leonards in the House of Lords (*Bargate* v. *Shortridge*, 5 H. L. Cas. 297), in reference to the effect of the conduct of a board of directors as determining the liability of a corporation, are applicable to this corporation, under the facts of this case. "It does appear to me," he says, "that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn round, and themselves raise the objection that they have not taken these precautions, and that shareholders ought to have inquired and ascertained the matter. . . . The way, there-
398*] fore, in which I *propose to put it to Your Lordships, in point of law, is this: The question is not whether that irregularity can be considered unimportant, or as being different in equity from what it is in law, but the question simply is, whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard in a court of justice to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do."

This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court, and has been engrafted upon the common law of Ohio. *Pearce* v. *M. & I. R. Co.* 21 How. 441; *Straus* v. *Eagle Ins. Co.* 5 Ohio St. 59. But the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard.

The instances already cited of the course of dealing of this corporation, and others of a similar nature, of which there is evidence in the record, sufficiently attest that the corporation accepted the acts of 1851 and 1852 as valid grants of power; and it would be manifestly unjust to allow it to repudiate the contracts which it has made, because their acceptance of these grants has not been clothed in an authentic form. The supreme court of Ohio have recognized the obligation of corporators to be prompt and vigilant in the exposure of illegality or abuse in the employment of their corporate powers, and have denied assistance to those who have waited till the evil has been done, and the interest of innocent parties has become involved. *Chapman* v. *Mad River R. R. Co.* 6 Ohio St. 119; *The State* v. *Van Horne*, 7 Ohio St. 327.

We conclude that the validity of the contract of the Cleveland corporation, under the circumstances, must be determined on the assumption that it was althorized to exert the *power conferred in the 4th section of [*399 the act of March, 1851, and 24th section of the act of May, 1852.

In deciding upon the validity of this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua company the 25th February, 1854, when he signed the contract with the committee of the Piqua board of directors; or whether that contract was affected by its ratification by the board after his resignation was entered upon the minutes, or by the subsequent consummation of the contract, in the reciprocal transfer of the securities and payment of the consideration; or whether, as matter of law, the bonds of the Piqua company, commercial in their form, payable to another party, and issued after his resignation, are null and void.

The contract of the guarantors indorsing the bonds, is a distinct contract, and may impose an obligation upon them independently of the Piqua company. In the absence of a personal incapacity of Dennison to deal with his principal, the issue of the bonds by the directors of the Piqua company is an ordinary act of administration; and bonds in such form, it is admitted, "challenge confidence wherever they go." We perceive no illegality in their delegation to them of the power to determine whether the Ohio or Pennsylvania gauge should be adopted, or their sale of the privilege to adjust the controversies and questions relating to it. Their adoption of the Ohio gauge was a solution of all the difficulties; it enabled the Indianapolis company to adopt it; it superinduced the resulting consequence of running connections among the four corporations; it secured profits to the guarantors; it imposed the burden of relaying their track upon the Piqua company. Their contract to adopt this gauge and to form the corresponding connections is a valuable consideration, and the Piqua company have fulfilled the engagements that Dennison and Niel were authorized to stipulate on their behalf. There is testimony that the bargain was a hard one for the guarantors, and argument that it was probably an unjust one, and possibly fraudulent in reference to the stockholders of the Cleveland company. But the bill is framed, not to obtain relief from error or fraud in the administration of the powers of the company *by their trustees, but [*400 against the exercise of powers that did not belong to the corporation, and which the body could not confirm, except by a unanimous vote. *Foss* v. *Harbottle*, 2 How. 461; 2 Phil. Ch. 740.

We proceed to consider of the effect of the sanction given to the arrangements of the Cleveland company, through Dennison and Niel, with the Piqua company, by the vote of the meeting in July, 1854. It is objected that the notice of this meeting was insufficient, and that, unprepared as the corporators were, the

proxy appointed by the nonresident stockholders was overpowered by the heat and passion of the directors and their adherents. There is some force in the complaint that this meeting was not conducted with a due respect for the social rights of a portion of the stockholders. But the time, place, and manner of the meeting were appointed by the directors, as the act of 1851 permits. The proxy of the appellant was there, exhibited his instructions, discussed the propositions submitted, and declined to vote, when his vote would have controlled the action of the meeting. Since that time, several annual meetings have been held, at which the appellant was represented. The circumstances of the contract and its effects have been developed, and yet the resolution sanctioning this contract has not been rescinded. It may be that among the stockholders, and within the corporation, the cause of this procrastination and hesitancy to act upon the subject may be estimated properly. But we are to regard the conduct of the corporation from an external position. The community at large must form their judgment of it from the acts and resolutions adopted by the authorities of the corporation and the meeting of the stockholders, and by their acquiescence in them. These negotiable securities have been placed on sale in the community, accompanied by these resolutions and votes, inviting public confidence. They have circulated without an effort on the part of the corporation or corporators to restrain them, or to disabuse those who were influenced by these apparently official acts. Men have invested their money on the assurance they have afforded.

A corporation, quite as much as an individ-
401*] ual, is held to a *careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced. The opinion of the court is, that the injunction granted upon the bill of the appellant was improvidently granted, and that he is not entitled to the relief he has sought; *and that the decree of the Circuit Court dissolving the injunction and dismissing the bill is correct, and must be affirmed.*

THE UNITED STATES, *Appt.*, *v.* ANDRES CASTILLERO.

(See S. C. 23 How. 464–469.)

Islands, when not grantable by Mexican governor—order to grant, by Mexican president, on July 20, 1838—effect of—grant of island of Santa Cruz, valid.

Islands situated on the coast, it seems, were never granted by the governors of California or any of her authorities, under the colonization law of 1824, or the regulations of 1828.

The power to grant the lands of the islands was neither claimed nor exercised by the authorities of the department, prior to the 20th day of July, 1838.

On that day the Mexican President, by a despatch, authorized Governor Alvarado, in concurrence with the departmental assembly, to grant the desert islands adjacent to that department.

Grants made by the governor, under the power conferred, without the concurrence of the departmental assembly, were simply void. It was so held by this court in U. S. v. Osio, at the present term.

By another despatch on the 20th day of July, 1838, the President recommended to the governor and the departmental assembly that one of the islands, such as the claimant might select, be assigned to him, before they proceeded to grant and distribute such lands, under the general authority conferred by the previous despatch.

The legal effect of that second communication was to withdraw such one of the islands as should thus be selected by the claimant from the operation of the previous order, and to direct that it be assigned to this claimant.

On the 5th day of March, 1839, he presented his petition to the governor, asking for a grant of the island of Santa Catalina. The governor, on the same day, made a decree that a title of concession should issue, and that the *espediente* should be perfected in the usual way.

On the 7th day of March, 1839, he presented another petition to the governor, asking for a grant of the island of Santa Cruz, representing that the island previously offered was unfit for improvement, and for that reason praying that the order of concession may be so changed as to conform to his last mentioned request.

On the 22d day of May, 1839, the governor made the grant, basing it upon the special despatch referred to in the petition; and all the documentary evidences of title, including the grant, were found in the Mexican archives.

Held, that the genuineness of the documentary evidence of title is satisfactorily proved, and that the grant was made by competent authority.

Emanating, as the despatch did, from the supreme power of the nation, it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the department.

Neither the governor nor the assembly, nor both combined, could withhold the grant, after a proper selection, without disobeying the express command of the supreme government.

Argued Feb. 23, 1860. Decided Apr. 2, 1860.

APPEAL from the District Court of the United States for the Southern District of California.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **J. S. Black**, *Atty. Gen.*, and **E. M. Stanton** for appellants.

Mr. **J. A. Rockwell**, for appellees.

The argument of counsel, being confined almost entirely to the facts, is not here given.

*Mr. Justice **Clifford** delivered the [*465 opinion of the court:

This is an appeal from a decree of the district court of the United States for the southern district of California, affirming a decree of the commissioners appointed under the act of the 3d of March, 1851, to ascertain and settle private land claims.

Pursuant to the 8th section of that act, the appellee in this case presented his petition to the commissioners, claiming title to the island of Santa Cruz, situated in the county of Santa Barbara, in the state of California, by virtue of an original grant from Governor Alvarado. All of the documentary evidences of title produced in the case are duly certified copies of originals found in the Mexican archives, as appears by the certificate of the surveyor general, which makes a part of the record. They consist of a special despatch from the Minister of the In-

NOTE.—*Title to islands*—see note to 58 L. R. A. 673.

terior of the Republic of Mexico, addressed to Governor Alvarado; the petition of the claimant to the same, and the original grant to the petitioner, which purports to be signed by the governor, and to be duly countersigned by the secretary of the department. Certain other documents were also introduced, to which it will be necessary to refer, as a part of the proceedings that led to the grant.

Islands situated on the coast, it seems, were never granted by the governors of California or any of her authorities, under the colonization law of 1824, or the regulations of 1828. From all that has been exhibited in cases of this description, the better opinion is, that the power to grant the lands of the islands was neither claimed nor exercised by the authorities of the department prior to the 20th day of July, 1838, as was satisfactorily shown in one or more cases heretofore considered and decided by this court.

On that day, the Minister of the Interior, by the order of the Mexican President, addressed a communication to Governor Alvarado, authorizing him, in concurrence with the departmental assembly, to grant and distribute the lands of the desert islands adjacent to that department to the citizens of the nation who might solicit the same. That despatch bears date at a period when the President was in the 466*] exercise of *extraordinary powers, and was issued, as appears by its recitals, with a view to promote the settlement of the unoccupied islands on the coast, and to prevent those exposed positions from becoming places of rendezvous and shelter for foreign adventurers, who might desire to invade that remote department. Grants made by the governor, under the power conferred by that despatch, without the concurrence of the departmental assembly, were simply void, for the reason that the power, being a special one, could only be exercised in the manner therein prescribed. It was so held by this court in *United States* v. *Osio*, 64 U. S. 457, decided at the present term, and we are satisfied that the decision was correct.

But the grant in this case was not made under the general authority conferred by that dispatch. In addition to what was exhibited in the former case, it now appears that another despatch of a special character was addressed by the same cabinet minister to the governor on the same day. Like the other, it bears date at the city of Mexico, on the 20th day of July, 1838, and is signed by the Minister of the Interior. By the terms of the communication, the governor is informed that the President, regarding the services rendered by this claimant to the nation and to that department as worthy of great consideration and full recompense, has directed the minister to recommend strongly to the governor and the departmental assembly that one of the islands, such as the claimant might select, near where he ought to reside with the troops under his command, be assigned to him, before they proceed to grant and distribute such lands, under the general authority conferred by the previous dispatch.

Beyond question, the legal effect of that second communication was to withdraw such one of the islands as should thus be selected by the claimant from the operation of the previous order, and to direct that it be assigned to this claimant. His attorney, accordingly, on the 5th day of March, 1839, presented his petition to the governor, asking for a grant of the island of Santa Catalina, which is situated in front of the roadstead of San Pedro, and requested that the *espediente* might pass through the usual forms.

*In conformity to the prayer of the peti- [*467 tion, the governor, on the same day, made a decree that a title of concession should issue, and that the *espediente* should be perfected in the usual way. Accompanying the order of concession there is also a form of a grant of the island to the claimant; but it is without any signatures, and does not appear ever to have been completed.

On the 17th day of March, 1839, his attorney in fact presented another petition to the governor, asking for a grant of the island of Santa Cruz, which, as he represents, is situated in front of Santa Barbara, on the coast of that department.

Both of these petitions are based upon the special despatch addressed to the governor; and in the one last presented, the claimant represents that the island previously offered is wholly unfit either for agricultural improvement or the raising of stock, and for that reason prays, in effect, that the order of concession may be so changed as to conform to his last mentioned request. For aught that appears to the contrary, his request was acceded to without hesitation, for, on the 22d day of May, 1839, the governor made the grant, basing it upon the special dispatch referred to in the petition.

To prove the authenticity of the dispatch and the genuineness of the grant, the petitioner called and examined Governor Alvarado. He testified that he was acquainted with the handwriting of Joaquin Pesado, the Minister of the Interior, and also with that of Manuel Jimeno, the secretary of the department, who countersigned the grant. Both of these signatures, as well as his own, he testified, were genuine; and he also stated that he recognized the document as a genuine instrument, and intended it at the time as a perfect and complete title in the claimant. His testimony finds support in this case, to some extent, by the fact that all the documentary evidences of title, including the grant, were found in the Mexican archives; but much stronger confirmation of his statements is derived from the record evidence which those archives are found to contain.

At the argument, we were very properly furnished by the counsel of the appellants with a copy of an index of concessions, *pre- [*468 pared by the secretary of the department. That index covers the period from the 10th day of May, 1833, to the 24th day of December, 1844. It contains a list of four hundred and forty-three concessions, and among the number is the one set up by the claimant in this case. Its description in the index corresponds in all particulars with the grant produced, except as to the date. As there given, it is dated the 5th day of March, 1839, which is the true date of the concession, under the first petition.

Considering that the name of the grantee and the description of the premises agree with the grant produced in the case, we think it a reasonable presumption that the error of date is in

the index, and not in the grant. For these reasons, we think the genuineness of the documentary evidence of title is satisfactorily proved. Having come to this conclusion, the only remaining question is whether the grant was made by competent authority. Direction was given to the governor and the departmental assembly in the special despatch on which this grant was issued, that one of the islands, situated along the coast of the department, should be assigned to this claimant before they proceeded to grant and distribute such lands under the general order. Those communications were of the same date; but it is obvious, from the language of the special despatch, that it was issued subsequently to the other communication, and must be regarded as qualifying the latter, so far as their terms are repugnant. Had the claimant petitioned for a grant of this description, under the general order, his application would have been addressed to the discretion of the governor and of the departmental assembly; and unless both had concurred in granting the prayer, his application would have been defeated, for the reason that such a title could only be adjudicated by their concurrent action. Power to refuse such applications was vested in the assembly as well as in the governor, but when both concurred, and the adjudication had been made, the title papers were properly to be issued by the governor as an executive act. As the assembly was a constituent part of the granting power under the general order, it was doubtless thought proper that the withdrawal 469*] of *one of the islands from its operation, and the disposal of it in another way, should be notified to the assembly as well as to the governor. They were accordingly directed not to proceed to make adjudications under that order until the assignment of the title to this claimant was perfected, but they were not required to make the assignment or to cause it to be made. To accomplish that purpose, and carry into effect the command of the President, two things only were necessary to be done; one was to be performed by the claimant, and the other was a mere ministerial act. It was the claimant who was to make the selection; and if it was a proper one, near the place where he was stationed with his troops, nothing remained to be done but to make the assignment as described in the dispatch. Emanating, as the despatch did, from the supreme power of the nation, it operated of itself to adjudicate the title to the claimant, leaving no discretion to be exercised by the authorities of the department. Neither the governor nor the assembly, nor both combined, could withhold the grant, after a proper selection, without disobeying the express command of the supreme government. Nothing, therefore, remained to be done, after the selection by the claimant, but to issue the title papers, and that was the proper duty of the governor, as the executive organ of the department. No doubt appears to have been entertained of the justice of the claim, either by the commissioners or the district court; and in view of all the circumstances, we think their respective decisions were correct.

The decree of the District Court is, therefore, affirmed.

*THE DUBUQUE AND PACIFIC RAILROAD COMPANY, *Plff. in Err.*, [*66
v.
EDWIN C. LITCHFIELD.

(See S. C. 23 How. 66-90.)

Land grant in aid of Des Moines river—strictly construed—what it was—lands outside of grant—bona fide claimant.

Under the act of 1846, to aid in the improvement of the navigation "of the Des Moines river," that portion from its mouth to the Raccoon fork was the "said river," on each side of which the strip of land granted was to lie.

All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language.

The donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied.

The act of Congress was a direct grant to Iowa, in fee, of an undivided moiety of the whole tract lying on each side of the river, from the Raccoon fork to the Missouri line.

No authority was conferred on the executive officers administering the public lands to do more than make partition between the tenants in common, Iowa and the United States, in the manner prescribed by the act of Congress.

It was impossible to make partition, under this grant, of lands lying outside of its boundaries; and all attempts to do so were merely nugatory.

Where the action was brought by a bona fide claimant under the grantee of the river improvement fund against the railroad company, although the case agreed was made up in a friendly spirit, to try the title at the instance of executive officers, the court felt bound to hear and decide the cause on its merits.

Submitted Mar. 29, 1860. Decided Apr. 9, 1860.

IN ERROR to the District Court of the United States for the District of Iowa.

This was an action of right, brought in the court below by the defendant in error, to try the title to a certain section of land in the state of Iowa.

The case having been submitted to the court upon an agreed statement of facts, a judgment was entered in favor of the plaintiff, whereupon the defendant sued out this writ of error.

The Attorney General having represented to the court that the government was interested in the questions involved in this case, leave was granted to him to intervene and file a printed argument on behalf of the United States.

The case is very fully stated in the opinion of the court.

Mr. **Platt Smith**, for plaintiffs in error:

There is no doubt but that the plaintiff is entitled to recover, if, by the true construction of the act of August 8, 1846, lands were granted the entire length of the river. But on the other hand, if the grant, like the improvement of the river, was limited to that portion of the Des Moines below the Raccoon fork, then the plaintiff must fail in his action, as the *locus in quo* is some sixty miles above the Raccoon fork. The defendants claim that plaintiff has no title, but that the lands belong to them as part of a grant made by act of Congress, approved May 15, 1856, to aid the construction of certain railroads in Iowa, and subsequently regranted by the state of Iowa to the defendants. The facts agreed to in this case, show clearly that the land in dispute belongs to the defendants, unless it was covered by the grant

made to improve the navigation of the Des Moines river.

It requires considerable persevering ingenuity to make the language of the act ambiguous; but the diversity of opinion existing at different times among the heads of the departments, is such as to warrant the conclusion that the language is not clear and explicit.

It is a well-known historical fact, that all grants of land by alternate sections to aid in making public improvements are obtained on the plausible plea that the sections reserved to the government will be doubled in value in consequence of the improvement. This is the head and front of the argument, and the real consideration which induces the government to part with the lands. Putting the construction upon this act which I contend for, no violence will be done to the well-settled principle and policy lying at the very foundation of all land grants of the kind. But if the grant is construed to extend several hundred miles above the improvement, then there was no consideration for the grant; the general policy governing like cases has no application to the case. The parties who drew the bill, the delegate from Iowa and the Commissioner of the General Land Office, must have, either through ignorance or design, overreached and defrauded the government.

Again; it is a well-settled principle of law, that all grants by governments are to be construed strictly against the grantee, that nothing shall pass except what is conveyed by clear and explicit language.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420; *Gildart* v. *Gladstone*, 12 East, 668.

The counsel on the other side has taken considerable pains to show that there are exceptions to the above rule, such as grants made for a valuable consideration, grants to pious and charitable institutions, etc. But I am not aware that the Des Moines River Navigation Company fall within either of the above exceptions.

But it is contended that the plaintiff below, in this case, stands in the light of an innocent purchaser. A proper plea of innocent purchaser has several ingredients in it, which are altogether wanting in this case. A purchaser is always chargeable with every defect apparent in the chain of title which he holds.

Reeder v. *Barr*, 4 Hamm. Ohio, 446; *Nelson* v. *Allen*, 1 Yerg. Tenn. 360.

In the case of *Ware* v. *Brush*, 1 McLean, 533, the court says: "The assignment by the executor was wholly without authority, and therefore could convey no right to the assignee. Is the defendant chargeable with notice of this want of power in the executor? We think he is a purchaser with notice. The assignment by the executor appears upon the face of the warrant, which was transferred to the defendants and copied into the patent. This was clearly notice to the defendant that the assignment was made by the executor, and it was the duty of the defendant to examine the will for the power to make it. The executor was in fact a mere agent, and could only act within the limit of his authority. An assignment beyond this could transfer no right."

Mr. Litchfield was bound to look at the act of Congress, by which he was notified that the grant did not extend above the Raccoon fork; also to the certificate of Mr. Secretary Stuart, who certified the land to the territory under protest. Mr. Stuart was of opinion that the grant did not extend above the Raccoon fork, and only certified under protest, in order to give the state an opportunity of protesting the question in court. Mr. Litchfield comes in as an adventurer under that suggestion, and now claims to be an innocent purchaser.

The opposite counsel has made an elaborate argument to show that the proper interpretation of laws must be derived from their own language; that evidence *aliunde* cannot be admitted for the purpose of varying, extending, or controlling the meaning of a statute. I do not call such an act as this a public law. It is true that it is an act passed by Congress; but it is essentially a private act,—a grant and not a law or statute, within the general and broad acceptation of the term.

It is also contended on the other side, that the United States government is estopped in consequence of letters written a long time subsequent to the passage of the act; that if the original wording of the act did not extend above the Raccoon fork, the writing of these letters and the making of eight or nine alternate decisions for and against the grant, extending above the Raccoon fork, work an estoppel against the United States.

There is something novel in the idea of a party setting up an estoppel against the United States, in a suit to recover land in which nothing more than a fighting right has been certified under protest, with a view of allowing the mooted question to be settled by the court.

Mr. **Charles Mason**, for defendant in error:

Each of the parties to this suit claims to be the owner of the tract of land in controversy. It is only necessary to consider the title of the defendant in error, as he was a plaintiff below.

On the 8th of August, 1846, Congress granted to the then territory of Iowa, a quantity of land lying along the Des Moines river, for the purpose of aiding to improve the navigation of a portion of that stream. A year or two afterwards, and before any of the lands had been transferred to the state, a controversy arose as to the extent of that grant. It was contended on the one side that it reached to the source of the river, while on the other it was held to be limited to the Raccoon fork.

The land which is the subject of this suit lies within five miles of the Des Moines river, but above the Raccoon fork. It was duly selected as a portion of that grant, and has been regularly transferred from the state to the defendant in error. If, under all the circumstances of the case, the grant includes this tract, his title is complete—otherwise it is worthless. The court below decided that question in his favor, and the case is now brought here to test the correctness of that decision.

We hold that the plain language of the act itself is sufficient to settle this question conclusively in his favor. It grants "one equal moiety in alternate sections of the public lands (remaining unsold and not otherwise disposed of, incumbered or appropriated), in a strip five miles in width on each side of said river."

It is true, that in defining the object of the grant, the law declares it to be for the purpose

of aiding to improve the Des Moines river, from its mouth to the Raccoon fork, and the conclusion is thence drawn by some, that the grant itself was intended to extend no higher than the latter point. But I submit whether such a conclusion can be reached by any sound rule for the interpretation of statutes.

When we speak in general terms of the Des Moines river, we mean the whole river, and not a portion of it. In defining the purpose of the grant, a limited portion of the river is expressly mentioned. But in fixing the limit of the grant, the river itself is named without restriction or qualification. How shall it then be said that a part and not the whole of the river was intended?

As if to place the matter beyond all reasonable doubt, Congress has fixed another restriction upon the extent of this grant. The lands must be selected within the then territory of Iowa. The first restriction prevented us from taking lands more than five miles from the river—the second confines us within the territory. On the principle involved in the maxim "*expressio unius est exclusio alterius*," each of these restrictions adds strength to the conclusion that there are no other restrictions unexpressed. "As exceptions strengthen the force of the law in cases not excepted, so, according to Lord Bacon, enumeration weakens it in cases not enumerated."

Dwarr. St. 605.

In fact, a prohibition of one thing often involves an actual permission to do what is not thus prohibited.

Thus, the whole constitutional provision which prevents Congress from interfering with the slave trade prior to 1808, has always been regarded as giving authority to prohibit it after that period. In like manner, the limitation which restricts us to the territory of Iowa in the selection of land is in effect an authority to select the alternate sections within five miles of the whole length of the river, wherever such land can be found within any portion of that territory.

In the construction of a statute, we must endeavor to give a definite meaning to every word and expression found therein. The plain and natural import of the terms employed is to govern in construing the law; and where a clear, intelligible meaning can be gathered from those terms, we are not to look beyond them to fancy some unexpressed intent.

See *Denn* v. *Reid*, 10 Pet. 524.

We need (as we think) only read this statute with an unprejudiced wish to arrive at its meaning from the natural import of the language alone, to be satisfied that for the purpose of aiding to improve the Des Moines river as high up as the Raccoon fork, it was the evident intention of Congress to grant the alternate sections in a strip five miles in width on each side of said river, from its mouth to its source, so far as such land could be found within the limits of the then territory of Iowa.

The land for thirty or forty miles above the mouth of the Des Moines, was not to contribute an acre to the improvement, though much money was to be expended on that very portion of the river. On the one side of that part of the stream was the state of Missouri, and the land was, therefore, excluded from being taken by the very terms of the grant; and on the other side was the half-breed tract in the state of Iowa, and was private property, as will appear from the treaty of 1824, and the act of Congress of July 30, 1834.

See Stat. at L. vol. VII. p. 229, and vol. IV. p. 470.

Besides a considerable portion of the land between the half-breed tract and the Raccoon fork had been sold by the United States prior to 1846; so that, at the date of the passage of this law, there was but little more than one half the amount of land below the Raccoon fork to be affected by the grant, which it would have embraced had the alternative sections throughout this portion of the river been subject to the terms of the grant. There was only 321,000 acres left to be transferred to the state under this grant below the Raccoon fork; whereas the amount of six sections to the mile for the whole distance would have composed an aggregate of more than 587,000 acres. This deficiency of 266,000 acres situated below the Raccoon fork would probably, at that time, have been of more value than the whole 900,000 acres which were, as we contend, granted above that point, and which were to be received in lieu thereof. In railroad grants, it is the custom to allow the alternate sections to be taken for fifteen miles on each side of the road, to make up for any deficiency like the present. Instead of increasing the breadth of the grant for that purpose in this instance, a suitable addition has been made to its length.

What we contend for is, that in the construction of this statute the court should confine itself to the language of the law. The principle which has been sanctioned by this court justifies us in insisting upon such a rule.

In the case of *Paulina's Cargo* v. *The U. S.* 7 Cranch, 60, Chief Justice Marshall says:

"In construing these laws it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it."

See, also, *U. S.* v. *Fisher*, 2 Cranch, 358.

We respectively submit, whether the present is a case which justifies a strained construction of the statute. Must not something more than a mere inconvenience or a departure from a supposed rule of fitness, be necessary, to justify a disregard of the ordinary rule of construction, in accordance with the fair import of the language used?

But the present Attorney General (Mr. Black), in a very clearly written opinion, which will be found entire in the record, has decided this question adversely to us, founding that opinion entirely on the doctrine of doubts. After stating that there is an obscurity in the language used, sufficient to raise a doubt as to its meaning, he proceeds as follows:

"But for my own part I have not the least doubt about it. My reason may seem paradoxical, but the very obscurity of the grant, in my judgment, makes it clear. It is out of these doubts that certainty grows. In every doubtful case, we know very well what we ought to do, as soon as we are certain which party is entitled to the benefit of the doubt. We shall see who is entitled to it here.

"It is well settled that all public grants of

property, money, or privileges are to be construed more strictly against the grantee; whatever is not expressly given, or very clearly implied from the words of the grant, is withheld."

Now, with the greatest respect for the learning and ability of this high functionary, I venture to suggest that he has made a double mistake in this instance: 1st. As to there being an obscurity in the language used; 2d. If such is the case, he has not correctly expounded the doctrine of doubts as applied to such cases as this.

I have nothing to add to what has already been said of the first of these points. If I am correct in this position, the rule as to doubts has no application whatever to this case. But suppose the language to be actually of doubtful import; is that doubt to be construed against the grantee in cases like the present?

In a general way, we find the doctrine laid down that grants from the King are to be construed strictly against the grantee—thus directly inverting the rule as between private persons—but this rule is subject to many and important exceptions. When closely scrutinized, it will, I think, be found to be narrowed down to cases of royal grants, which are mere bounties, or to cases where privileges and exemptions are granted to private corporations. No instance can, I think, be found wherein such a rule has been applied to a grant intended for a great public purpose, and made to a state or any other municipal corporation.

"A statute made *pro bono publico* shall be construed in such a manner that it may, as far as possible, attain the end proposed.

Bac. Abr. Stat. 1, 7.

"The rules of construction which apply to general legislation in regard to those subjects in which the public at large is interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted—the latter, liberally in favor of the public, and strictly against the grantees."

Bradley v. *N. Y. & N. H. Railroad Co.* 21 Conn. 306; see, also, Sedgw. Stat. and Const. L. 338, 339; *Ohio Life & Trust Co.* v. *Debolt*, 16 How. 435; 2 Co. Inst. 496, 497; *Sutton's Hospital*, 10 Co. 27, 28; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 558.

But suppose the case of a real contract for a valuable consideration, and suppose the advantages conferred to be at the expense of no one but the government itself; and can anyone who carefully examines a decision of the majority in that case for a moment doubt that the whole court would have concurred unanimously in the views of the minority, as to the true rule by which the law should be construed?

Now, the case at bar is one of this very character. It is not simply a grant, but it is a contract, in fact as well as in law. A proposition was made by Congress to grant these lands, provided the state would assent to certain conditions with which the grant was coupled. One of these conditions (an implied one) was that Iowa should construct the improvement from the mouth of the Raccoon fork — the grant being made to aid in that improvement, and the government having a great interest in the result.

But in addition to this, it was expressly provided that the river should be and forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States or persons in their service, passing through or along the same.

If, in addition to the benefit which would result from this improvement to the United States as the proprietor of the public domain, could also be added the advantages above stipulated for, the government would be making an exceedingly profitable disposition of its property. A proposition to that effect was, therefore, made by Congress, and accepted by the legislature of the state. It was, therefore, not only in fact, but in form, a contract for a valuable consideration promised on the part of the state, and is, therefore, not subject to the strict rule contended for by the Attorney General.

I am aware that there are some decisions of this court which will be relied upon as establishing the contrary doctrine to that for which I have been contending; but a critical examination of those cases will show the error of such a conclusion.

In *The U. S.* v. *Arredondo*, 6 Pet. 729, the general rule is laid down, as claimed by the Attorney General, and as admitted by myself, that doubtful grants by the King are to be construed in favor of the grantor. But there is nothing in that decision to contradict the views hereinbefore expressed in regard to exceptional cases like the present. Nor is there anything in the facts of that case incompatible with these conclusions.

I believe it to be a well settled principle, that a statute is never to be warped, as to its meaning, by extrinsic facts. Even a deed from a private individual cannot be affected by evidence of what was said or written by the parties or anyone else, at the time it was about to be executed. How much less should such evidence be permissible in the case of a statute, which is a much more solemn and important instrument and which is intended to affect the interests of the public, who have not the means or the opportunity of looking behind the record, if that were permissible.

I am aware that parol proof is properly resorted to for the purpose of explaining a latent ambiguity in a deed, and also in a statute. If an act was passed for the relief of John Smith, parol proof may be given to show which of the many persons answering to that name was intended.

But where is the latent ambiguity in the present case? None has ever been shown or pretended. All that has ever been claimed as doubtful, is patent upon the face of the statute.

Parol proof is admissible to explain any such difficulty, in either a deed or a statute.

Mr. **J. S. Black,** *Atty. Gen.*, intervening on behalf of the United States:

I shall try to make this paper as brief as I can, and weary the judges with unnecessary matter as little as possible. It is my duty to speak freely about the case itself, but I must not be understood as reflecting upon the parties or their counsel, most especially not upon the

latter. Of the defendants' attorney I know nothing except what is reputable, and the gentleman who appears for the plaintiff is known to the whole country by his high character for integrity as well as ability. But men have different notions of right and wrong. Doubtless the conduct of my opponents squares exactly with their own ideas of propriety. Upon the face of the complaint and the plea, this is an action by a citizen of New York against an Iowa Railroad Company, for section 1, in township 88, North, Range 29 West of the principal Meridian. Whether the nominal plaintiff or the nominal defendant is the owner of that single section, is the whole question which pretends to be technically brought before you. But it is, in fact and in truth, in purpose and in object, an appeal from the Secretary of the Interior to the Supreme Court, in which the real appellants are certain parties interested in an old land grant, and the appellees are the United States. The appellants take this appeal, because they hope that you will expand a legislative grant of 321,000 acres of land into a grant of 1,153,000 acres. You are expected to sit as a board of revisers on the acts and doings of the interior department.

If the framers of the Constitution and the laws had thought proper that this court, or any other judicial tribunal, should review the proceedings of the Executive in such cases as this, they would doubtless have given the power. But it has been withheld, and the decisions of the Executive have been made final, for reasons which seem to me full of practical wisdom and justice.

I trust the court will look narrowly into every part of this record, and carefully consider the whole case, before giving any judgment either way upon the point which these parties have pressed upon you in their arguments.

I desire to call the attention of the court very specially to the following points:

1. This is a fictitious suit brought here, not to determine the rights of the nominal parties, nor to settle any real dispute between them, but to get an opinion which will throw the moral influence of this court against the government, in a matter already decided by the Executive. Therefore the case ought to be dismissed.

2. Assuming that an actual dispute exists between the parties, they have agreed upon a statement of facts which is, in some respects, palpably erroneous and unjust, and in others so defective that no judgment can safely be pronounced upon it.

3. If the court feel bound in such a case to give an opinion, it will be neither necessary nor proper to pronounce upon the construction of the Des Moines river grant. The rights of the parties to the section in suit depend on the conveyances which were made to them by the state of Iowa.

4. The true interpretation of the Des Moines river grant confines it to that part of the river which lies below the Raccoon fork, as the proper department of the government has decided.

I shall make a few remarks on each of these points, following the order in which I have set them down:

1. I am compelled by the evidence in the record itself to believe that this suit has not been instituted by the plaintiff for his own use, or with any view to the assertion of his own rights, or to redress any injury which he supposes himself to have suffered, but solely for the purpose of getting the opinion of this court for the benefit of other parties not named upon the record. Between Litchfield and the Dubuque Railroad Company there is no controversy. The real plaintiffs are the claimants under the Des Moines grant, and the government of the United States is the party aimed at as the real defendant. I repeat that I mean no imputation upon counsel, but merely to express the opinion that the whole proceeding is irregular and wrong. The facts are proved by the record, and their legal effect is shown by numerous adjudicated cases, among which it is only necessary to mention that of *Lord* v. *Veazie*, 8 How. 251. I invite attention to that case and the authorities there cited, because it corresponds to this so exactly that a distinction between the two is almost impossible.

2. There is such a manifest impropriety in the statement of the facts which the parties have agreed upon, that it is impossible for the court to pronounce judgment safely upon it. It is loaded with statements, certificates, *ex parte* affidavits, letters, etc., which no suitor in this or any other court has a right to produce, either with or without the consent of opposing counsel. It is true, as set forth in the verdict, that the matters and things therein stated are only to be taken for what they are legally worth. But it must be remembered that illegal evidence is not excluded by courts of justice because it is worthless, but because it is positively mischievous. I cannot say for myself that I fear the effect upon your mind of such affidavits as those of Messrs. Sample and Belknap, or the certificate of Mr. Guy Wells. But when a court receives and reads such things, those who know not what manner of men the judges are, might readily suppose the decision to have been affected by them, more or less. The court is bound, for its own sake, to have them removed out of sight. Such a statement as this should be sent away and refused all entertainment, not merely because it imposes upon the court the necessity of separating the truth from the trash, but because it involves a certain amount of danger to the just administration of the law, or at least to the reputation of the judiciary. But this record is objectionable, not only because it contains too much, but for the reason that it contains nothing or next to nothing, upon the very point in issue.

For these reasons, in case my motion fails upon the other ground, I shall insist that this writ of error be dismissed, and the cause remanded to the court below, with directions to take such measures as may be necessary to purge the stated case of the illegal and inadmissible matter which it contains, and to insert into it a full and specific statement of the titles under which both parties claim, and the nature, extent and duration of the defendant's possession.

3. If Your Honors shall conclude to set aside all these considerations, and determine to give a judgment upon the case, I must be allowed to ask (and I ask it with perfect respect), that your opinion be confined to the respective titles of the parties on record. You will not be disposed to pass upon the rights of other persons

who are not properly before you, unless justice to those who are before you make it absolutely necessary. In this case, it is not necessary at all

The plaintiff declares his title to be derived from the state, as trustee of the Des Moines river fund. The defendant's title is also derived from the state. Both parties claim under the same grantor, and that grantor is admitted to have had a good title. We do not know, indeed, which party has the earlier deed, but the concealment of this fact from the court is no fault of ours. The presumption is against the plaintiff, since the burden was on him of showing a clear title in himself.

Suppose it to be all true that the grant to the state made by Congress in 1846, for the improvement of the Des Moines river, covered the section in suit; and suppose also that the title of the state to this section was made perfect by the selection of the state agent, and the approval of the proper department here. The state kept her title until 1856, and then petitioned Congress for another grant of the same land, to aid her in making a railroad, and got it. After getting this second grant and locating it on the section in suit, she conveyed it away to the defendant, in consideration that a railroad shall be made. The defendant accepts the land from the state, and pays the consideration by making the railroad. After all this, the state conveys the same land to Litchfield. Does Litchfield get a title? Most assuredly not. By accepting the second grant from Congress, locating it on the section sued for, conveying it to the railroad company for a valuable consideration, and putting the company in possession, the state, and all claiming under her by subsequent conveyance, are clearly estopped from setting up another claim under an older title. When a party sells and conveys land, he transfers all the title he has. It would be an intolerable wrong to let the state select the same land under two grants, sell it to one party under the second grant, and then turn her grantee out of possession by the production of the first grant. The whole title of the state had been conveyed away to the railroad company before Litchfield's deed, and he, therefore, took nothing by it.

If it be assumed, without evidence, that Litchfield's deed is older than the title of the defendant, there is still no room in the case in point which the parties have tried so hard to raise, namely: the construction of the Des Moines grant. If the plaintiff had a conveyance previous to 1856, his right, whatever it is, will depend on the acts and deeds of the state, in making the several conveyances to himself and the other party.

4. While I confess to some anxiety that this court, for the sake of example, should dismiss the case without giving any opinion about the construction of the Des Moines grant, it shall not be said that I am unwilling to meet the point, if you shall think that it fairly and necessarily arises. I have no fears that your opinion will be opposed to that of the department. I will not urge it upon affidavits, nor waste words in reply to what has been said about the desire of parties interested in the claim to get more lands than the government thought them entitled to. I am very willing to admit that they want a great deal more than they got. But the question to be settled is, how much they have a right to receive.

The simple and naked question presented to the interior department was on the construction of the 1st section of the act of 1846, "that there be and here is granted to the territory of Iowa, for the purpose of aiding said territory to improve the navigation of the Des Moines river, from its mouth to the Raccoon fork (so called), in said territory, one equal moiety in alternate sections of the public lands (remaining unsold and not otherwise disposed of, incumbered or appropriated), in a strip of five miles in width on each side of said river, to be selected within said territory by an agent or agents to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

Does this give to the territory one moiety of all the lands on both sides of the river up to its source, or is the grant confined to the lands which lie between the fork and the mouth? What is the extent of this grant? How is the strip described, within which the alternate sections of land are to be taken? It is described as a strip five miles in width on each side of said river. What river? The said river—the river before mentioned and described—that is, the Des Moines river, from its mouth to the Raccoon fork.

I admit that this, like every other statute, must be interpreted *ex visceribus suis* with the aid of such lights as may be shed upon it by known historical and geographical facts, together with the authority of those officers whose duty it has been to interpret it heretofore. Where Congress has said one thing plainly and distinctly, in a law passed and enrolled, it cannot be modified, or in any manner changed by proof, however clear, that the committee which reported the bill, or any other member of the body, or even all of them together, meant to say a different thing. But when an obscurely worded law has received a construction at the hands of those who passed it, that construction will not be set aside by any court. So when an officer, whose duty it is to administer and execute the law, gives an official construction to it, his opinion is entitled to equal respect; and when the persons interested in a different construction, have acquiesced in that which the law receives from the officers, the conclusion is still more strong and clear against any opposing view. All this has occurred in the present case.

While the bill was pending before Congress, it was submitted to the commissioner of the land office with an inquiry how much land would be included in the grant. His answer shows that in his opinion no land would be included, except what lay between the mouth of the river and the fork. The house committee, to whom the subject was referred, acknowledged this to be the true construction, reported the letter of the commissioner, and laid it before the house along with the bill. After the passage of the law, the commissioner of the land office addressed a letter to the governor of the state, informing him that the range of selection was limited to the lands below the fork, and transmitting plans to guide the state in making its selection. The agent of the state

proceeded to make the selections within the limits defined. Both the governor of the state and the agent appeared to make the selections officially, notified the land office of their selection made below the fork, without pretending to have any claim above. The idea that the grant extended to the source of the river was an afterthought, which did not occur, even to the parties interested, for several years. These facts are kept out of view by the statement of the parties, but Your Honors will find them set forth in Mr. Cushing's Opinion, 7 Opinions, 694.

The first evidence to be found upon record that anybody doubted about the extent of this grant, is in a letter dated February 23, 1848, from Mr. Young, who had then just become commissioner of the land office. He suggested that the state was entitled throughout the whole extent of the river within the limits of Iowa. This was pronounced by the Secretary of the Board of Public Works in Iowa, to be "a very liberal opinion," and the claimants have contended for it with more or less pertinacity ever since. But Mr. Young became conscious of his error, and retracted his ill-advised opinion, before doing anything which could commit him to it. He reported the lands above the fork as being vacant and open to sale, and Mr. Polk accordingly issued his proclamation to put them in the market. But the Iowa board of public works had, by this time, become so impressed with their new opinion, that they sent a protest to the register against the sale of the lands. The sale went on, nevertheless, and considerable quantities of land were sold and pre-empted. This was in the summer of 1848. On the 8th of January, 1849, the delegation in Congress from the state of Iowa addressed a letter to Mr. Walker, then Secretary of the Treasury, in which they argued in favor of stretching the grant up to the source of the river; and on the 2d of March, 1849, the day before he retired from office, Mr. Walker gave them an answer, in which he expressed the opinion that the grant had the whole extent which they claimed for it. He sent the correspondence to the Commissioner of the Land Office for his information and government. This reconverted Mr. Young, or at all events caused him to rescind his last decision against the claim, and on the 1st of June, 1849, he sent an order to the receiver at Iowa City, directing him to withhold from sale all the odd numbered sections within five miles of the Des Moines, above as well as below the Raccoon fork.

Still nothing decisive was done to give the state a title to the lands in dispute, when the commissioner reported the facts to Mr. Ewing. He refused his concurrence in Mr. Walker's opinion, and expressed the conviction that the grant did not extend to any lands above the fork. He consented, however, to suspend any sales of the land embraced within the claim of the state, so that an opportunity might be given to apply to Congress for an extension of the grant. From this decision an appeal was taken to the President, who referred it to the Attorney General, Mr. Johnson. His opinion was in favor of the largest claim which the state had made. But Mr. Ewing continued to oppose it, until he went out of office and was succeeded by Mr. Stuart. Mr. Johnson's opinion was never adopted by the land office, as appears from the report of September 26, in which Mr. Butterfield reviews it, objects to its conclusions, and, as I think, overthrows them completely. Mr. Stuart also decided against Mr. Johnson's view, and so did Mr. Crittenden, to whom he submitted the question. But he allowed Mr. Ewing's order to stand until the end of the approaching session of Congress. At this stage of the business a grave error seems to have been committed. The Secretary of the Interior, without changing his conviction, changed his action. He is supposed to have been overruled. But if the President, or any head of a department, entertained an opinion different from his, none of them took the responsibility of placing that fact upon the record. He put his name to an indecisive order, with so many restrictions in it as to leave the matter as open as ever. Mr. McClelland submitted the case to Mr. Cushing, who gave the opinion so much complained of by the plaintiff's counsel, holding that the grant did not extend above the fork; but in view of the complications surrounding the whole matter, he proposed that a part of the claim should be conceded, on condition that the state would agree to accept it and relinquish the remainder. Mr. McClelland made the offer, which was pending without acceptance at the time when Mr. Thompson came into the department. Mr. Thompson insisted upon a categorical answer, and the offer of compromise was refused. Mr. Thompson then decided directly and formally against the claim, the President and Attorney General concurring. There it was thought to be ended, until this case brought it before the court.

Let us look at these authorities for a moment, and see where the weight of them lies. In favor of the construction which the state contends for, we have a letter from the Commissioner of the Land Office, evidently written without consideration or conference, and retracted immediately afterwards. Then comes the letter of Mr. Walker, which was also retracted, not by himself, to be sure, but by his successor, who had a full right to do so before any action was taken upon it. Afterwards Mr. Attorney General Johnson expressed an opinion to the same effect; but it was not adopted by the department which had asked for it, nor by any body else having aught to do with the matter.

On the other hand, the opinion of Mr. Commissioner Shields, given to Congress upon the bill while it was pending, involved the gravest responsibility which an officer could assume. It was adopted by the committee and by the house, as a true construction of the act. General Shields followed it out when he came to execute the law, and the state authorities, conscious that he was right, fully and freely consented to his view, without any resistance and without complaint. President Polk and the Treasury Department, at the head of which was Mr. Walker himself, decided against the claim when the proclamation was issued for the sale of the lands, and persisted in that decision after the protest from the board of public works. Mr. Ewing was so clear upon the point, that no appeal to the President and no opinion from the Attorney General could shake his conviction. Mr. Stuart was equally clear, but perhaps not equally firm. The weight of

Mr. McClelland's authority and that of Mr. Cushing, is thrown against the claim. Mr. Buchanan and Mr. Thompson have decided against it, more solemnly, if possible, than any of their predecessors. If the opinion of public officers be worth anything at all, there are enough of them here to settle many cases like this. All the actual decisions in the case are against the claim.

It will not fail to be observed by the court, that of the three opinions which have been given in favor of this claim, those of Mr. Young and Mr. Walker are wholly unaccompanied by reasons, and Mr. Johnson's argument is so unsatisfactory that it carries with it no weight except that of his name. He reached his conclusion by transposing the words of the grant, a process which might change the meaning of any law that was ever written. Besides that, his judgment was manifestly influenced by the erroneous doctrine, that in cases of doubt such grants as this should be executed "rather in a large and liberal, than a restricted spirit." 5 Op. 243.

Moreover, he did not regard this question of construction as being important. He took Mr. Walker's letter as conclusive and binding on the government. He thought it immaterial whether it was right or wrong, and declared himself "glad to be of opinion that it could not be legally revoked."

If the court shall reach this part of the case, and be of opinion that the words of the grant are sufficiently ambiguous to leave the intent of the legislature in doubt, it will then become necessary to determine what rule of interpretation shall be applied to it. Shall the government or the grantee have the benefit of the doubt? A more important question to the public treasury and the morals of the people has never been determined in this court. If it be once settled that acts of this kind are to be construed largely in favor of the parties who get them passed, it will take millions every year, in land and money, to satisfy claimants to whom Congress never intended to give thousands. It is not necessary to show our respect for Congress, by affecting to be ignorant that legislation like this is generally procured upon the solicitation of parties interested. The public and well-known history of the country proves that land grants have been sometimes carried by means much worse than solicitation. Will you put it into the power of parties to possess themselves of the public domain or the public money, under grants which they themselves shaped so as to make them unintelligible? That would be throwing the door wide open to the most dangerous and most demoralizing species of fraud. It would be an offer of the most enormous premium to every man whose ingenuity is great enough to practise deception upon Congress. I have no fears that this court will make itself responsible for the consequences which would follow from such a rule.

I do not ask Your Honors to say that a strained construction in favor of the public right should be put on any statute. Let every grantee have what Congress gives him in words which are tolerably plain to the apprehension of intelligent men. But do not give by construction, what the grant itself was not understood to convey. There is no hardship in this. When a legislative body means to give anything, the words can easily be found to express that meaning. It does not happen once in a thousand times, that the language of a grant, construed strictly, carries less than the legislature is willing to bestow.

But even if you are disposed to repudiate the general rule, or change it so as to give a public grantee the benefit of a reasonable doubt, what could he take by such a doubt as this—a doubt which has no countenance in the law itself—a doubt which the authors of the grant never dreamed of—a doubt which did not enter the heads of the grantees themselves, until it was suggested by a loosely written and ill-considered letter from the land office—a doubt so dim that it was not seen by the state of Iowa or any of her agents, while they were accepting the law with a construction which confined them to its words—a doubt which was steadily repelled by nearly all the officers of this government, and never entertained by any long enough to be acted on? Doubts may do good service sometimes, but not such doubts as this.

The counsel for both parties made extended replies to the above argument by the Attorney General, especially denying the charge that there was no real controversy between the parties to the record. In support of this denial, several affidavits were also filed.

As this part of the argument but slightly affects the merits of the case, it is not here given.

Mr. Justice **Catron** delivered the opinion of the court:

The land in controversy lies within five miles of the Des Moines river, and within the limits of what was the Iowa territory when the act of Congress of 1846 (9 Stat. at L. 77) was passed, making the grant to improve the navigation of the Des Moines river from its mouth to the Raccoon fork; but the land sued for lies nearly sixty miles above the mouth of that fork.

Litchfield, the plaintiff below, claims by virtue of a title derived from the state of Iowa, acting as trustee of the Des Moines river fund.

The Dubuque & Pacific Railroad Company is in possession of the section of land, under a grant from Congress for the purpose of constructing a railroad from Dubuque, on the Mississippi river, to a point on the Missouri river near Sioux City. This grant was made to the state of Iowa in 1856 (11 Stat. at L. 9) and is for every alternate section (designated by odd numbers), for six sections in width on each side of the road. The road was located, the lands designated by the United States, and accepted by Iowa; and then they were transferred to the railroad company by the legislature of that state. The section in dispute is one of those vested in the railroad company. This is the younger and inferior title, if the first grant for *improving the river extends along its [*84 whole length; and the material question in this case is whether the grant made by the act of Congress of August 8th, 1846 (9 Stat. at L. 77), for the river improvement, is limited to lands lying next the river; and below the Raccoon fork. And although this depends on a true construction of the act, still it becomes necessary to give a brief historical statement of

the proceedings before the Executive Department respecting this claim, extending through more than ten years; these proceedings being relied on, either to conclude the title, or to control the construction of the act of Congress.

They are as follows: By the act of Congress approved August 8th, 1846 (9 Stat. at L. 77), a grant of land was made to the territory of Iowa "for the purpose of aiding said territory to improve the navigation of the Des Moines river from its mouth to the Raccoon fork, in said territory, one equal moiety, in alternate sections, of the public lands (remaining unsold and not otherwise disposed of, encumbered, or appropriated) in a strip five miles in width on each side of said river, to be selected within said territory, by an agent to be appointed by the governor thereof, subject to the approval of the Secretary of the Treasury of the United States."

The 4th section of the act provides that the lands shall become the property of the state of Iowa on her admission into the Union, which was very soon expected to occur. The governor of Iowa was notified by the Commissioner of the General Land Office of this act, soon after its passage, *viz.*, October 17, 1846, by letter, in which it is stated that, "under the grant, the territory is entitled to the vacant lands, in alternate sections, within five miles on each side of the Des Moines river, from the northern boundary of Missouri to the Raccoon fork."

No objection to this construction was then made by the state authorities, and the agent of the state proceeded to make the selections within the limits above stated.

No question as to the extent of this grant arose until nearly two years after. It appears, however, that a letter dated February 23d, 1848, from Commissioner Young, did not adhere 85*] *to the restrictions mentioned in the first letter, but its terms seem to concede to it a greater extent. And in 1849 this question was brought to the attention of the Secretary of the Treasury, by the delegation of the state in Congress; they claiming that the state was entitled to land along the whole course of the river to its source. In reply (March 2d, 1849) the secretary, Mr. Walker, expresses an opinion that the "grant extends on both sides of the river from its source to its mouth, but not into lands on the river in the state of Missouri." This opinion conceded that nine hundred thousand acres above the Raccoon fork was within the grant.

In conformity with this view of Mr. Walker, selections of lands above the fork were reported by the Commissioner of the General Land Office, for confirmation, to the Secretary of the Interior, Mr. Ewing; the supervision of the public lands having passed from the Treasury to the Interior Department. Mr. Ewing, upon the ground that the opinion of Mr. Walker had not been carried into effect, held that the same was open for revision, and, not concurring therein, refused to approve the selections; but, as Congress was then in session, and might "extend the grant," ordered a suspension of action in the matter.

From this decision of Mr. Ewing an appeal was taken in 1850 to the President, by whom the matter was referred to the Attorney General Mr. Johnson, who, in his opinion of July 19, 1850, construed the grant as extending above the Raccoon fork.

No action appears to have been taken under this opinion of Mr. Johnson; and the question remained open at the accession of the next President, Mr. Fillmore, when it was submitted to the Attorney General, Mr. Crittenden, who, on the 30th June, 1851, replied that the letter of Mr. Walker had no binding effect on his successor, being but an opinion expressed, not an act done; that the opinions of the attorneys general are merely advisory; and that the grant, in his opinion, was limited to the lands below the fork. In this opinion it appears that Mr. Stuart (then Secretary of the Interior) concurred; but afterwards, on the 29th October, 1851, he addressed the Commissioner *of the General Land [*86 Office on the subject, and directed the selections above the Raccoon fork to be reported for his approval, for the reasons and upon the conditions therein stated, *viz.:* "that the question involved partakes more of a judicial than of an executive character, which must ultimately be determined by the judicial tribunals of the country." In conformity with this decision, lists of lands above the fork were submitted by the commissioner in October, 1851, and March, 1852, and approved by Mr. Stuart in accordance with the views expressed in his letter of the 29th October, 1851. Acting under this authority, the commissioner, in 1853, submitted lists to Secretary McClelland also, which were approved. The subject was again brought before the Secretary of the Interior in 1856, and by him referred to Attorney General Cushing. Mr. Cushing, in his reply of 29th May, 1856, advised that a proposition set forth by him be submitted to the state for a final adjustment of the matter. This proposition was not accepted by the state; and in 1858 the subject was laid before Attorney General Black, whose opinion clearly restricted the grant to the river below the Raccoon fork; that being in accordance with the construction originally given it at the General Land Office. On mature consideration, we are of opinion that the title of neither party has been affected by the proceedings in the Land Office, or by the opinions of the officers of the Executive Department, but that the claims of the parties under the two acts of Congress must be determined by the construction to be given to those acts. This we are required to do in deciding this cause.

The caption of the act of 1846 informs us that the donation was made to aid in the improvement of the navigation "of the Des Moines river;" and the body of it grants to the territory (and state) alternate sections, to improve the navigation "of the Des Moines river, from its mouth to the Raccoon fork," in a strip five miles in width on each side of "said river." And we are further told (§ 3d), that "the said river Des Moines shall forever remain a public highway for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, *or persons in their service, passing [*87 through or along the same."

What navigable river was to be improved, and was in the contemplation of Congress in 1846, when the northern portion of Iowa was a wilderness? Surely not the small streams and

brooks reaching into Minnesota territory, as is here claimed.

Congress recognized the Des Moines river, over which a free passage was secured, to be a stream emptying into the Mississippi; and from its mouth to the Raccoon fork was the "said river," on each side of which the strip of land granted was to lie.

As proof of which, we refer to the following facts: The bill was introduced into the House of Representatives by Mr. Dodge, the delegate from Iowa territory, and was the subject of a report by the committee on public lands, which report is a document in the case agreed, and the facts therein stated are admitted. Among these facts, it appears (by a previous report of Captain Fremont, who had officially explored the Des Moines river) that from its mouth to the Raccoon fork was two hundred and three miles; that it presented no obstacles to navigation that could not be overcome, at a slight expense, by the removal of loose stones at some points, and the construction of artificial banks at some few others, so as to destroy the abrupt bends, and that this was all that would be required to render it navigable; that the variable nature of the bed and the velocity of the current would keep the channel constantly clear.

The committee's report states that the country is occupied and cultivated as high up as the Raccoon fork; and that a clear and uninterrupted navigation could be secured at an expenditure not great when compared with the object; that the land appropriated by the bill is similar in its character and object to many grants already made by Congress for other western territories and states, and at the same time less in quantity; but it is believed that it will be sufficient to accomplish the desired improvement; and as evidence of this, Captain Fremont's statement is relied on. The committee was, however, of the opinion that locks and dams might be required at some of the ripples.

88*] *Accompanying this report, as a part of it, is a letter from the Commissioner of the General Land Office, obtained by Mr. Dodge (dated May 5th, 1846), in which it is officially stated, "that the amount of unsold land within five miles on each side of the Des Moines river, from its mouth to the Raccoon fork, proposed to be granted to the teritory of Iowa by House bill No. 106, is estimated at 261,000 acres." The bill No. 106, as reported, was passed into the law before us. When we carry with us the fact that the 261,000 acres of land were surveyed, and the plats recorded in the General Land Office, to which surveys the commissioner's letter referred, it is plain that the river, from its mouth to the Raccoon fork, was, in the view of Congress, as manifestly as if the outlines of the tract (or strip) had been given by a plan in connection with the river. Of this we have no doubt; but if we had doubts from any obscurity of the act of Congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be

plainly expressed in the statute; and if not thus expressed, they cannot be implied. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420.

We concur with the following citation and reasoning of the plaintiff's counsel, to wit: Lord Ellenborough, in his judgment in *Gildart* v. *Gladstone*, 12 East, 633 (an action for Liverpool dock dues), says: "If the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public, and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended."

"The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and *clear to pass everything that is intended [*89 to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which cannot be obtained by plain and express terms."

The second ground relied on in support of Litchfield's title is, that he is an innocent purchaser from the state of Iowa of land conceded to belong to the improvement fund by the officers and agents of the United States; and having been certified as part of the grant, and as being one of the odd sections belonging to Iowa, the principal is bound by the acts of his agents, and that these binding acts cannot be revoked at the pleasure of the Secretary of the Interior, as is here assumed to be done.

We have set forth the proceedings on this claim, and have already expressed the opinion that the courts of justice are not concluded by them. The principal reason, however, why the conveyance to Litchfield, under the river improvement grant, cannot be upheld, is this: the act of Congress was a direct grant to Iowa in fee of an undivided moiety of the whole tract lying on each side of the river from the Raccoon fork to the Missouri line. Congress had the undoubted power to make the grant and vest the fee.

No authority was conferred on the executive officers administering the public lands to do more than make partition between the tenants in common, Iowa and the United States, in the manner prescribed by the act of Congress.

The premises in dispute lie sixty miles beyond the limits of the tract granted; it was, therefore, impossible to make partition, under this grant, of lands lying outside of its boundaries; and all attempts to do so were merely nugatory. It follows that the plaintiff below has no title, and his action must fail.

The Attorney General has intervened, and insists that this action is a mere fiction, and was intended to draw from this court an opinion, affecting the rights of the United States and others, the parties to this suit have nothing at stake, and that the case should be dismissed.

*To meet this imputation of contriv- [*90 ance, the parties and their counsel have filed affidavits and statements, from which it satisfactorily appears that the action was brought

by a bona fide claimant under the grantee of the river improvement fund against the railroad company; and although the case agreed was made up in a friendly spirit, nevertheless the object was to try the title, and this was done at the instance of some of the executive officers.

If the judgment of the district court were affirmed, the defendant below would lose the land; and it being reversed, the plaintiff below loses it. The action was obviously brought to carry out Secretary Stuart's suggestion, when he said, "that the question involved partakes more of a judicial than an executive character, and must ultimately be determined by the judicial tribunals of the country."

We have, therefore, felt bound to hear and decide the cause on its merits; and finding that the plaintiff below has no title, *we direct that the judgment of the District Court be reversed, and the cause remanded; and that court is ordered to enter judgment for the defendant below.*

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THE NEW ENGLAND SCREW COMPANY.

(See S. C. 23 How. 420–433.)

Custom cannot excuse from performance of contract—otherwise, when custom forms part of the contract—evidence of custom, when admissible, and with what effect—when a part of the contract—written evidence construed by court.

The custom of a party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from a full compliance with his contract.

To excuse full compliance, mere knowledge of such a usage would not be sufficient, but it must appear that the custom actually constituted a part of the contract.

But when such custom was well known to the other contracting party, and actually formed a part of the contract, it may furnish a legal excuse for the nondelivery of a proportion of the goods.

Parol evidence of custom, consequently, is generally admissible, to enable the court to arrive at the real meaning of the parties.

Omissions may, in some cases, be supplied by the introduction of the custom; but it is not admitted to contradict or vary express stipulations or provisions of the contract.

Proof of usage is admitted, either to interpret or to ascertain the nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal or obscure.

Where defendants adopted a rule to accept all orders for goods, and to fill them in the order they were received, and that rule was well known to the plaintiffs, evidence to prove that the orders had been taken up in turn, and filled in proportion to the orders given by other customers, was admissible.

And evidence to show what had been the usage of the defendant's business was also admissible, because that usage constituted an essential part of the several contracts.

Written evidence, as a general rule, must be construed by the court.

The charge to the jury must receive a reasonable interpretation.

Submitted Mar. 21, 1860. Decided Apr. 9, 1860.

NOTE.—*Usage and custom, admissibility of, in construction of contracts*—see note to Adams v. Otterbach, 14 L. ed. U. S. 805.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **Geo. W. Wright**, for plaintiffs in error:

1. The delivery of the full quantity of goods agreed upon cannot be excused by any custom to deliver only a part.

Linsley v. *Lovely*, 26 Vt. 123; *The Reeside*, 2 Sumn. 567.

2. The custom (as well as the contract) must be mutual. Bliven and Mead might with equal propriety set up a custom when they order 10,000 gross of screws, to receive but 1,000, as the New England Screw Company, on accepting such order unconditionally, to deliver only the smaller quantity.

Here the custom alleged was all on one side. If screws fell in price, Bliven and Mead were obliged to receive the whole. If the screws rose in value, Bliven and Mead could only claim what the company in its discretion saw fit to deliver them. Such rise took place.

See *Holford* v. *Adams*, 2 Duer, 471.

3. The custom proved was illegal, as dangerous, and contrary to the policy of the law.

1. It varied express and written contracts.

Hone v. *Mutual Safety Ins. Co.* 1 Sand. 137; *The Reeside*, 2 Sumn. 569.

2. The delivery of goods at the time and in the quantity expressly agreed on, is as obligatory as the payment of money. A debtor's custom to pay his debt "in course, and as far as he consistently can in view of his obligations to his other creditors," will not excuse him from paying his notes given without any such limitation.

4. Custom, to be legal, must be the general custom of the trade, and not (as was this case) the custom of the party only.

What was proved was not properly a custom, but was the habit of the defendants in error, to fulfil their obligations only so far as they found it convenient.

5. If such custom (or habit) could legally be proved, the extent and effect thereof should have been submitted as a question of fact to the jury under the evidence, and not determined by the court.

6. Judgment should be reversed.

Messrs. **T. A. Jenckes** and **E. W. Stoughton**, for defendant in error:

1. The evidence of the custom of the New England Screw Company to fill orders in part only, was properly admitted under the general rules, as to the admissibility of evidence of customs and usages.

Renner v. *Bank of Columbia*, 9 Wheat. 581; citing *Yeaton* v. *Bk. Alexandria*, 5 Cranch, 49; see, also, *Mills* v. *Bank of U. S.* 11 Wheat. 431; *Bank of Washington* v. *Triplett*, 1 Pet. 25; *Van Ness* v. *Pacard*, 2 Pet. 137; *Cookendorfer* v. *Preston*, 4 How. 324; *Bowling* v. *Harrison*, 6 How. 258; *Adams* v. *Otterback*, 15 How. 544.

And in the circuit courts of the United States.

Trott v. *Wood*, 1 Gall. 443; *The Reeside*, 2 Sumn. 569.

See, also, the following text writers:

1 Bl. Com. 75; 2 Stark Ev. 258; 1 Phil. Ev. 556; 2 Greenl. Ev. §§ 251, 252; Sm. Merc. L.

29, 30, and note. And the following cases: *Gabay* v. *Lloyd*, 3 Barn. & C. 793; *Stewart* v. *Cauty*, 8 Mees. & W. 160; citing *Pelly* v. *Royal Exch. Co.* 1 Burr. 341; *Ougier* v. *Jennings*, 1 Camp. 505, note; *Palmer* v. *Blackburn*, 1 Bing. 61; *Yeats* v. *Pim*, 1 Holt. 92; *Noble* v. *Kennoway*, Doug. 510; *Loring* v. *Gurney*, 5 Pick. 15; *Naylor* v. *Semmes*, 4 G. & J. 274.

2. The contracts for the sale of screws by the defendant company were subject to the custom of the defendant company, to fill the same in part only; and the contract with the plaintiffs was made, subject to and controlled by this custom.

See the following authorities:

Renner v. *Bank of Columbia; Mills* v. *Bank of U. S.; Van Ness* v. *Pacard; Cookendorfer* v. *Preston; Bowling* v. *Harrison; Adams* v. *Otterback*, as cited above; 2 Greenl. Ev. §§ 251, 252, and notes; *Stewart* v. *Cauty, ubi sup.*

It was the usage of an individual, and the plaintiffs had actual notice.

See, also, as to the law governing the usage and habit of trade of an individual, the following authorities:

2 Greenl. Ev. §§ 251, 252; *Loring* v. *Gurney*, 5 Pick. 15; *Naylor* v. *Semmes*, 4 G. & J. 274; *Noble* v. *Kennoway*, Doug. 510.

3. The judgment of the court below should be affirmed.

Mr. Justice **Clifford** delivered the opinion of the court:

425*] *This is a writ of error to the circuit court of the United States for the southern district of New York.

According to the transcript, the suit was originally instituted in the supreme court of the state of New York by the present plaintiffs, who were citizens of that state; but was afterwards regularly removed, under the 12th section of the judiciary act, into the circuit court of the United States, because the corporation defendants were citizens of the state of Rhode Island.

It was an action of assumpsit, brought to recover damages for the supposed breach of six separate and distinct contracts, in which the defendants, as was alleged in the declaration, stipulated to deliver to the plaintiffs, pursuant to their written orders given at sundry times, certain quantities of screws, usually denominated wood screws, of various sizes and descriptions, as were therein specified. Readiness to perform on the part of the plaintiffs, and neglect and refusal on the part of the defendants to deliver the goods, after seasonable demand, constituted the foundation of the respective claims for damages as alleged in the declaration. Those claims are set forth in eighteen special counts, to which are also added the common counts, as in actions of *indebitatus assumpsit*. Of the several contracts, the first is alleged to have been made on the 7th day of October, 1852, and the last on the 19th day of April, 1853.

At the May term, 1855, the parties went to trial upon the general issue. To prove the several agreements, the plaintiffs relied on certain correspondence which had taken place between the parties upon this subject, consisting of letters written by the plaintiffs to the defendants, in the nature of orders or requests for the goods, and the replies thereto written by the defendants.

As appeared by the proofs, the plaintiffs were merchants, engaged in buying and selling hardware, and the defendants were engaged in manufacturing the description of goods specified in the declaration. They were in point of fact the sole manufacturers of the article in the United States, and were constantly receiving orders for the article from their customers *faster [*426 than they could fill them, and for larger quantities than they were able to produce.

Orders had been given for this article by the plaintiffs prior to the date of this controversy; but the evidence in the case does not show when their dealings commenced. Six orders of like import were given by the plaintiffs, during the fall of 1852 and the early part of the year 1853, for large quantities of the article, of various sizes and descriptions. This suit was brought to recover damages for not filling those orders, which, it is insisted by the plaintiffs, had been accepted without any reservation. Some of them had been filled in part only, and others had not been filled for any amount when the suit was commenced.

It was denied by the defendants that the orders had been accepted without condition. On the contrary, they insisted that the plaintiffs well knew that the supply was greatly less than the demand, and that the orders were only accepted to be filled in their turn, as the defendants were able to produce the article.

To support the first three counts of the declaration, the plaintiffs, among other things not necessary to be noticed, introduced three letters —two from themselves to the defendants, and the reply of the defendants to the same. Reference will only be made to such brief portions of the correspondence as appear to be essential to a proper understanding of the legal questions presented in the bill of exceptions.

Dissatisfaction was first expressed by the plaintiffs in their letter dated on the 30th day of September, 1852. In that communication, they simply refer to the long delay that has occurred in filling their orders, and furnish a memorandum of the amount and sizes of the article claimed by them to be due and not delivered, under their order of the 29th of June of same year. They state that after three months' delay, only about one and one fourth per cent of the same has been filled, and that they have not a gross of screws under an inch in their stock. Request was also made in the same communication that the plaintiffs would send at once all they could of the article, and the balance of the same as soon thereafter as*it [*427 was possible. That request was, in effect, repeated in another letter, written on the 5th day of October, 1852; and on the 17th day of the same month, the defendants replied, saying that the order referred to would be taken up at the earliest possible day.

No further correspondence applicable to the first three counts was introduced by the plaintiffs in the opening of the case.

They then gave evidence to prove the second agreement, as alleged in the fourth, fifth, and sixth counts of the declaration. For that purpose they introduced two letters—one from themselves to the defendants, dated on the 15th

day of October, 1852; and the other from the defendants to them in reply, dated on the following day. Their letter to the defendants contained an order for three thousand seven hundred and fifty gross of screws, half to be delivered by the 15th day of March then next, and the other half a month later, subject to the regular discount at the time of delivery. That order was given thus early, as the plaintiffs stated, with a view to avoid thereafter the inconvenience they had suffered from not having their orders filled, and because they anticipated a short supply of the article the next season. In the same letter they informed the defendants that it was given as an additional order, and requested that those previously sent might be filled without further delay.

To that communication the defendants replied, acknowledging its receipt, and saying that the order had been entered in their books, to be executed at the times named. They also referred to the previous orders, saying they would do what they could to fill them before navigation closed on the canals; but added, that they could only take them up in course, as they had a great many orders from other parties in the same condition.

Evidence was then offered by the plaintiffs to prove the third agreement, as alleged in the seventh, eighth, and ninth counts in the declaration. To support those counts, two letters were introduced—one from the plaintiffs to the defendants, dated the 4th day of November, 428*] 1852; and the reply of *the defendants to the same, which was dated on the sixth day of the same month. By the letter first named, the defendants were furnished with another order of the plaintiffs for an additional quantity of screws, and were requested to place the order in their books, to be filled as fast as possible, at a given rate. Previous orders were also referred to in the same letter, and the plaintiffs complain that they have not been filled in their turn; adding that they have not a gross of gimlet-point screws in their stores, and earnestly requested the defendants to send them a lot by steamboat on the following day. Two days afterwards the defendants acknowledged the receipt of the order, and informed the plaintiffs that it had been entered in their books, to be taken up in course.

Those letters constitute the only evidence offered by the plaintiffs in the opening to prove the third agreement.

They then gave in evidence another order from themselves to the defendants, to prove the fourth agreement, as alleged in the tenth, eleventh, and twelfth counts of the declaration. It was dated on the 7th day of November, 1852. In the same communication they stated that they were in great want of a certain description of screws, and expressed the hope that the defendants would send what they could of the article by steamboat without delay, adding: "We have always said, send what you can of our orders as fast as you get a case or two ready," or to that effect. To that letter the defendants replied, under date of the 19th of the same month, saying that the best they could do was to enter the order, to be taken up in course, intimating that perhaps it might be accomplished in about two months.

Similar evidence was given to prove both the fifth and the sixth agreements, as alleged in the six remaining counts of the declaration. Two orders given by the plaintiffs were introduced for that purpose. One was dated on the 10th day of February, 1853, and the other on the 19th day of April, of the same year. They were each for twenty thousand gross of screws; and the defendants were requested to enter the orders in their books, to be filled as soon as possible after they should have completed those previously given. Separate *answers were [*429 given by the defendants to each of these orders, to the effect that they would be entered in the books of the defendants, to be taken up in course or in their turn, and be filled when they reached them, as far as they should be able to do so, consistently with their obligations to other customers.

No part of the two orders last named had been filled when this suit was commenced. Demand was made of the defendants, on the 30th day of September, 1853, for the delivery of such proportions of the several orders as had not been previously filled. At the same time, the plaintiffs rendered their account, and tendered to the defendants their promissory notes for the respective sums which would become due to the defendants on making such delivery.

Such was the substance and effect of the evidence introduced by the plaintiffs in the opening, so far as it is necessary to consider it at the present time. Many other matters were stated in the correspondence; but as they were not material to this investigation, they are omitted.

To maintain the issue on their part, the defendants, among other things, introduced a letter from the plaintiffs, addressed to them, dated on the 3d day of September, 1852, in which inquiry was made of the defendants why they did not fill the orders given by the plaintiffs. They also stated in the same letter that not a week passed without their hearing of the defendants taking and executing orders from other customers; but admitted, in effect, that they had long since been given to understand the rule of business adopted by the defendants in that behalf, and only complained that precedence was given to the first orders from other customers.

Testimony was also introduced by the defendants that they had some five hundred customers, and that the orders of the plaintiffs had been taken up and filled in proportion to the orders given by other customers, as the defendants manufactured the article and were able to deliver the goods. To that testimony the plaintiffs objected; but the court overruled the objection, and it was admitted, and the plaintiffs excepted.

All of the orders given by the plaintiffs, except the two last named, were filled in part, and, as the defendants proved, in *due [*430 proportions to the orders of other customers, as the article was produced. They also proved that when orders were given and accepted without the price of the article being agreed, it was their custom, and according to the usage of their business, to charge at the rates ruling at the time of the delivery; and if during the interval the discount from fixed rates had increased, the purchaser had the benefit of the allowance; but if prices had risen, and the dis-

sount was less, then the purchaser paid according to the increased price. To this testimony, as to the usage of the defendants' business, the plaintiffs objected, but the court overruled the objection; and the testimony having been admitted, the plaintiffs excepted. That practice, however, was not applicable to customers who were not duly notified of the usage, but all such had their orders filled at former rates. Orders from other customers were received by the defendants throughout the period of these transactions, but they refused to accept orders from new parties.

Proof was also offered by the defendants, tending to show that the profit to the manufacturer was less upon the small sizes of the article than upon the large, and it was admitted by their counsel that the market price of the goods advanced after the orders of the plaintiffs were given. Much additional testimony was introduced on the one side and the other, to which it is not necessary to refer, for the reason that it presents no question for the decision of this court. On this state of facts, the presiding justice instructed the jury to the effect that the several contracts for the sale of the goods by the defendants to the plaintiffs were subject to the custom of the defendants to fill the same in part only, and that the plaintiffs, from having been dealers with the defendants, and from the correspondence between them, were chargeable with notice of the defendants' custom to fill their contracts only in the order they were accepted, and in proportion with each other, and not in full, according to the strict terms thereof. Under the rulings and instructions of the court, the jury returned their verdict for the defendants, and the plaintiffs excepted to the instructions. Exception was taken to two of the 431*] rulings of *the court and to each of the instructions to the jury, but they present only one question for decision and, therefore, may well be considered together. No evidence of general usage or custom in the ordinary sense of those terms was offered in this case, and no question touching the general rules of law upon that subject is presented for the decision of this court. It may also be safely admitted that the custom of a party to deliver a part of a quantity of goods contracted to be delivered, though invariable, cannot excuse such party from a full compliance with his contract, unless such custom is known to the other contracting party, and actually enters into and forms a part of the contract. Mere knowledge of such a usage would not be sufficient, but it must appear that the custom actually constituted a part of the contract. But when it appears that such custom was well known to the other contracting party as necessarily incident to the business, and actually formed a part of the contract, then it may furnish a legal excuse for the nondelivery of such a proportion of the goods as the general course of the business and the usage of the seller authorize, for the reason that such general usage, being a part of the contract, has the effect to limit and qualify its terms. *Linsley* v. *Lovely*, 26 Vt. 137. Customary rights and incidents, universally attaching to the subject-matter of the contract in the place where it was made, are impliedly annexed to the language and terms of the contract, unless the custom is particularly and expressly excluded. Parol evidence of custom, consequently, is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage. But parol evidence of custom and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of the custom, but the custom cannot prevail over or nullify the express provisions and stipulations of the contract. 2 Add. on Cont. 970. Proof of usage, says Mr. Greenleaf, is admitted either to interpret the meaning of the language of the contracts, or to ascertain the *nature and extent of the contract, in [*432 the absence of express stipulations, and where the meaning is equivocal or obscure. 1 Greenl. Ev. § 292. Its true and appropriate office is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. *The Reeside*, 2 Sumn. 567. Nothing can be plainer than the proposition that the evidence in the case proved that the supply with the defendants was much less than the demand of their customers. To avoid dissatisfaction, therefore, they were obliged to devise some system which would enable them to do equal justice among those who were properly competing for the article. Accordingly, they adopted a rule to accept all such requests, and to enter the list in a book kept for the purpose, and to fill them as far as possible in the order they were received. They had been in business for some time, and that rule had become the custom of their trade, and, as such, was well known to the plaintiffs during all the time of these transactions. Many of their orders thus given at short intervals had been expressly accepted to be filled in turn or in course, and the correspondence plainly showed that the plaintiffs well knew what was meant by those terms. Evidence to prove that the orders had been taken up in turn, and filled in proportion to the orders given by other customers, was, therefore, admissible, in order to show that the defendants had fulfilled their contract, and done no injustice to the plaintiffs; and it is equally clear that evidence to show what had been the usage of the defendants' business was also admissible, because that usage constituted an essential part of the several contracts which were the subjects in controversy. *Renner* v. *Bank of Columbia*, 9 Wheat. 588. After what has been remarked, one or two additional observations respecting the instructions given to the jury will be sufficient. Written evidence, as a general rule, must be construed by the court, and the first instruction was confined to that purpose. It gives the true exposition of the correspondence, and therefore is not the subject of error. It is insisted by the counsel of the plaintiffs *that the second instruction withdrew [*433 the evidence of notice from the consideration of the jury.

We think not, and for two reasons. In the first place, it was the proper duty of the court to construe the correspondence, and that of itself was sufficient to justify the charge. But

the charge must receive a reasonable interpretation. In effect, the jury were told that the evidence, if true, showed that the plaintiffs had notice of the custom of the defendants in regard to the filling of the orders. It did not withdraw the question as to the credibility of the witnesses from the consideration of the jury, and that was all that could properly be submitted to their determination. In view of all the circumstances, we think the exceptions must be overruled.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

CHARLES BLIVEN and Edward B. Mead,
Plffs. in Err.,
v.
THE NEW ENGLAND SCREW COMPANY.

(See S. C. 23 How. 433–435.)

Decision in Bliven v. *N. E. Screw Co., ante, p. 510, affirmed.*

All the questions in this case have already been considered and decided by this court in the preceding case, between the same parties.

Submitted Mar. 21, 1860. Decided Apr. 9, 1860.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

The history of the case and a sufficient statement of the facts appear in the opinion of the court.

See, also, the preceding case, which was between the same parties and involved the same transactions.

Mr. **Geo. W. Wright,** for plaintiffs in error:

On the specific contracts for screws, for the recovery of the value of which suit was brought, neither of them having been fulfilled, no recovery can be had for the partial performance.

2 Kent's Com. 509; see note a, and cases cited.

Messrs. **T. A. Jenckes** and **E. W. Stoughton,** for defendant in error:

If the contracts had been of the character alleged by the plaintiffs in error, their right to strict performance as a condition precedent to paying for the screws actually delivered, would have been waived by their letter of May 19th, 1853, in which they authorized the defendants in error to draw upon them for the value of such as they had received. Not only would this have operated as such waiver, but it is very persuasive evidence, that the plaintiffs in error, at that time, did not pretend that the defendants in error were bound to deliver any specified quantity of screws before being entitled to demand payment of the price.

It is in evidence also, by the testimony of the witness Slocum, that the plaintiffs in error had been customers of the defendants in error for several years, and that the latter had never executed any of their general orders in full; and that they had always been in the habit of making payments upon orders partly executed, as they offered to do by the letter referred to.

The contracts relied upon were not absolute, but the six several orders referred to were accepted conditionally, and with express reference to the usage perfectly well known to the plaintiffs in error.

Upon this subject there was no conflict of evidence, and what the contract between the parties actually was, it was of course the duty of the court to determine.

See, also, abstract of the arguments in the preceding case.

Mr. Justice **Clifford** delivered the opinion of the court:

This case comes before the court upon a writ of error to the circuit court of the United States for the southern district of *New York. [*434 It was an action *indebitatus assumpsit,* brought by the present defendants to recover the amount due them for certain goods sold by them to the plaintiffs in error, who were the original defendants. At the May term, 1855, the parties went to trial upon the general issue. To prove the issue on their part, the plaintiffs introduced a letter from the defendants, dated on the 17th of May, 1853, and addressed to the plaintiffs. In that letter the defendants acknowledged the receipt of the plaintiff's account, but claimed a small deduction for an alleged error. Evidence was then introduced by the plaintiffs, tending to show that account was correct.

Having proved their account, the plaintiffs rested their case.

To maintain the issue on their part, the defendants set up that the goods charged in the account had been delivered to them in pursuance of certain contracts made between the parties, in which the plaintiffs had agreed to sell and deliver to them large quantities of screws usually denominated wood screws, of various sizes and descriptions, but they had failed to fulfil their contracts. They admitted that a part of the goods had been delivered; but, inasmuch as no one of the contracts had been completed, they insisted that a recovery could not be had for a partial performance.

Their defense was sustained by the same evidence as that introduced by them in the preceding case, and the plaintiffs offered the same evidence in reply as they had in the other case, to make out their defense. Similar exceptions were taken by the defendants to the rulings of the court in admitting their testimony as to the course of business, and the usage of the plaintiff's trade. After the evidence was closed, the court instructed the jury that the several contracts for the sale and delivery of the screws by the plaintiffs to the defendants were subject to the custom of the plaintiffs to fill the same in part only. Under that instruction, the jury returned their verdict in favor of the plaintiffs for the amount of the account, together with interest, and the defendants excepted. No question is presented in the bill of exceptions that has not already been considered and decided by this court in the preceding case. For the reasons there given, we think the rulings and instructions *of the circuit court were correct. [*435

and refer to those reasons for the grounds on which the conclusion in this case rests.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK, *Plffs. in Err.*,

v.

FRANKLIN RANSOM and Uzziah Wenman.

(See S. C. 23 How. 487-491.)

Actual damages—evidence of, necessary—not established by inference—measure of.

Where a plaintiff is allowed to recover only "actual damages," he is bound to furnish evidence by which the jury may assess them.

Actual damages should be actually proved, and cannot be assumed as a legal inference from facts which afford no *data* by which they can be calculated.

The possible advantage or gain made by defendants by the use of plaintiff's improvement on their machines, is not the measure of his loss.

If he fails to furnish any evidence of the proper *data* for a calculation of his damage, he should not expect that a jury should work out a result for him by inferences or presumptions founded on subtle theories.

Submitted Mar. 22, 1860. Decided Apr. 9, 1860.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This action was brought in the court below, by the defendants in error, to recover damages resulting from the alleged infringement of a certain patent.

The trial below having resulted in a verdict and judgment in favor of the plaintiffs, the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

No counsel appeared in this court for plaintiffs in error.

Mr. **Charles M. Keller** for defendants in error.

As the counsel did not discuss the point on which the case was decided in this court, the argument is not here given.

488*] *Mr. Justice **Grier** delivered the opinion of the court:

The plaintiffs in error were defendants in an action for infringement of a patent, "for a new and useful improvement in the mode of applying water to fire engines so as to render their operation more efficient."

On the trial, they took some twenty-four exceptions to the rulings of the court in their charge to the jury; but they have not seen fit to appear in this court, and point out to us on which of these numerous exceptions they principally rely for the reversal of the judgment. The defendants in error have not elected to have the writ of error dismissed for want of prosecution, but have filed a printed argument praying for an affirmance of the judgment.

On examination of the record, we find that the bill of exceptions contains no copy of the specification of the letters patent. Without this, we are unable to test the correctness of the construction of the patent by the court below.

But there is one exception which the record enables us to examine, and in which we think there is error.

The defendants' 14th prayer for instruction is as follows:

"The plaintiffs have furnished no *data* to estimate actual damage, and, therefore, in no aspect of the case can they recover more than nominal damages."

If the predicate of this proposition be true, the conclusion was correct, and the instruction should have been given by the court.

Where a plaintiff is allowed to recover only "actual damages," he is bound to furnish evidence by which the jury may assess them. If he rest his case, after merely proving an infringment of his patent, he may be entitled to nominal damages, but no more. He cannot call on a jury to guess out his case without evidence. Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without certain *data* on which to make it.

The invention in this case was not one which enabled the patentee to make a profit by a monopoly of its use. Nor was it a separate and distinct machine, by the sale of which he *could make a profit. The patent is for [*489 an improvement in the apparatus of the common fire engine, by which the hydrostatic pressure of the water from the hydrant may be combined with the hydraulic pressure of the engine, and thus add to its power and efficiency. There was evidence tending to show the invention to be valuable, and that it could be applied to the engines in use at an expense of $25, thereby greatly increasing the power of the machine. It was proved that the city had applied this invention to fifty engines, but no information whatever of the price or value of a single license is given in the bill; fifty is the coefficient by which an unknown number is to be multiplied, and without further *data* the result is still an unknown quantity. If there had been any proof that the selling price of a single license for a single engine was $400, the jury would have had something to support their verdict for $20,000.

In the case of *Seymour* v. *McCormick*, 16 How. 485, it was decided by this court, that where the profit of the patentee is derived neither from an exclusive use of the thing patented, nor from a monopoly of making it for others to use, the actual damage which he suffers by the use of his improvement without his license, is the price of it, with interest, and no more. It is to his advantage that everyone should use his invention, provided he pays for a license. The only damage to the patentee is the nonpayment of that sum when the infringer commences the use of the invention.

As the plaintiffs in this case did not furnish any evidence upon which to found a calculation of actual damages, the court should have instructed the jury as requested by the counsel. Instead of it, the court instructed the jury as follows:

"If the invention is valuable; if by its use the power and efficiency of the fire engines belonging to the defendant are so increased, that

fifty engines used with this improvement are equal in practical effect to seventy-five, or any other number of engines, used without this improvement, the jury are at liberty to infer, if they think the inference a just one, that the defendant, in its corporate capacity, has saved 490*] the cost *of the purchase and operation of the additional number of engines which would have been required to produce the same results if this invention had not been used; and that the corporate authorities, if they had admitted the plaintiffs' rights, would have paid the amount of this additional cost, or a large portion of it, as the consideration for a license to use this invention, rather than to abandon its use; and that the plaintiffs have therefore lost by the infringement what the defendant would have so paid to secure such license. It is for this reason that the benefits received by the defendant in its corporate capacity, from the use of the invention, in the consequent reduction of its expenditures for fire engines, and their management and operation, are proper subjects for consideration in determining the plaintiffs' damages; and the jury must determine for themselves, upon the considerations of this and the other facts of the case (if they find that the plaintiffs are entitled to recover), what damages have been actually sustained by the plaintiffs in consequence of the unauthorized and wrongful acts of the defendant, being careful only to give the actual damages proved, and not to speculate upon the possibility or even probability of damages beyond such as are proved to have been sustained by the plaintiffs."

It was of little use to caution the jury from giving speculative or any other than "actual damages," after the large margin of inference and presumption which they were permitted to take in order to find *data* by which to calculate them.

It was said, in the case to which we have referred "actual damages should be actually proved, and cannot be assumed as a legal inference from facts" which afford no *data* by which they can be calculated.

In order to find out the plaintiffs' loss or damage, the jury were allowed by the court to infer that the defendants have saved all the money indicated by the comparative powers of the engines with and without the improvement; and after having made this inference, they may presume that the defendants would have paid this amount to the plaintiff for the use of his improvement.

Thus the possible advantage or gain made by 491*] the use of *plaintiffs' improvement on their machines, is made the measure of his loss. If the plaintiffs, unable to furnish any other *data* for a calculation, had proved that the defendants had made a certain amount of money by putting out the fires in New York, which the plaintiffs would otherwise have made by use of their invention, he might with some reason contend that this was a proper measure.

But if he fails to furnish any evidence of the proper *data* for a calculation of his damage, he should not expect that a jury should work out a result for him by inferences or presumptions founded on such subtile theories.

We therefore direct the case to be remanded for a venire facias de novo.

GEORGE B. MOREWOOD, John R. Morewood, and Frederick R. Routh, *Appts.*, *v.* LORENZO N. ENEQUIST, Owner of the Brig Gothland.

(S. C. 23 How. 491-495.)

Charter-parties and contracts of affreightment are maritime contracts, cognizable in admiralty—conflicting testimony.

New Jersey Steamboat Company v. The Merchants' Bank of Boston, 6 How. 334, affirmed.

Charter-parties and contracts of affreightment are maritime contracts, within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*.

People's Ferry Co. v. Beers, 20 How. 401, considered.

This court will not reverse a decree of the circuit court, merely upon a doubt created by conflicting testimony.

Submitted Mar. 13, 1860. Decided Apr. 9, 1860.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the district court of the United States for the southern district of New York, by the appellee, against the appellants, *in personam*, to recover freight stipulated for in a charter-party.

The district court entered a decree in favor of the libelant. This decree having been affirmed, on appeal, by the circuit court, the defendants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Robert Dodge** and **R. Johnson** for appellants.

Mr. **Charles Donohue** for appellee.

Counsel filed five briefs, in which the evidence in the case and the question of jurisdiction were exhaustively discussed. But as the question of admiralty jurisdiction *in personam* must be considered as having been conclusively settled, the argument is not here given.

Mr. Justice **Grier** delivered the opinion of the court:

The ship Gothland, owned by Enequist, the libelant, was chartered by Burt, Myrtle, & Co., of Batavia, to proceed to Padung, on the Island of Sumatra, there to receive a quantity of coffee; to return thence to Batavia and complete her cargo, and deliver the same in New York, freight to be paid by the assignees of the bills of lading on delivery of the cargo. The *libelant's suit is *in personam* against [*493 the consignees or assignees of the cargo, for the amount of freight stipulated in the charter-party.

The only defense alleged in the answer is, that a portion of the merchandise delivered was not in good order, and had been greatly damaged by sweating, caused by want of proper ventilation on the voyage.

This defense was fully discussed and exam-

NOTE.—*To what places the jurisdiction of admiralty is confined*—see note to Allen v. Newberry, 16 L. ed. U. S. 110.

Admiralty jurisdiction as to matters of contract—see note to 18 C. C. A. 347, and note to 27 C. C. A. 530.

ined both in the district and circuit court, and a decree was entered for the libelant in both.

In the argument in this court, the counsel, without abandoning the original defense, have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject, and return to the fluctuating decisions of English common-law judges, which, it has been truly said, "are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice."

The errors of those decisions have mostly been corrected by legislation in the country of their origin; they have never been adopted in this.

We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject. The case of *The New Jersey Steamboat Company* v. *The Merchants' Bank of Boston*, 6 How. 344, was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated, both by counsel and the court. Everything connected with the history of courts of admiralty, from the reign of Richard II. to the present day—everything which the industry, learning, and research of most able counsel could discover, was brought to our notice. We then decided that charter-parties and contracts of affreightment are "maritime contracts" within the true meaning and construction of the Constitution and act of 494*] *Congress and cognizable in courts of admiralty by process either *in rem* or *in personam*.

Lord Tenterden admits that, by the maritime law, "the ship is bound to the merchandise and the merchandise to the ship; and it is a necessary consequence that the contract is as much a maritime contract as a bottomry or *respondentia* bond, or mariners' wages." See Abbott on Shipping. But in England they cannot have the benefit of this lien or privilege, because courts of common law cannot enforce a lien *in rem*, and will not permit the court of admiralty to do it. Our district courts had exercised this jurisdiction without question till the case just mentioned came before this court. Since that time no objection has been raised in this court to the jurisdiction of courts of admiralty over contracts of affreightment. See *Rich* v. *Lambert*, 12 How. 347, etc., etc.

The numerous briefs of argument filed in this case contain nothing which was not brought to our notice in the former discussions of this subject, except some remarks on the case of *The People's Ferry Co.* v. *Beers*, 20 How. 401. It has been contended that this case has established the doctrine that the jurisdiction of our courts of admiralty under the Constitution should be restrained to that which they were permitted to exercise in the colonies before the Revolution. The court decided in that case that a contract to build a ship is not a maritime contract: and though, in countries governed by the civil law, courts of admiralty may have taken jurisdiction of such contracts, yet that in this country they are purely local, and governed by state laws, and should be enforced by their own tribunals. As a cumulative argument, it was stated that the act of Congress of 1789 was not intended to conflict with the rights of the state tribunals to enforce contracts governed by their own laws, and not strictly of a maritime nature; that such contracts were thus considered at the time the Constitution was formed, and had never been previously cognizable in courts of admiralty as within the category of maritime contracts; and that the contest of jurisdiction in that case "was not so much between rival tribunals as between distinct sovereignties claiming to exercise power over contracts, property *and personal *495 franchises." The arguments used in stating the opinion of the court must be referred to the subject before it, and construed in connection with the question to be decided. They had no reference whatever to any former decisions of this court on the question now (it is hoped for the last time) mooted before us.

There is much testimony in the record of this case, on the issue made by the answer, with the usual discrepancy and contradiction in matters of opinion. The question whether the cargo was injured through the negligence and fault of the master, or whether the damage to it was caused by the innate vice of the cargo and its necessary exposure on the voyage, was a very complex one, depending wholly on the opinion of experts. Where witnesses of proper skill and experience have formed their judgment from a personal examination of the subject of the controversy, their opinions are generally more worthy of confidence than those elicited by hypothetical questions, which may or may not state all the accidents and circumstances necessary to form a correct conclusion.

The decision of this case by the district and circuit courts is supported by the testimony of numerous witnesses, who had both the capacity and experience to judge, and had examined the subject of the controversy. We see no reason to dispute the correctness of their judgment, or to enter into a particular examination of the conflicting testimony in order to vindicate the correctness of our own. We have frequently said that appellants should not expect this court to reverse a decree of the circuit court merely upon a doubt created by conflicting testimony.

The judgment of the Circuit Court is affirmed, with costs.

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*ANSON, BANGS, & CO., *Compts. and Appts.*, [*1

v.

THE BLUE RIDGE RAILROAD COMPANY.

(See S. C. 23 How. 1, 2.)

Motion to dismiss for want of bond—time given to file bond.

Upon a motion to dismiss the appeal, upon the grounds that no appeal bond was given at the time of granting the appeal, either as a security for costs or supersedeas of execution, the court gave appellant sixty days to give the bond, and file it with the clerk, upon complying with which order, the motion to be dismissed; otherwise, granted.

Argued Mar. 23, 1860. Decided Apr. 16, 1860.

APPEAL from the Circuit Court of the United States for the Northern District of Georgia.

The case is stated by the court.

On motion to dismiss.

Messrs. **Reverdy Johnson, R. Toombs,** and **T. R. R. Cobb** for appellants.

Mr. **P. Phillips** for appellee.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a motion to dismiss the appeal, on the part of the appellee, upon the ground that *2] no appeal bond was given at the *time of granting the appeal, as required by the statute, either as a security for costs, or supersedeas of execution. 1 Stat. at L. pp. 84, 85, §§ 22, 23, p. 404.

It is admitted that no bond was given, but the counsel resisting the motion proposes to give one for the costs. and thus prevent the dismissal, if consistent with the practice of the court. The practice has been allowed in several cases, as will be seen by reference to 10 Wheat. 311; 16 How. 148, and 9 Wheat. 555. In the last case, time was granted within which to give the bond, or the case be dismissed. The bond may be taken and approved before any judge or justice authorized to allow the appeal or writ of error.

Let the appellant have sixty days to give the bond, and file it with the clerk, upon complying with which order the motion be dismissed; otherwise, granted.

SIMEON BENJAMIN, *Plff. in Err.*,

v.

OLIVER B. HILLARD and Moses C. Mordecai.

(See S. C. 23 How. 149–167.)

Extent of obligation of surety—when surety discharged by change of contract with principal—when not—settlement, effect of—damages, measure of—question for jury—notice to defendant.

The general rule is to attribute to the obligation of a surety the same extent as that of the principal.

If the terms of his engagement are general and unrestricted and embrace the entire subject, his liability will be measured by that of the principal, and embrace the same accessories and consequences.

The mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor.

There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract, without the surety's consent, to produce that result.

But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, there is no ground for the surety to complain.

Where a settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it, the guarantor connot plead it in bar.

All questions of damages are, strictly speaking, for the jury; but there are certain established rules, according to which they ought to find.

The amount that would have been received, if the contract had been kept, is the measure of damages.

Introduction of the notice to the defendant, of the defects in the work, was proper.

Argued Mar. 21, 1860. Decided Apr. 16, 1860.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This was an action on the case brought in the court below, by the defendants in error, against the plaintiff in error, as guarantor of the performance of a certain contract, to recover damages resulting from an alleged failure to perform said contract.

The trial in the court below resulted in a verdict and judgment in favor of the plaintiffs, for $6,000 and $1,869.15 costs; whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Charles Tracy** and **William Curtis Noyes,** for plaintiffs in error:

1. The court erred in the construction of the defendant's agreement.

It was the contract of a surety which is to be taken *strictissimi juris*, and is not to be enlarged by a liberal or loose interpretation.

Leggett v. *Humphreys*, 62 U. S. (21 How.) 66–76; *Miller* v. *Stewart*, 9 Wheat. 681, 703; *Wright* v. *Johnson*, 8 Wend. 512, 516.

The motive and design of the writing was, to protect the plaintiffs against the loss of the money they were to advance. It, therefore, guarantied a performance of the contract by the delivery of the articles, and that if they were not delivered, the money should be refunded with interest.

There is nothing in the surety's agreement which binds him to answer for the breach of any warranty which the principals have contracted to make. The sealed agreement binds the manufacturers to warrant the engine capable of driving six run of stones, but the guaranty has no connection with such a prospective warranty. The surety's obligation must be and is definite; he is liable at once or never; the articles are delivered or they are not; if delivered, he is clear; if not delivered, he is at once liable to refund the money advanced, but nothing else.

The essential idea of having money refunded in gross, apparent on the face of the paper, shows that it was a total nonperformance alone which would charge the surety, and the mention of that sum necessarily excludes all other liability.

The surety cannot be supposed to have intended to assume an indefinite liability for ultimate defects in articles accepted and used by the plaintiff, and as to which the defendant was wholly ignorant.

2. The undertaking of the defendant was satisfied by the performance of Hopkins & Leach's contract.

The receipt which went forth from the plaintiffs was justly relied upon by the defendant as a full discharge of the contract; and he acted upon it in relinquishing valuable securities which he held for his indemnity. The plain-

NOTE.—*Discharge and rights of surety*—see notes to 35 L. ed. U. S. 486; 35 L. ed. U. S. 679; 52 C. C. A. 427.

tiffs are, therefore, estopped from denying the performance so evident by their receipt.

Broom Com. L. 841, 842, 91 L. L. O. S.

The plaintiffs treated this settlement with Hopkins & Leach as a determination of the suretyship. Thus, on December 27, 1848, being nine days after the settlement, they gave notice to Hopkins & Leach of the failure of the engine. But they never gave any notice to the defendant till the last of May, 1849.

3. The defendant's obligations as surety were discharged by the acts and agreements of the plaintiffs and Hopkins & Leach.

The new agreement, to which the defendant was not a party, gave till the third rise of water in October to complete the delivery. Such new agreement was made upon a good consideration, and was valid and binding. It made a permanent and material change in the contract.

Whether the change was for the benefit of the one party or the other, or both, it was, in either case, a change of the contract and discharged the surety.

Miller v. *Stewart*, 9 Wheat. 681, 703; Burge, Surety, 203-206; Pit. Pr. & Sur. 208; Theob. Pr. & Sur. 154; Par. Merc. L. 67; *Brigham* v *Wentworth*, 11 Cush. 123; *Dickerson* v. *Commissioners*, 6 Ind. 128; *Hunt* v. *Smith*, 17 Wend. 179, 180; *Walrath* v. *Thompson*, 6 Hill, 540; 2 N. Y. 185; *McWilliams* v. *Mason*, 6 Duer, 276; *Bangs* v. *Strong*, 7 Hill, 250; *Samuel* v. *Howarth*, 3 Mer. 272.

The fact that the time of performance originally contracted for had already arrived, and Hopkins & Leach might be deemed in default of performance, makes no difference in the application of the rule. Plaintiffs chose to waive the default and make a new contract. If the plaintiffs had insisted on the default, then Hopkins & Leach would have kept the engine and the defendant would have been liable only for the advances previously made, being then only about $4,000, and he would have been more secure of indemnity by reason of the engine, so far as built, being still the property of Hopkins & Leach.

It is material to the risk or safety of the surety that the advances be made as specified in the contract to which he is surety.

An advance made before the time it should be made or after it, or in a different kind of medium, is equally a departure from the conditions of the suretyship.

Theob. Pr. & Sur. 154, § 183; *Bacon* v. *Chesney*, 1 Stark. 192; *Simmons* v. *Keating*, 2 Stark. 426; Law J. N. S. Ch. 260; Jur. 38; 4 Beav. 379; 10 Law J. N. S. Ch. 395; 5 Jur. 164; *Bonser* v. *Cox*, 6 Beav. 110-113; *Walrath* v. *Thompson*. 2 N. Y. 185; S. C. 6 Hill, 540; *F. & M. Bank of Michigan* v. *Evans*, 4 Barb. 487; *Calvert* v. *London Dock Co.* 2 Keen, 638; 7 Law J. N. S. Ch. 90; 2 Jur. 62; Burge, Surety, 117, 118; *Wright* v. *Johnson*, 8 Wend. 512; *Hunt* v. *Smith*, 17 Wend. 179; Fell, Guar. 206, *et seq.* 2d Am. ed.

4. The court erred in refusing to charge the jury, as requested by the defendant's counsel, in relation to the rule of damages.

The engine, boilers, and appurtenances thereof had a definite price fixed by the contract, *viz.*, $3,150. The parties had set this as the value of such articles, properly made and fully answering to the terms of the contract. In any assessment of damages for failure to deliver such articles, that price must be taken as the test of value.

Whatever rule of damages might be applied, this element of the price of an engine of the specific dimensions and sufficient to drive six run of stones, was an essential consideration, and the instruction asked for should have been granted.

Cary v. *Gruman*, 4 Hill, 625.

5. The court erred in admitting the paper called a survey.

This paper was an unsworn statement, made *ex parte*, and contained allegations of particular facts, and also expressions of opinions of the persons signing it.

Messrs. **G. C.** and **L. W. Goddard**, for defendants in error:

First. The first exception in the case was as to the admission of this survey.

It was competent evidence to show that notice and information were sent to defendant; and in this light only was it put in evidence.

It being proper evidence for one purpose, and the exception being general to its entire exclusion, it is not well taken.

Camden v. *Doremus*, 3 How. 515.

It was, however, admissible for all purposes, as the defendant had already introduced evidence as to its contents, as had the plaintiff also, without objection.

Second. The next exception is to the refusal to nonsuit. This cannot be done against the will of the plaintiff.

Elmore v. *Grymes*, 1 Pet. 469; *DeWolf* v. *Rabaud*, 1 Pet. 476; *Crane* v. *Morris' Lessee*, 6 Pet. 598.

Third. The remaining exceptions are to the charge.

The construction given to the guaranty is correct.

The last clause of the contract with Hopkins & Leach is that they would give security for the money and for the fulfilment of this contract. And then, on the same paper, follows the guaranty, by which the defendant guaranties the performance of the within contract on the part of Hopkins & Leach; and also agrees to refund the money paid on it, if not performed.

The charge of the court on the alleged enlargement of the time for completing the contract was correct.

Such an acquiescence in delay on the part of Hopkins & Leach as was testified to, would not, as matter of law, discharge the defendant; but a material alteration of the contract by the parties would discharge him.

The time for the putting up the engine, etc., was not fixed by the contract. They were to be put up "when the foundations are finished and ready for the reception of the machinery," of which Hopkins & Leach were to have ten days' notice. There was no change in this.

An agreement with the principal for delay does not discharge the surety, unless it is one which the principal can enforce; one which is valid in law, and made on sufficient consideration.

McLemore v. *Powell*, 12 Wheat. 554; *Vilas* v. *Jones*, 10 Paige, 79.

The contract was under seal, and could not

be varied by parol so as to be obligatory on the parties to it.

Davey v. *Prendergass*, 5 Barn. & Ald. 187; *Gahn* v. *Niemcewicz Exrs.* 11 Wend. 312.

The account and statement was no discharge of Hopkins & Leach on their contract.

The engine had not been tried in connection with the mill; and of course it could not be determined whether it would drive the mill, with six or any run of stones, and whether that part of the contract had been performed.

If the defendant's guaranty of the "performance of the contract" extended to the quantity and sufficiency of the work when done, then he had no right to assume, if he did, that his liability thereon ceased when the last payment was made to Hopkins & Leach; for that payment might, and in fact did, become due before the mill was complete and before the engine could be tried.

There was nothing in the memorandum of settlement to mislead him.

Whether the contract was performed or fulfilled in the sense of the contract and as guarantied, could only be ascertained at Wilkesbarre. And the defendant was bound to ascertain, before he could act on such assumption to the prejudice of the plaintiffs.

The guaranty was coextensive with the obligations of the contract.

Nonperformance by Hopkins & Leach was what the guaranty looked to—was what it was required for, and what it was given to provide for. By the contract, the plaintiffs were entitled to security for the money and for the fulfilment of the contract.

The guaranty, to meet this, follows its terms, and secures the performance, and the return of the money if not performed.

What amount of money or what damages the plaintiffs were entitled to recover, depended on the evidence as to nonperformance; which was fairly submitted to the jury under instructions, which were not excepted to.

In respect to the amount of recovery or the rule of damages, the court charged that if the jury found the engines, etc., were insufficient to drive six run of stones, the damages should be such sum as would supply the deficiency.

The cause was tried in 1856. The plaintiffs were then out of pocket in money paid to Hopkins & Leach, over $8,000, including interest, with little or no benefit from it. Besides which, they had "expended large sums of money to put the engines, etc., in a condition to run," and then the engine would not do the work required by the contract.

Mr. Justice **Campbell** delivered the opinion of the court:

In September, 1847, Hillard & Mordecai employed the firm of Hopkins & Leach to make at Elmira, in New York, and deliver to them at Wilkesbarre, Pennsylvania, a steam engine, and apparatus necessary to put the same in complete operation, of the best materials and in the most substantial and workmanlike manner, according to specifications, and warranted to be of sufficient capacity and strength to drive six run of stones, and the gearing and machinery necessary for flouring and gristing purposes. Also, to make and deliver the cast iron, wrought iron, steel, and composition work for driving six run of stones, and the machinery attached, of the best materials and workmanship. These they were to erect and put up on a foundation prepared by Hillard & Mordecai, who were to afford the proper aid for that purpose. The machinery was to be completed and delivered at Wilkesbarre upon the first safe and navigable rise in the water of the river (Chemung) in the ensuing spring; and Hopkins & Leach were to give a responsible individual for security for the money paid on the contract, and for its fulfilment, Hillard & Mordecai agreed to pay $2,000 the first of December, 1847; $2,000 the first of February, 1848; and the remainder upon the completion of the work, for which payments they were to be allowed interest. Before the first payment, the defendant subscribed an agreement, indorsed on the contract, as follows: "For value received, I hereby guarantee the performance of the within contract on the part of Hopkins & Leach; and in case of nonperformance thereof, *to refund to Messrs. Hil- [*163 lard & Mordecai all sums of money they may pay or advance thereon, with interest from the time the same is paid." This suit was brought on this guaranty by Hillard & Mordecai for the insufficiency of the work done by Hopkins & Leach. On the trial they adduced testimony to show that the engine and apparatus set up by Hopkins & Leach were not of the best material, nor of substantial and workmanlike construction, and had not strength to drive six run of stones, and in improving them they had sustained expense and loss; that from the middle of December, 1847, till December, 1848, the time when the work was finished, they had advanced $5,500, and that only a trifling balance existed at that date, which was paid before the work had been tested by use; that afterwards, and in that month, defects were discovered, of which Hopkins & Leach had notice. In consequence of which, they made efforts to improve their work; but in June, 1849, the plaintiffs procured an examination to be made by three machinists and engineers, whose report upon the imperfection of the machinery was communicated to Hopkins & Leach and to the defendant, and who were required to amend their work. This notice and report were read to the jury, the defendant excepting to their competency. The defendant, after the case of the plaintiff was submitted to the jury, insisted to the court that his contract was merely a guaranty, either of the performance of the agreement by Hopkins & Leach by the delivery of the machinery, or the refunding of the moneys that might be paid before that event; and that the advances of the plaintiffs, being in drafts or notes, and not within the time limited by the contract, the defendant was not liable at all, or if liable, only to the extent of the payment of $4,000, until they had fully performed their contract; and the plaintiffs having fully paid off Hopkins & Leach, and receipts being given, the defendant had a right to consider his guaranty as at an end.

The court overruled a motion to nonsuit the plaintiff, and instructed the jury that the defendant was responsible on his contract, not only for the nonpayment of the money advanced to Hopkins & Leach in case they failed to make and deliver *the engine and machinery, [*164 but also for the full and faithful performance

of all of the agreement of Hopkins & Leach. The general rule is to attribute to the obligation of a surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted, and embrace the entire subject (*omnem causam*), his liability will be measured by that of the principal and embrace the same accessories and consequences (*connexorum et dependentium*). It will be presumed that he had in view the guaranty of the obligations his principal had assumed. Poth. on Ob. 404; 3 M. & S. 502; *Boyd* v. *Moyle*, 2 C. B. 644.

In the case before us, the contract of the surety is not in the alternative, but consists of two terms: one, that the principals shall perform their engagement, not merely by their delivery of some machinery, but of such machinery as the contract includes; the other, that if there be a nonperformance, whether excusable or not, the money advanced on the contract shall be secured to the plaintiffs to the extent for which their principals are liable.

The defendant, to sustain his defense that the plaintiffs had varied their agreement with Hopkins & Leach, adduced testimony to the effect that the latter had informed them of their inability to complete the work "by the first safe and navigable rise in the river," and that they assented to the delay proposed by them till another rise; that a portion of the work was sent in April, and a portion in June, and a portion in October, and that the plaintiffs were not ready to receive it until October, and it was not erected until December, 1848, at which time a settlement took place, and the plaintiffs paid the small balance then due.

The circuit court instructed the jury that the waiver by the plaintiffs of the punctual delivery of the engine and machinery did not constitute such a change in the contract as to discharge the guarantor. That a mutual alteration of the contract by the principal parties 165*] would operate to discharge the *defendant as a guarantor; but an acquiescence on the part of the plaintiffs in a longer time than was specified in the contract for fulfilment, especially as the time of fulfilment was somewhat indefinite, would not, as matter of law, operate to discharge the defendant; and the court declined to charge the jury "that if they believed that the performance of the contract was essentially altered or varied, or the time of the delivery of the machinery at Wilkesbarre extended upon good consideration, without the knowledge or consent of the defendant, the plaintiffs were not entitled to recover."

The agreement of Hopkins & Leach comprised the manufacture of complicated machinery of distinct parts and different degrees of importance, and these were to be transported to a distance, there to be set up in connection with other works about which other persons were employed. That such a contract should not be fulfilled to the letter by either party is not a matter of surprise. The covenants are independent; and there is nothing that indicates that a failure on either part to perform one of these covenants would authorize its dissolution, or that the breach could not be compensated in damages.

The evidence does not allow us to conclude that there was any intention to change the object or the means essential to attain the object of the original agreement. In its execution, there were departures from its stipulations; but these seem to have been made on grounds of mutual convenience, and did not increase the risk to the surety. He was fully indemnified by his principals until after the settlement between the plaintiffs and Hopkins & Leach.

It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time of the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in a point so material as, in effect, to make a new contract, without the surety's consent to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to *arrive at their end, we can find no [*166 ground for the surety to complain. The circuit court presented the question fairly to the jury, and the exceptions to the charge cannot be supported. Trop. de Caution, 575; *Baubien* v. *Stoney*, Speer, Ch. (S. C.) 508; 11 Wend. 312.

The defendant adduced testimony to show that the plaintiffs accepted the engine and machinery; that an account was stated between the plaintiffs and Hopkins & Leach of the work done and money paid, and an acknowledgment of its settlement entered upon it, and signed by the parties; that Hopkins & Leach exhibited this account to the defendant, and demanded a return of the securities they had deposited with him for his indemnity, and that they were yielded on the credit given to that acknowledgment. He requested the court to instruct the jury, that if they believed that the defendant, relying upon the receipt given by the plaintiffs, settled with Hopkins & Leach, and surrendered to them securities he held to indemnify him against the liability he assumed by his guaranty, and such surrender and discharge were made after the settlement between Hopkins & Leach and the plaintiffs, and upon the faith of it, the plaintiffs are bound by such settlement and receipt, so far as the same relates to the defendant, they having put it in the power of Hopkins & Leach to procure the surrender of such securities for the defendant. This prayer finds its answer in the agreement of Hopkins & Leach, and the guaranty of the defendant.

The material of which the machinery was to be composed, and the workmanship and capacity of the manufacture, were warranted. The defects in the machinery were latent, and could only be ascertained by its use. The settlement between the parties did not embrace the subject to which the warranty applied, nor contain any release or extinguishment of the covenants concerning it. The cause of the present suit is not the same as that included in the stated account, or acknowledgment entered upon it.

The present suit originates in the contract between Hopkins & Leach and the plaintiffs. The former could not plead that settlement in bar of a similar suit against them; and conse-

167*] quently *their guarantor cannot. They have misconceived the import of that settlement without the agency of the plaintiffs, and are not entitled to charge them with the consequent loss.

The circuit court instructed the jury, that if they found the engine, boilers, and apparatus for steam power, were sufficient to drive six run of stones suitable for grinding, the damages to be found should be such as would enable the plaintiffs to supply the deficiency, and that they were not required to assume the contract price as the full value of such machinery.

The principle thus laid down coincides with that in *Alder* v. *Keighly*, 15 M. & W. 117. "No doubt," say the court in that case, "all questions of damages are, strictly speaking, for the jury; and however clear and plain may be the rule of law on which the damages are to be found, the act of finding them is for them. But there are certain established rules, according to which they ought to find; and here is a clear rule: that the amount that would have been received, if the contract had been kept, is the measure of damages if the contract is broken." This rule was reaffirmed in *Hadley* v. *Baxendale*, 9 Exch. 341. The exception to the introduction of the notice to the defendant and the report accompanying it, cannot be sustained. It was proper for the plaintiffs to notify the principals and their surety of the defects in their work, and to call upon them to amend it. The report was not introduced as testimony of the defects, nor can we assume that it was used for that purpose.

Upon the whole record, our conclusion is there is no error, and the judgment of the Circuit Court is affirmed.

MARTIN VERY, *Plff. in Err.*,
v.
GEORGE C. WATKINS.

(See S. C. 23 How. 469–476.)

Conversation, between trustee and cosurety of defendant, when inadmissible—what errors not grounds of reversal—inadmissible paper—what is a valid levy—property levied on may be left in possession of another—when property in trustee's possession may be levied on—surety exonerated when principal is—demand, how made of receiver.

A conversation between witness and a cosurety of defendant, defendant not being present at the conversation, is inadmissible to fix upon defendant as cosurety a separate liability for an alleged breach of the bond by their principal, for which they had made themselves mutually responsible.

Assignments of error, which are complaints because the court admitted evidence directly pertinent to the issues which had been made by the pleadings, are not grounds of reversal.

A paper in the handwriting of the deceased cosurety of the defendant was inadmissible to show that the testimony of the other witnesses was not consistent with an appraisement which they had made, pursuant to an order of the court.

If the officer charged with the duty to make a levy has a view of the goods and they are in his power, and he declares that he makes a levy or seizure of them in execution, it is a valid levy.

It cannot be implied that a levy by a marshal was incomplete because he left the property where it was when the levy was made.

After a levy has been made with a fi. fa. upon goods and chattels, the officer may confide them to another person for safe keeping.

An execution is leviable upon the property in the possession of a trustee of defendant, where it was allowed by him, voluntarily, to remain.

In an action to make a security liable for an alleged breach of his bond, he is entitled to have the benefit of any irregularity which his principal could have resisted.

Under a decree authorizing one to demand property of a receiver, the demand should be made under a certified copy of that part of the decree, permitting the demand of the property, and requiring its surrender, with a receipt upon it, either by such one or his attorney, that the goods were surrendered by the receiver.

Such a certificate the court would have directed to be put on file, as a voucher for the protection of the receiver from further responsibility to the parties, and as evidence that its decree had been executed in that particular.

Submitted Mar. 23, 1860. Decided Apr. 16, 1860.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **J. Stillwell** for plaintiff in error.

Messrs. **A. Pike** and **Geo. C. Watkins**, in person, for defendant in error.

Mr. Justice **Wayne** delivered the opinion of the court:

On the 3d of March, 1841, at Little Rock, Arkansas, one James Levy gave his obligation with a mortgage for $4,000, with interest, due six years after date, to one Darwin Lindsley, who soon after assigned the obligation to Martin Very, the plaintiff in error. In March, 1843, Levy paid to Very $2,000, and at the same time executed a promise, in writing, to pay the residue of the debt in jewelry and other wares, which Very agreed to receive in payment, to be selected within a year from that time, from Levy's stock of goods. Very refused to perform the agreement, and in 1848 brought an action on the original obligation, to which Levy pleaded the agreement by way of accord and satisfaction, with an offer to perform on his part. The supreme court of Arkansas, on an appeal, held it to be, in equity, *a clear accord [*471 and satisfaction, upon a good consideration, because the creditor by that arrangement received payment of nearly half of the debt in advance, and because the residue was to be paid almost four years before the debt became due. In the meantime, Very brought a bill to foreclose the mortgage in the circuit court of the United States for the district of Arkansas, to which Levy set up the same defense by way of answer. In April term, 1850, the court sustained the defense of Levy, and decided that Very should select from the stock of goods in question a sufficient amount, according to their value, on the 3d March, 1844, to satisfy the rest of the debt. It then became necessary to appoint a receiver in the cause. John M. Ross was appointed receiver, and gave a bond, with E. Cummins and Geo. C. Watkins as securities, in the penal sum of $5,000, with the condition that he would faithfully discharge his duties as receiver, with respect to such goods as might be brought into

NOTE.—*Rights and liabilities of sureties*—see notes to 12 L. ed. U. S. 66; 35 L. ed. U. S. 679; 43 C. C. A. 222; 51 C. C. A. 248.

court, and that he would carefully keep and dispose of them in conformity with such order and decree as the court might make in that suit.

In consequence of Very's refusal to abide by his agreement, Levy was obliged to keep his stock of goods on hand to tender them to Very, according to the agreement. But Levy had other creditors, who seized upon the same goods in execution, and they were in possession of the sheriff when Ross was made receiver, and from the sheriff he received them. The next step was an order from the district judge, directing Very to select from a box of jewelry in the hands of the receiver such an amount, according to the value of the goods in March, 1843, as would be sufficient to discharge the balance of the debt due to him. This he refused to do, and then the clerk of the supreme court of Arkansas was directed, with the assistance of two skillful and disinterested persons, to make a selection from the goods for Very.

It was done. A report was made, that the value of the goods in March, 1844, had been $5,777, and that according to that value a selection had been made to the amount of $2,002.59, to pay Very's claim upon Levy, and that the goods had been set apart for that purpose, with an in-472*] ventory. A *final decree was then made, authorizing Levy to withdraw the remainder of the goods from the hands of the receiver, adjudging also that Very should take the selected goods in payment of the residue still due upon the bond and mortgage, and that Ross, the receiver, should deliver them to him on demand. Very refused to abide by that decree, and prosecuted an appeal to this court. Here the decree of the court below was affirmed. On its return, Very refused to pay the costs. Levy had to pay them in order to get a mandate from this court to carry its decree into execution. Under these circumstances, Levy sued out a writ of execution, and directed it to be levied on the goods belonging to Very, still in the hands of Ross. The receiver and the marshal returned it without further action on the writ. A venditioni exponas was then issued, and the goods were sold by the marshal for $260, the full value of them at that time, in their then condition. Three years and six months passed, and then Very, having acquiesced all of that time in what had been done, commenced this suit to recover from Watkins, as the security of Ross, damages for a breach of his bond, alleging that he had carelessly kept the jewelry which had been in his possession as receiver, and for not having surrendered it to him when he demanded it, as under the decree of the court he had a right to do.

Watkins filed three pleas to this action. The first is a detailed narrative of the proceedings in the suit between Very and Levy to the appointment of Ross as receiver, and showing that, by the decree, Very had been required to receive, in satisfaction of the debt due to him by Levy, jewelry to the amount of $2,002.59; and that from that decree they had appealed to the Supreme Court of the United States, where the decree of the court below had been affirmed with costs. *Very* v. *Levy*, 13 How. 345. And further stating, that Levy had paid the costs of the suit in the Supreme Court, and that the jewelry, still being in the hands of Ross, had been levied upon and sold by the marshal, and that the proceeds of it were applied to the repayment of Levy of the costs, which Very was bound to pay by the decree.

Watkins, in his second plea, denied that the jewelry had *been injured from the care- [*473 less keeping of Ross; and his third plea is a denial that Very had ever demanded it from Ross.

Upon the trial of the case, the plaintiff excepted to the rulings of the court, as well for excluding as for admitting testimony.

We have examined with some pains the plaintiff's assignments of error, without finding cause for sustaining either of them. The first is, that the court refused to permit a witness to testify to a conversation between himself and Cummins, the cosurety of Watkins, for the purpose of fixing upon the latter a liability, in this action, to the plaintiff. It seems that Watkins was not present at that conversation. Whatever it may have been, it was inadmissible; and had Cummins been alive, and had he been called as a witness to narrate it, he would not have been a competent witness to fix upon his cosurety a separate liability for an alleged breach of the bond by their principal, for which they had made themselves mutually responsible. The argument of the counsel for the defendant in error is unanswerable upon this point.

The second, third, fourth, fifth, and sixth assignments of error are complaints because the court admitted evidence directly pertinent to the issues which had been made by the pleadings, and defensive as to the imputed negligence of Ross in keeping the goods committed to him as receiver, and as to their condition, quality, and value when they were turned over to him under the order of the court; and as to their condition when it was levied upon by the marshal to pay the costs of the Supreme Court.

The seventh assignment of error was the refusal of the court to admit a paper in the handwriting of Cummins, the deceased cosurety of the defendant, to show that the testimony of the other witnesses, Dort and Kirk, was not consistent with the appraisement which they had made, pursuant to the order of the court. It was clearly inadmissible.

The eighth and ninth assignments of error relate to the levy upon the jewelry by the deputy-marshal; and the court is asked to instruct the jury: "If the levy was made without seeing the jewelry and taking it into possession, they should *disregard it as any evidence of [*474 any levy: as, in law, a levy upon personal property—which jewelry is—cannot be made without having a sight of it, and taking possession thereof."

The court refused the instruction as asked; but said to the jury, that to make a valid levy on goods and chattels on a writ of fi. fa., if the officer charged with the duty has a view of them, and they are in his power, and he declares that he makes a levy or seizure of them in execution, such is a valid levy, without taking them into his possession.

The objection to this instruction seems to be, that there had been an insufficient seizure, because the officer did not take manual possession of the box containing the jewelry, but left it in the keeping of Ross, who had pointed it out to him when he came to make the levy. But the

evidence establishes that a levy was made by the officer, and that he returned the execution to the marshal, for further proceedings upon it.

It cannot be implied that the levy was incomplete, on account of the box having been left where it was when the levy was made, where it had been kept by Ross whilst he continued to be receiver, and where it remained afterwards, from Very not having demanded it, as he had a right to do and should have done.

After a levy has been made with a fi. fa. upon goods and chattels, the officer may confide them to another person for safe keeping, until there has been a settlement of the judgment and payment of all costs.

The court, in giving this instruction to the jury, went further than it was necessary to do, without, however, having interfered with the right of the jury to find from the evidence whether or not a levy had been made.

The tenth assignment of error relates to the instruction of the court, that by the decree of the court below in August, 1850, and the affirmance of it by this court in 1851, Ross ceased to act as receiver, and from thenceforth held the jewelry in question only as the trustee of Very. That decree put an end to the controversy, excepting to what remained to be done under the mandate of the court for the execution of its decree. It is true that Ross, as re- 475*] ceiver, had not been *discharged by a formal order upon motion when the decree was made; but it is also true that the jewelry, by the decree, was made the property of Very, and that he could have demanded it from Ross, and that he could not justifiably have refused to deliver it. It was the property of Very for all purposes, as any other that he owned, or which could have been conveyed to him by any kind of title. It was, as such, liable for his debts. It seems to have been considered by the counsel of Very as liable for the costs of appeal in the Supreme Court, which Very had neglected to pay. Levy, however, paid them, and obtained an execution against Very for his reimbursement, which was as well leviable upon this property, still in the possession of Ross, as upon any other. It was allowed by him voluntarily to remain where the law had placed it, without having made any proper demand for it under the decree. We do not consider the application for it by Mr. Fowler, as the attorney of Very, a proper demand. Mr. Fowler's relation to him was not that special attorneyship which authorized him to demand it in the manner that he did. No doubt that both Mr. Cummins himself and Mr. Fowler thought themselves empowered, as attorneys in the suit, to withdraw it from Ross, to make a private sale of it for the payment of the costs due by Very.

But Ross had responsibilities in the matter under the decree, which gave him the right to withhold it from the counsel of one of the parties, until a demand was made upon him, according to what the course of equity practice requires to be done under such decrees. It matters not what causes he may have assigned to Mr. Fowler for not delivering the jewelry to him, for, in a controversy to make the security of Ross liable for an alleged breach of his bond, the former is entitled to have the benefit of any irregularity which his principal could have resisted. According to the practice in equity, under such a decree as this is, authorizing Very to demand the jewelry, the demand should have been made under a certified copy of that part of the decree, at least, permitting Very to demand the property, and requiring Ross to surrender it, with a receipt upon it, either by Very or by his attorney, that the *goods were sur- [*476 rendered by Ross. Upon the return of such a certificate, the court would have directed it to be put on file with the other papers in the suit, as a voucher for the protection of Ross from further responsibility to the parties, and as evidence that its decree in that particular had been executed. Such a course is not merely a form, to be followed or not, as parties to such a decree may please, but it is a cautionary requirement, to prevent further litigation, by exactness in the performance of a decree in equity. Had it been observed in this instance, this suit would not have been brought.

The instruction as given is in conformity with the decree. Having examined every assignment of error, we shall direct the judgment of the court below to be affirmed.

THE ORIENT MUTUAL INSURANCE COMPANY, *Plff. in Err.*,

v.

JOHN S. WRIGHT, use of Maxwell, Wright & Company.

(See S. C. 23 How. 401-412.)

Open policy, what is, and effect of—when same attaches—rules governing same—construction of such a policy—when and how premiums to be settled.

An open or running policy enables the merchant to insure his goods shipped at a distant port when it is impossible for him to be advised of the particular ship upon which the goods are laden and therefore cannot name it in the policy.

The party insured can insure the cargo "on board ship or ships," on condition of declaring the ship upon the policy and giving notice to the underwriter as soon as known, and if possible, before the loss of the ship on board of which the goods have been laden.

The underwriter agrees that the policy shall attach, if the vessel be seaworthy, however low may be her relative capacity to perform the voyage; and for the additional risks he may thus incur, he finds his compensation in an increase of the premium.

The ship must be seaworthy, or the policy will not attach; but the degrees of seaworthiness are various; and the rates of premiums are varied by the underwriters according to the different estimates they form of the character and qualities of the vessels to which they relate.

The principles of law and rules of construction governing policies of this description stated.

Where the parties agree, that in respect to vessels rating lower than A 2, the premiums on the risks shall be fixed at the time they are declared or reported; when thus fixed, and the premium paid or secured, the policy attaches upon the goods from the time they are laden on board the vessel.

The mere declaration of the ship, on board of which the goods are laden, is not sufficient to complete the contract, as something more is to be done by the assured; he must pay or secure the additional premium which the underwriter has reserved the right to fix, at the time of the declaration of the risk.

NOTE.—*Insurance. Different kinds of policies. Valued policy*—see note *ante*, 329.

Marine insurance, see note to 22 L. ed. U. S. 216, and note to 42 L. ed. U. S. 113.

Where the vessel declared or reported by the assured was rated below A 2, and the company had reserved the right to fix at the time the additional premium, and unless assented to by the assured, and the premium paid or secured, the contract of insurance, in respect to the particular shipment, did not become complete or binding; held, that the premiums were to be settled when the risks were reported; not at any other period.

Argued Mar. 20, 1860. Decided Apr. 23, 1860.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This action was brought in the superior court of Baltimore city, by the defendants in error, on a certain policy of insurance.

On petition of the plaintiff in error, the cause was removed into the circuit court of the United States for the district of Maryland.

The trial below resulted in a verdict and judgment in favor of the plaintiffs for $17,365.-13 with costs; whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **A. Hamilton, Jr., and F. B. Cutting,** for plaintiff in error:

The contract of insurance contained in the record is commonly called an open or running policy, and is issued when the shipments to be protected thereby, the time of making them, the vessel or vessels carrying them, the ports of destination, and the value or amount of cargo, and other circumstances material to the risks to be borne by the underwriter have no present existence, or are unknown to either of the parties.

The contract is necessarily incomplete, though binding upon the underwriter to the extent of the agreement. It contemplates that if the assured shall desire to avail himself of his right to be protected under it, he shall, when the risks to be insured are known to him, or within a reasonable time thereafter, make a declaration, return, or report of them to the underwriter, with all essential particulars, in order that the premium to be charged may be estimated by the insurer, and if agreed to, may be entered with the particulars upon the policy which is "open" to receive them.

1 Phil. Ins. 26, 3d ed. 1 *Ibid.* 273; 1 Duer, Ins. 77, § 23.

Until the return by the merchant of risks, not known at the time of making the agreement to insure, no basis exists upon which the consideration or premium for assuming the hazards could be estimated or named by the underwriter; consequently, an open or running contract to insure separate sums upon unascertained future successive and distinct shipments to be thereafter declared or reported by the merchant, is an agreement that the underwriter will assume the risk as to them, at and from the lading thereof, in consideration that the assured will pay, or agree to pay, such premium as shall be, in good faith, named by the insurer, as an adequate compensation for the risks to be assumed by him.

2. The premium is the price, and is the sole consideration for which the underwriters agreed to indemnify the assured against loss. The rates of premium at which he can afford to take hazards, is the basis upon which the whole business of insurance rests. It is vital that the insurer should have the power to determine his rate of charge, leaving it, of course, optional with the merchants to accept or reject. Hence, under the agreement contained in the policy in controversy, as the risk to be insured at the time when it was effected was not known and did exist, it was impossible to estimate the premiums to be paid, and therefore an agreement being necessarily incomplete, various reservations were made, and amongst others, the essential ones, to add an additional premium upon the cargo to be shipped by vessels rating lower than A 2, or by foreign vessels. That the premiums or risks should be fixed at the time of the indorsement, and such clause to apply as the company may insert as the risks are successively reported.

Mr. Wright had the option to make shipments by vessels of this description, and the right to claim the benefit of contract by paying, or agreeing to pay, the additional premium which the company might, in good faith, charge for the risk.

1 Duer, Ins. 66, sub. 11; 1 Phil. Ins. 2, 8.

3. In such cases, there are as many different contracts of insurance as there are different subjects to insure, and these contracts are as distinct as if each was made the subject of a separate policy.

When the company has, in good faith, estimated and determined the rate of premium which it deems to be commensurate with the risk reported to it, and the merchant considers it too high and refuses to agree to it, the contract, as to that shipment, has not become complete.

The merchant has a right to be protected by the policy, at and from the lading of the cargo, if he chooses to agree to pay the premium demanded by the company therefor; but if he chooses, he may decline to pay it, in which case as the whole consideration fails, the company may refuse to enter the risk, or if an entry has been made, may strike it from their books.

12 La. Ann. 259; 1 Duer, Ins. 77, § 23; Story, Cont. § 431.

4. The schooner Mary W. did rate lower than A 2; consequently, when Mr. Wright made the declaration or return of the shipment by her to the company, it had the right to determine in good faith the additional rate which in its judgment would be adequate to the character of the risk that he desired should be insured. The contract makes no provision, in case the parties cannot agree on the premium, for its adjustment, by arbitration or otherwise, and in such case the law does not undertake to make a price for them.

5. Mr. Wright did refuse to agree to pay either of the rates of premium, which the company in good faith determined. He denied the right of the company to estimate the risk, denounced the rates named by it as exorbitant, offered to leave the dispute to arbitrators, and finally offered to pay, at a less rate, etc.; consequently, the contract between the parties, to insure the cargo of the Mary W., was never complete.

When Wright refused to pay or to agree to pay either of the rates of premium demanded, the company was free from liability. His refusal went to the entire consideration on which alone it had engaged to be liable at all.

Messrs. **R. J. Brent** and **H. May,** for defendants in error:

The principle of construing an insurance policy is to be most liberal towards assured.

Smith, Merc. L. 197; 2 Marsh. 87; 3 Kent, 257; 14 Pet. 109; 1 Duer, Ins. 161, § 5; *Parmer* v. *Ins. Co.* 1 Sumn.

The premium note being given and the amount agreed to, makes a new contract perfect and complete by extension on the old terms.

1 Arn. Ins. 26, and note; 1 Phelps, 14, and notes; 2 H. Bl. 343, 345, notes; 19 How. 318.

The premium note is conclusive, whether paid or not.

3 Kent, Com. 260; *Dalzell* v. *Mair,* 1 Camp. 532; *Foy* v. *Bell,* 3 Taunt. 496; 9 How. 390.

The policy takes effect from date of premium note, though policy delivered after.

Lightbody v. *N. A. Ins. Co.* 23 Wend. 18.

The adverse argument is most unreasonable, because it is virtually the claim of a power *ex parte* to annul the contract already attached and in force.

1 Phelps, Ins. 123; *Royalton* v. *Turnpike Co.* 14 Vt. 311; 1 Duer, 162, §§ 7–10.

Intention of parties must be on the whole contract, even by overruling grammatical construction.

Morey v. *Homan,* 10 Vt. 565.

If the risk had once attached, premium note could not be refused payment or returned.

8 Johns. 1.

The last clause retains one and one half per cent on all returned premiums.

The contract was irrevocable the moment the premium and extension was reported and approved.

1 Pars. Cont. 406, 407, note, K; *Taylor* v. *Merchants' Insurance Co.* 9 How. 390.

The contract is not the less complete because an increased premium was left open for subsequent agreement.

This was decided in *U. S.* v. *Wilkins,* 6 Wheat. 135, and not overruled, as supposed, in 17 Ohio, 192.

But here is an express obligation to pay an increased premium, and that is itself as good as if the increased premium had been paid at the time—promise for promise is a good consideration.

1 Pars. Cont. 373–376; 19 How. 323.

Now, as to the effect of the indorsement leaving the premium not fixed at the time, we insist—

1. That the average premium was fixed in the very extension of the policy, liable to be increased or abated.

2. The right to fix the rate in the case of *The Orient* must be reasonable, and not exercised so as to annul the contract.

1 Duer, 162, §§ 7–10; 1 Phil. Ins. 123; 14 Vt. 311.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Maryland.

The suit was brought by the plaintiff below upon a policy of insurance covering a quantity of coffee laden or to be laden on board the "good vessel or vessels" from Rio de Janeiro to any port in the United States, "to add an additional premium, if by vessels lower than A 2, or by foreign vessels."

The policy contained the following clause in respect to premiums: "Having been [*403 paid the consideration for this insurance by the assured, or his assigns, at and after the rate of one and one half per cent, the premiums on risks to be fixed at the time of indorsement, and such clauses to apply as the company may insert, as the risks are successively reported." The policy bears date 27th July, 1855. The company subscribed at the execution $22,500 as the amount insured.

On the 30th July, 1855, the policy was altered by agreement of parties by striking out the words, "vessels not rating lower than A 2," as it originally stood, and inserting the words now in the instrument, namely: "An additional premium, if by vessels lower than A 2, or by foreign vessels."

On the 4th January, 1856, the company subscribed an additional sum of $15,000, and on the 19th April following the sum of $25,000.

Premium notes were given at the time the different sums were subscribed, at the rate of premium mentioned in the body of the policy.

The agent of the company at Baltimore, who negotiated this insurance, the defendants being a New York company, states that when applications are made to enter risks on running policies, they are indorsed at once by him, and the report of such indorsement transmitted to the company in New York, which names the premium, and this is communicated to the assured; that the premiums specified in the body of the policies are nominal, and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported; and that the nominal premiums taken on the delivery of a running policy are returned, if no risks are reported.

In the latter part of August, 1856, the plaintiff applied to the agent at Baltimore for an indorsement on the policy of the coffee in question, laden or to be laden on board a vessel called the Mary W., from Rio de Janeiro to New Orleans, which application was communicated to the company in order that they might fix the premium. The company at first declined to acknowledge the vessel as coming within the description in the policy, on account of her alleged inferior character and unfitness [*404 for the voyage; but the plaintiff insisting upon the seaworthiness of his vessel, and his right to the insurance within the terms of the policy, the company fixed the premium at ten per cent, subject to the conditions of the policy, or two and one half per cent, as against a total loss. This rate of premium the plaintiff refused to pay.

The coffee was shipped on The Mary W. at Rio de Janeiro for New Orleans, on the 12th July, 1866, at which period she started on her voyage, and was lost on the 29th of the month upon rocks, the master being some seventy miles out of his reckoning at the time.

Evidence was given on the trial, on the part of the company, tending to prove that The Mary W. was rated below A 2, and even that she was unfit for a sea voyage, being originally intended, when built, in 1846, as a coasting vessel, and prayed the court to instruct the jury,

that if they find from the evidence the vessel, at the time of the application for the indorsement of her cargo upon the policy, was rated in the office of the company and other offices of underwriters in New York lower than A 2, and being so rated, the company offered to make the indorsement at the premium fixed by them, and that on the premium being communicated to the plaintiff, he refused to pay it or assent thereto, then he is not entitled to recover, which prayer was refused; and the court thereupon instructed the jury, substantially, that the plaintiff was entitled to recover for the loss, so far as the rate of premium was concerned, upon deducting such additional premium to the one and one half per cent, as in the opinion of underwriters may be deemed adequate to the increased risk of the coffee shipped in a vessel rating below A 2.

The jury rendered a verdict for the plaintiff.

The material question presented in the case is, whether or not the company were under a contract, with any of the terms and conditions of the policy, to insure this particular cargo of coffee on board of the vessel Mary W. at the time the loss occurred; for, unless the contract is found there, none existed between the parties, as it is admitted none was entered into at the time the vessel was reported and the risk de- **405*]** clared. *The plaintiff has assumed the affirmative of this question, and insists that the company was bound by the terms of the policy to cover the coffee from the time it was laden on board the vessel at Rio as soon as the risk was declared, and this whether the vessel rated below A 2 or not. This is necessarily the result of the position claimed, as it denies to the company the right to fix an additional premium, even if it should happen that the vessel rated below A 2; that then, or in that event, it is contended, the additional premium becomes a question of mutual adjustment between the parties, and if they disagree, to be determined by the courts. On the part of the company, it is insisted that, according to the special provisions in the policy, in case the vessel reported rates below A 2, the contract is inchoate and incomplete until the payment or security by the assured, of the additional premium to be fixed at the time by the company.

The contract of insurance in this case arises out of an open or running policy, which enables the merchant to insure his goods shipped at a distant port when it is impossible for him to be advised of the particular ship upon which the goods are laden and, therefore, cannot name it in the policy.

A relaxation in this respect has been permitted by the laws and practice of commercial countries; and the party effecting the insurance is allowed to insure the cargo "on board ship or ships," on condition of declaring the ship upon the policy and giving notice to the underwriter as soon as known, and if possible before the loss on board of which the goods have been laden. The underwriter, who consents to insure upon policies of this description, of course, has no opportunity to inquire into the character or condition of the vessel, and agrees that the policy shall attach, if she be seaworthy, however low may be her relative capacity to perform the voyage; and for the additional risks he may thus incur, he finds his compensation in an increase of the premium. A higher premium is always demanded where the vessels to which the insurance relates are not known.

The ship, indeed, must be seaworthy, or the policy will not attach; but the degrees of seaworthiness or of the capacity of *a ship [**406** to perform a given voyage are exceedingly various; and it is well known that the rates of premium are varied by the underwriters according to the different estimates they form of the character and qualities of the vessels to which they relate.

In the case of an insurance of goods shipped from and to port or ports designated, or on a voyage particularly specified, the ship to be afterwards declared, and the rate of premium to be paid is ascertained, and inserted in the body of the policy at its execution, the contract becomes complete, and the policy attaches upon the goods from the time they are laden on board the vessel, as soon as the ship is declared or reported, provided the shipment comes within the description in the policy. But until the declaration is made by the assured, it is inchoate and incomplete; and, if not made at all, the risk is regarded as not having commenced, and the assured is entitled to a return of his premium.

The principles of law and rules of construction governing policies of this description appear to be well settled, as may be seen by a reference to the authorities collected in the text writers.

1 Arnold, ch. 7, § 2, pp. 174–179, Perkins's ed.; 1 Phillips, ch. 5. § 2, pp. 174–177; 2 Parsons, ch. 1, § 2, pp. 34–35, and ch. 6 pp. 198–199; 3 Kent, Com. p. 256; *Entwisle* v. *Ellis*, 1857, 2 Hurl. & Nor. (Exch.) 549; *Langhorn* v. *Cologan*, 4 Taunt. 330; *E. Carver Co.* v. *Manf. Ins. Co.* 6 Gray, 214.

But the policy before us is materially different from the class of open or running policies adopted in England and upon the continent at an early day, and which appear to be generally if not universally in use at the present time. Instead of determining the amount of premium and inserting it in the policy at the time of its execution upon the shipments to be afterwards declared, as in the case of the policies we have been considering, the parties here agree, that in respect to a certain class of vessels, namely: those rating lower than A 2, the premiums on the risks shall be fixed at the time they are declared or reported; when thus fixed, and the premium paid or secured, the policy attaches upon the goods from the time they are laden on board the vessel. The mere declaration of the *ship on board of [**407** which the goods are laden, is not sufficient to complete the contract, as something more is to be done by the assured to bring the subject within the special stipulations in the policy; he must pay or secure the additional premium which the underwriter has reserved the right to fix, at the time of the declaration of the risk.

The premiums specified in the body of the policy are nominal; and the true premiums to be charged are fixed by increasing or reducing the nominal premiums when the risks are reported. This, it was proved, was the established custom of this company, and of which the assured is chargeable with notice. Indeed, this custom appears to have been acted upon in cas-

nection with this policy, and with the dealings of the parties under it.

On the 13th August it indorsed on it: Brig Windward, from Rio de Janeiro to Baltimore—value of shipment $4,750, at 1¼ per cent premium; and on the 20th November: Brig T. Walters, from same place to Philadelphia—value of shipment $2,375, at 1¼ per cent premium. The premiums for insurance of these two shipments are ¼ per cent less than the rate in the body of the policy.

We have said, that where the vessels to which the insurance relates are not known to the underwriter, a higher premium is always demanded, as he has no opportunity to inquire into the character or capacity of the vessel for the voyage; which information is readily accessible where the ship is known, by reference to the book of the register of vessels kept by the underwriters, in which the name, master, rate, and present condition are entered.

Now, the change made in this policy, and in others of the class, in the time of fixing the premium, from that of the execution of the policy to the time when the risk is reported, places the underwriters, in respect to fixing the premiums, on the footing of insurance of goods to be shipped on board a vessel named, the underwriters possessing all the information possessed in that case, in respect to the character of the vessel. As the effect, therefore, of this change in the terms of the policy is to reduce the rate 408*] of premium, it is as beneficial to *the assured as to the underwriter—which, doubtless, led to his assent to this mode of insurance. It is true, that in respect to vessels to be afterwards declared, and the premiums on the risks to be fixed at the time declared or reported, the parties stand on the footing of original contractors, the underwriter having the right to fix the premium, and the applicant the right to assent or not, as he sees fit; and, undoubtedly, mutual confidence must exist, in order to the successful working of the system. On the one side, the underwriter might be unreasonable in the amount of the premium claimed; and on the other, the applicant, who is presumed to have the earliest advices of the ship on which his goods are laden, might conceal her condition when reported, and impose upon the underwriter. Injustice might be practised in this way by both parties, if this mode of dealing with each other may be assumed.

But this would hardly be just as to either party, and especially when the interest of both is concerned to deal justly and honorably with each other. The business of the underwriter depends essentially upon the good faith with which he deals with his customers; and this motive, as well as the great competition that exists in the business, may be well relied on to prevent any unreasonable advantage. But, at worst, the applicant is not bound to pay the premium, if unreasonable; and may at once be insured in any other office, and claim a return of premium, if any, advanced. The evidence in the present case furnishes no ground for apprehension, as the premium charged was not unreasonable, but the contrary.

But, be the argument ever so strong in respect to the opportunities to deal unjustly with each other, it is quite clear, upon the fair if not necessary construction of the terms of the policy, both parties have agreed to submit to them, for the sake of the better means furnished to ascertain the true character of the risks, and thus reduce the rate of premium below that which was charged under the old system, where it was fixed in the absence of knowledge on the subject; and the period of time these policies with this change of the terms has been in use, for aught that appears, without complaint or *dissatisfaction, affords evidence that [*409 all apprehensions of unfair dealing are imaginary.

We have said that, according to the true construction of the terms of this policy, where the vessel declared or reported by the assured was rated below A 2, the company had reserved the right to fix at the time the additional premium; and unless assented to by the assured, and the premium paid or secured, the contract of insurance, in respect to the particular shipment, did not become complete or binding. The court below held the contrary, the instruction to the jury maintaining that the contract was complete and binding as soon as the vessel was reported; and that, if the parties could not agree as to the additional premium, the question was one for the courts to settle; thus placing this policy upon the footing of those where the full premium was fixed, and paid or secured, at the time of the execution, and in which no special provisions concerning the premium are inserted.

These special clauses are very explicit, and are inserted in this policy for the benefit of the company. We think, independently of the usage and practice of the company under these policies, the import of the language used cannot well be mistaken.

The right is expressly reserved to charge an additional premium upon all vessels reported rating below A 2; and again, the premiums on risks are to be fixed at the time of indorsement—that is, when the vessels are reported to be noted on the policy. If the construction rested alone upon the right to add additional premiums upon a given rate of vessels, that might be some ground for the argument that the time for fixing them was open; and if the parties could not agree, the law must determine the question. But when the parties themselves stipulated, not only that in the particular case additional premium shall be charged, but that it shall be fixed at the time the risk is made known, there would seem to be no room for doubt or dispute in the matter. In the present case, there is also the additional special provision, namely: "and such clauses to apply as the company may insert as the risks are successively reported," thus providing for any *unforeseen or extraordi- [*410 nary risks that might be claimed under the policy.

Even if an arbitrator had been agreed upon to fix the additional premium, and he had refused, the contract would have been at an end, as the courts could not appoint one (*Wilks* v. *Davis*, 3 Mer. 507; *Milne* v. *Gery*, 14 Ves. 400; Code Napoleon, 1591, 1592; 1 Troplong de vente, Nos. 146, 160); and certainly they could not fix the premium in this case, on the disagreement of the parties, without assuming the right to make a contract for them. The premiums were to be settled when the risks were reported, not at any other period.

In the case of policies on goods "in ship or ships," to be afterward declared, and where the full premium is paid or secured at the execution, the policy, even in that case, is a mere outline of the contract, to be completed on making the declaration; but if not made within the terms of the policy, the contract is at an end as respects the particular shipment.

In *Entwisle* v. *Ellis*, 2 Hurl. & Nor. Exch. 549, 556, 1857, Channell, B., observed, speaking of a policy of this description, at the time of the making of the policy, certain particulars were agreed upon—others were left to be settled. The policy was to be on rice, to be warranted free from particular average, to be sent "in ship or ships." Something more was wanting to make a binding contract. The parties can only fill up such particulars as are left in blank so as to be consistent with the policy.

Applying this principle to the policy in the present case, regarding the special clauses therein something more is required to make a binding contract than the declaration of a ship rating lower than A 2 to bring the subject within the policy; the additional premium fixed by the company was to be paid or secured.

We have found very few cases in the books upon the peculiar class of policies before us, and no mention of them in the text writers on the subject of insurance. The case bearing more directly than any other upon the point in question is *Douville* v. *The Sun Ins. Co.* 12 La. Ann. 259.

411*] *The contract of insurance there was in an open or running policy of the class in which the full premium was paid or secured at the execution. But a modification was afterward made, by which "it was agreed that this policy shall cover merchandise to the address of the assured from European ports to New Orleans, *via* Boston or New York, subject to additional premium as per tariff."

The court held that by the terms of the policy the party desiring to be insured upon any particular shipment of merchandise was bound to present to the company an invoice of the goods (this had been provided for in the policy), and pay or secure the premium; that the party was not bound to report any shipment except at his election, nor could the company demand premium on the same, unless presented for insurance; and that, on a policy of the class before the court, there must necessarily exist as many contracts of insurance as there are indorsements on the policy of separate shipments.

We have examined this case more at large, from the novelty of the questions involved, as they do not seem to have been the subject of consideration by the courts or text writers, than from any difficulty we have felt in the view to be taken of them; and from the examination we have given to the peculiar features of the policy, we entertain no doubt but that the changes made, and which have been particularly referred to, will be found in practice beneficial both to the insured and insurer.

The only defect, perhaps, existing, is the want of a provision for the case, which may happen, where the declaration or report of the ship is not made until the loss is known—that is, where the ship and the loss are reported together. According to the old form of the policy, the full premium being ascertained and fixed at the date of it, it is well settled that, though the declaration is not made till the loss is known, if made with due diligence after advices of the ship, the underwriter is liable. There may be some difficulty in applying that rule to the class of policies before us. It was rejected in the case of *Douville* v. *The Sun Ins. Co.* above referred to.

*Upon the whole, after the best con- [*412 sideration we have been able to give to the case, we are satisfied the ruling of the court below was erroneous, and the judgment must be reversed, and a venire de novo awarded.*

Dissenting, Mr. Justice **Clifford.**

See dissenting opinion in next succeeding case.

THE SUN MUTUAL INSURANCE COMPANY, *Plff. in Err.*,

v.

JOHN S. WRIGHT, use of Maxwell, Wright & Co.

(See S. C. 23 How. 412-420.)

Orient Mut. Ins. Co. v. Wright, ante, p. 524, affirmed—waiver by insurance company.

The questions involved are substantially the same as have been examined in the case of the same plaintiff against the Orient Mutual Insurance Company, and the decision in that governs the present one.

Where the plaintiff objected to the premium, and the company, in answer to this, responds, that it had reserved the right in the policy to fix the premium in case of vessels rating below A 2, and that it could not consent to its determination by a third person; held, that there was no waiver of this right of fixing the premium on the part of the Company.

Argued Mar. 18, 1860. Decided Apr. 23, 1860.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This action was brought in the superior court of Baltimore city, by the defendants in error, on a certain policy of insurance.

On petition of the defendant, the cause was removed into the circuit court of the United States for the district of Maryland.

The trial resulted in a verdict and judgment in favor of the plaintiffs for $17,365.13, with costs; whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court. See, also, the preceding case, which is substantially the same as this.

Mr. **F. B. Cutting** for plaintiff in error.

Messrs. **R. J. Brent** and **H. May** for defendants in error.

See argument in the preceding case.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Maryland.

The suit below was upon a policy of insurance brought to recover a loss upon coffee on board the vessel Mary W. on a voyage from Rio de Janeiro to a port in the United States. The above questions involved are substantially the *same as have been examined in the case [*413 of the same plaintiff against the Orient Mutual Ins. Co., and the decision in that governs the present one.

It was insisted in this case, on the part of the

plaintiff below, that the company had waived the question as to premium on the declaration or report of the Mary W., as it was bound by the act of the agent in making the indorsement on the policy, who added simply the words, "not to attach if the vessel proved unseaworthy."

The company were advised, by a letter of their agent, dated August 23, 1856, of the application of the plaintiff to have the coffee in question on the Mary W. entered on his policy; and on the 25th of the month they answered, directing the agent to inform the plaintiff of the facts the company had previously communicated to R. C. Wright, a brother, in relation to the vessel, and that they regarded her an entirely unfit vessel for a cargo of coffee, and should not consider the policy as attaching to the cargo.

The correspondence with R. C. Wright on the subject was under date of the 14th August, same year, and which related to a different shipment of coffee on the same vessel.

The plaintiff, notwithstanding the objections of the company, insisted upon his right to have the coffee covered by the policy, and so advised the agent, who communicated the information to the company. On the 26th of the month, they, still insisting that the vessel was unfit for such a cargo, instructed the agent to inform the plaintiff that if he claimed the property to be covered by the policy, he must consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel. Upon this, the agent entered the coffee upon the policy, with the words, "not to attach if vessel be proved unseaworthy," and so advised the company. They, on receiving this advice, immediately informed the agent that the indorsement was a practical nullity, and directed him to inform the plaintiff that they conceded his right to be covered by the policy, and that they had no other remedy but to name a premium commensurate to the risk, and fixed the premium at ten per cent, subject to the conditions of the 414*] policy, or two *and a half per cent upon a total loss. In answer to this, the plaintiff objected to the premium, insisting, if the Mary W. rated below A 2, the company were only entitled to an equitable rate of premium; and if they and he could not agree, it was a proper case for a reference.

The company, in answer to this, respond, that they had reserved the right in the policy to fix the premium in case of vessels rating below A 2, and that they could not consent to its determination by a third person. The plaintiff again denied the right of the company to fix the premium, and thus the correspondence terminated.

It is quite apparent that there was no waiver of this right of fixing the premium on the part of the company, nor was it claimed or suggested in the communications between the parties at the time.

Judgment reversed, and a venire de novo awarded.

Mr. Justice **Clifford**, dissenting:

I dissent from the opinion of the court in this case; and inasmuch as the question presented is one of considerable importance, I think it proper to state the reasons of my dissent.

John S. Wright, the present defendant, sued the plaintiffs in error on a policy of insurance, to recover for a total loss of a cargo of coffee, shipped from Rio de Janeiro to New Orleans on the schooner Mary W. As appears by the bill of lading, the goods were shipped at the port of departure as early as the 12th day of July, 1856, and the vessel sailed for New Orleans on the same day. She had stormy weather after her departure; and on the 29th day of August following she was wrecked upon the rocks, and all her cargo was lost. Notice of the shipment was received by the plaintiff on the 23d day of August, 1856, and on that day he notified the agent of the defendants, residing in Baltimore, of the same, and requested him to enter under his policy the cargo of the vessel, which consisted of coffee, valued at $18 per bag.

By the terms of the policy the plaintiff was insured, "on account of whom it may concern —loss payable to them, *lost or not lost [*415 —at and from Rio de Janeiro to a port of the United States, on one half of five thousand bags of coffee, each two hundred bags in running marks and numbers, in order of invoice, subject to separate average, upon all kinds of lawful goods and merchandise laden on board of the good vessel or vessels, beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board the said vessel at the place of shipment as aforesaid, and so shall continue until the said goods and merchandise shall be safely landed at the place of destination, as aforesaid."

Another clause was that "the said goods and merchandise hereby insured are valued at $18 per bag, as interest may appear."

Payment of the consideration by the assured is expressly acknowledged by the terms of the policy, at and after the rate of one and one half per cent—to return one fourth per cent, if direct to an Atlantic port; to add an additional premium, if by vessels rating lower than A 2, or by foreign vessels, subject to such addition or deduction as shall make the premiums conform to the established rate at the time the return is made to the company.

Some reference to the correspondence between the parties becomes necessary, in order that the true nature of the controversy may be fully and clearly understood.

Defendant is a corporation, doing business in the city of New York; but they have an authorized agent in Baltimore, where the defendant resides. Their agent informed them by letter, under date of the 23d of August, 1856, that the plaintiff on that day had requested him to enter this cargo under his policy; and in the same letter stated the amount of the goods and the name of the vessel. To that letter the defendants replied three days afterwards, saying that they considered the vessel entirely unfit for a cargo of coffee, and should not consider their policy as attaching thereto.

That information was communicated to the plaintiff by the agent on the following day; but the plaintiff insisted that the goods were covered by the policy; and on the same day the *defendants were informed by their [*416 agent that the plaintiff did so insist. They were also furnished by their agent at the same time with a letter from the plaintiff, giving his reasons for insisting that the cargo should be entered under the policy. In that letter he stated that the sole object of open or running policies would be defeated, if the underwriters

were at liberty to decline any risk that might arise under them; and repeated, that he considered the defendants bound, by the spirit as well as the letter of their policy, to cover the goods at risk on this vessel.

Each party was thus fully possessed of the views of the other, and of all the circumstances of the case. Neither appears to have entertained a doubt as to the validity of the contract, and the only matter in dispute between them was the fitness of the vessel for such a cargo. But they had further correspondence, which it is important to notice, in order to understand the real nature of the controversy between the parties. Following the order of events, the next letter is the reply of the defendants to their agent, which is dated the 26th day of August, 1856, three days before the loss, and more than forty days after the vessel had departed on her voyage. In that letter they say, after acknowledging the receipt of one to which it was a reply, that, with regard to the case of the schooner under the policy of the plaintiff, they can only repeat their belief that she is an unfit vessel for such a cargo, which makes her an unseaworthy risk, and request their agent to say to the plaintiffs, that if he deems the property covered by the policy, he must so consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel.

Pursuant to that letter, the agent of the defendants, two days afterward, wrote to the plaintiff that the president of the company "has requested me to say to you, that he will cover for the schooner Mary W., but you must consider it subject to the risk of the policy not attaching from the unseaworthiness of the vessel," and made the indorsement on the policy as follows, dating it on the preceding day:

"August 27, 1856. Schooner Mary W., Rio 417*] de Janeiro to *New Orleans, on ½ cargo, 1,830 bags of coffee, at $18 per bag—not to attach if vessel be proved unseaworthy—$16,470."

When that indorsement was made, in my judgment the contract became complete, leaving the additional premium to be equitably adjusted between the parties, according to established rate of vessels rating under A 2; or in case of dispute, to be settled, like any other controversies, by the judicial tribunals. *E. Carver Co.* v. *Manuf. Ins. Co.* 6 Gray, 214.

On the following day the agent informed the defendants that he had made the indorsement. To that letter they replied on the 29th day of the same month, saying, in effect, that the condition inserted in the indorsement was practically a nullity; and as a reason for that conclusion, they add that no risk attaches if the vessel is proven to be unseaworthy; but the difficulty is, so to prove it. After some other remarks, which it is not important to notice, they go on to say that no other remedy remains except to name a premium commensurate with the risk, which they therein insist it is their right to do. Accordingly, they fix 10 per cent. subject to the conditions of the policy, or two and a half per cent against a total loss, and direct their agent to notify the plaintiff of their action in the premises, that he may determine on which rate he wanted the risk entered. That notice was given to the plaintiff by the agent on the 2d day of September following. He objected to the rates named as exorbitant, but admitted the right of the company to an equitable rate, and insisted that the cargo was covered by the policy. His views were communicated by the agent to the defendants on the 3d day of September, 1856, and on the following day they struck the risk from their books.

Evidence was introduced by the plaintiff that the premiums specified in the body of running policies are nominal, and that the true premiums to be charged are fixed by increasing or reducing the nominal premium when the risks are reported. Premium notes were given by the plaintiff in this case at the policy rate of one and one half per cent, and were paid by him to the defendants at their maturity long before the loss in this case. Sums paid for premiums on running policies, *according to the cus- [*418 tom of this company, are returned if no risks are reported, but with a deduction of a half per cent, which is retained by the company for their services. According to the testimony of the agent, he had no power to bind the company from the time of the application for insurance until the answer thereto was received from the company.

On this state of the case, the presiding justice instructed the jury as follows: "If the jury shall find, from the evidence, that the defendants executed the policy of the 27th of July, 1855, and received from the plaintiff the premium therein mentioned; and that their duly authorized agent in this city made the indorsements on the policy which have been offered in evidence; and shall further find that 1,830 bags of coffee belonging to the plaintiff were shipped on the 12th day of July, 1856, at Rio, on board the Schooner Mary W., to be carried to New Orleans; and that when the schooner left Rio she was seaworthy and in good condition; and shall further find that the vessel and cargo were subsequently on the voyage totally lost by one of the perils insured against; and that the schooner was rated lower in New York than A 2, then the plaintiff is entitled to recover for one half the value of the coffee so lost, at $18 per bag, less such additional premium beyond the 1½ per cent, as in the opinion of underwriters may be deemed adequate for the increased risk to a cargo of coffee shipped in a vessel rating below A 2, with interest from thirty days after such time as the jury may find the defendants were furnished by plaintiff with the preliminary proofs of his loss."

Under the instructions of the court, the jury returned their verdict for the plaintiff, and the defendants excepted. That instruction, so far as it is necessary to consider it at the present time, affirms that, by the true construction of the policy, the contract between the parties under the circumstances of this case, as disclosed in the evidence, was complete when the shipment of the goods was reported by the plaintiff, and the indorsement was made upon the policy by the authorized agent of the defendants. In that view of the case I entirely concur. When the report was forwarded by the agent, the only objection made to the risk was, that the vessel was *unsuitable, or that she was unsea- [*419 worthy. That objection was repealed, and finally the plaintiff was told, that if he insisted upon the indorsement, it would only be upon the condition that the policy should not attach if it turned out that the objection of the de-

fendants was well founded. He accepted the condition, and the indorsement was so made. After the indorsement was made, it was too late for the defendants to reconsider the position they had voluntarily assumed. *E. Carver Co.* v. *Manuf. Ins. Co.* 6 Gray, 214.

Suppose they had a right, as a condition precedent, to demand the payment of the additional premium before making the indorsement; they did not insist upon the right, but voluntarily waived it. They had already received the policy rate of one and one half per cent, and to the present time have neglected to refund the same. Prepayment of the policy rate was a sufficient consideration to uphold the contract; and certainly it will not be denied that they might waive the right to claim prepayment of whatever might be due to them for the additional premium contemplated by the policy. But their right to demand the additional premium as a condition precedent to the indorsement cannot be admitted. Such a construction would defeat the policy and, therefore, must be rejected, unless the language of the instrument is imperative to that effect. 1 Phil. Ins. § 438, and *Kewley* v. *Ryan*, 2 H. Bl. 343. Policy rate is not the actual rate of adjustment between the parties in any case under this instrument, unless, perchance, it happens to be the established rate at the time the return is made to the company. *Crawford* v. *Hunter*, 8 T. R. 16, *note*.

Addition or deduction from policy rate is to be made in all cases so as to make the sum paid and received conform to the established rate. Something, therefore, remains to be done in respect to every risk, irrespective of the character of the vessel. In case the shipment is by a vessel rating under A 2, or by a foreign vessel, an additional premium may be added; but there is no stipulation in the instrument that it shall be paid in advance of the instrument; and there is nothing in the language of the instrument from which to infer that such 420*] was *the intention of the parties. That inference was wholly gratuitous, and in my judgment, unfounded. When adjusted, the sum to be paid must conform to the established rate at the time the return was made to the company.

If the parties cannot agree what the established rate was at that time, like other matters of controversy, it must be settled by the judicial tribunals. *Harman* v. *Kingston*, 3 Camp. 150; 1 Arnold, Ins. 175, 177; Smith's Mer. L. 208; *U. S.* v. *Wilkins*, 6 Wheat. 144. Unless this be the true construction of the policy, then it is a delusion which ought to be shunned by every business man. Loss often occurs before the notice of the shipment. The assured cannot adjust the additional premium until he knows by what vessel the shipment has been made, so that, if it be true that the contract is incomplete until the additional premium is adjusted and paid, then open or running policies for the insurance of goods from distant ports are valueless. They are worse than valueless, as generally understood, because they have the effect to delude and deceive.

For these reasons, I am of the opinion that the judgment of the Circuit Court ought to be affirmed.

JOHN F. CALLAN and Michael P. Callan, *Appts.*,
v.
CHAS. W. STATHAM et al.

(See S. C. 23 How. 477-481.)

Deed, when fraudulent as to creditors—proof of payment of consideration, necessary to sustain—possession, and other facts—price below true value.

Upon a creditor's bill to set aside a deed, the court below decreed that the deed was fraudulent as against creditors, because the price was considerably below its true value, and because the evidence in respect to the payment of the consideration stated in the deed, was unsatisfactory.

Proof of payment of the consideration was vital to uphold the deed where the evidence was in defendant's possession and the transaction was secret.

The want of such proof is nearly, if not quite, fatal to the validity of the deed as against creditors.

Other facts also tended to justify the decree, to wit: The continuance of the vendor in the possession of the premises, the same after the deed as before; his heavy indebtedness; and suits pending and maturing to judgments against him; all of which were well known to the vendee.

Argued Mar. 28, 1860. Decided Apr. 23, 1860.

APPEAL from the Circuit Court of the United States for the District of Columbia.

The history of the case and a statement of the facts appear in the opinion of the court.

Messrs. **W. S. Cox** and **H. W. Davis**, for appellants:

1. It is maintained for the appellants that the pleadings did not justify the decree of the circuit court. The bills deny that the consideration, recited in the deed of October 16, 1854, actually passed. The answers aver that it did, and show that it was paid partly by surrender of a note for $4,000, and partly by a cash payment. These answers are responsive and are not disproved by any evidence and are, therefore, conclusive.

Feigley v. *Feigley*, 7 Md. 537.

The deed not being voluntary and fraudulent *per se*, actual fraud must be alleged and proved, not only against the grantor, but also against the grantee.

Stat. 13 Eliz. ch. 5, § 6; Story, Eq. Jur. § 353.

All the authorities hold that a bona fide purchaser without notice of fraud, is not affected by the grantor's intent to defraud creditors.

See *Astor* v. *Wells*, 4 Wheat. 466; Union *Bank* v. *Toomer*, 2 Hill, Ch. 27; *Storer* v. *Herington*, 7 Ala. 142; *Pope* v. *Andrews*, 1 S. & M. Ch. 297.

2. But supposing the pleadings sufficient, what are the alleged evidences of fraud?

1. The inadequacy of the consideration.

It appears that the consideration was not inadequate; that the complainant's witnesses overestimated the value of the property; that the title was defective; and that this consideration entered into the consideration of value.

2. The next evidence of fraud relied on is John F. Callan's continuance in possession of the property after his conveyance to his brother, and his receipt of rents from it.

Whatever might be the case in regard to the

NOTE.—*Fraud in avoidance of deeds*—see note to 6 L. ed. U. S. 429, and note to 40 L. ed. U. S. 543.

personal estate, possession of real estate is no evidence *per se*, of fraud.

Phettiplace v. *Sayles*, 4 Mason, 312.

Positive denials of fraud in the answers, cannot be overcome by mere suspicion.

Glenn v. *Grover*, 3 Md. 212; 9 Gill, 215; 7 Wend. 259.

3. But it is maintained further by the appellants:

1. That John F. Callan's interest in the property was such as creditors cannot reach. He did not pay anything for it, but had merely a right to acquire title hereafter on condition of paying within a certain time. On such an interest no common law execution could be levied.

VanNess v. *Hyatt*, 13 Pet. 294; *Hopkins* v. *Stump*, 2 Harr. & J. 301; *Sawyer* v. *Morte*, 3 Cranch, C. C. 331; *Bogart* v. *Perry*, 1 Johns. Ch. 52.

Nor can it be reached in equity.

Dundas v. *Dutens*, 1 Ves. Jr. 196; *Nantes* v. *Corrock*, 9 Ves. 183; *Rider* v. *Kidder*, 10 Ves. 368; *Caillaud* v. *Estwick*, 2 Ansty. 381; *Donovan* v. *Finn*, 1 Hopk. Ch. 59; *Ewing* v. *Cantrell*, Meigs, 904; *Erwin* v. *Oldham*, 6 Yerg. 185.

2. A conveyance of such an interest cannot be considered fraudulent against creditors.

Grogan v. *Cooke*, 2 Ball & B. 232; *Doyle* v. *Sleeper*, 1 Dana, 534; *Buford* v. *Buford*, 1 Bibb, 305; *Mathews* v. *Feaver*, 1 Cox, 278.

Messrs. **A. Austin Smith** and **Chilton & Davidge**, for appellees:

1. The decree is right, and ought to be affirmed.

After reviewing the circumstances of the case, the counsel said:

The *indicia* of fraud relied on are:

The insolvency of the grantor and pendency of suits against him about ripening into judgment, known to the grantee; the inadequacy of price; continued possession and enjoyment of the property by the grantor after the deed; the failure to show the payment of the alleged consideration; the antedating the deed and withholding the same from the record; the evasive and uncertain character of the answers; the falsity of John F. Callan's answer and its adoption by M. P. Callan, the grantee; the blood relationship of the parties; the inconsistency of the grantee's conduct, if bona fide; the secrecy of the transaction; the sweeping grant in the deed, and the admitted previous intent by the grantor to defraud his creditors, are so numerous and well established as hardly to require authority. The following are relied on in support thereof:

Hudgins v. *Kemp*, 61 U. S. (20 How.) 45; *Sands* v. *Codwise*, 4 Johns. 536; *Parker* v. *Holmes*, 2 Hill, Ch. 95; *Lee* v. *Hunter*, 1 Paige, 519; *Miller* v. *Tollison*, 1 Harp. Ch. 145; *Bozman* v. *Draughan*, 3 Stew. 243; *Bank U. S.* v. *Housman*, 6 Paige, 526; *Land* v. *Jeffries*, 5 Rand. 211; *Halbert* v. *Grant*, 4 Mon. 580; *Hildreth* v. *Sands*, 2 Johns. Ch. 35; *Walcott* v. *Almy*, 6 McL. 23; *Johnson* v. *Dick*, 27 Miss. 277; 1 Story, Eq. Jur. 369; 3 Md. Ch. 34, 35; *Swann* v. *Dent*, 2 Md. Ch. 111, 220; *Perkins* v. *Patten*, 10 Ga. 241; *Smith* v. *Henry*, 2 Bailey, 123; *Trimble* v. *Ratcliff*, 9 B. Mon. 511.

2. The appellants attempt to explain the inadequacy of price by assailing their own title. This objection to the title, however, is not taken by either appellant in his answer. It is not pretended that it was known to Michael P. Callan, or influenced the price.

If he had regarded the title as bad, it is inconceivable that he should have purchased at all; and even if there were no inadequacy, the other badges of fraud remain.

Under the statute of 13 Eliz. the conveyance must be, not only for a valuable consideration, but bona fide. Both must concur.

1 Story, Eq. Jur. § 353; *Sands* v. *Codwise*, 4 Johns. 536; *Glenn* v. *Randall*, 2 Md. Ch. 220.

3. A court of chancery will, at the suit of creditors, reach and condemn property which has been fraudulently conveyed, although it could not have been reached at law.

Bayard v. *Hoffman*, 4 Johns. Ch. 450; *Hadden* v. *Spader*, 20 Johns. 554; *Weed* v. *Pierce*, 9 Cow. 722; *Storm* v. *Waddell*, 2 Sandf. Ch. 495, 511; *Tappan* v. *Evans*, 11 N. H. 312, 326; *Sargent* v. *Salmond*, 27 Me. 539.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the District of Columbia.

The suit below was a creditor's bill, filed by Statham and others, the appellees, to set aside a deed made by J. F. Callan and wife to M. P. Callan, on the 16th October, 1854, conveying lot No. 8, in square No. 456, with the improvements, in the city of Washington, and to subject it to the payment of the plaintiff's judgments.

Judgments to an amount exceeding $3,000 were recorded against J. F. Callan, 5th May, 1855. The deed was recorded 14th April, 1855.

A second bill was filed against the same parties and others, on the 9th August, 1856, by Austin Sherman, a judgment creditor of J. F. Callan, for the purpose of setting aside the same deed, and subjecting the property to the payment of his judgments recovered 2d April, 1855, and exceeding in amount $9,000.

The two suits were consolidated, as the same proofs were equally applicable in respect to the charge of fraud in the execution of the conveyance sought to be set aside. The court below decreed that the deed was fraudulent as against creditors, and directed the property to be sold, and the proceeds to be brought into court for distribution. The case is here on an appeal from that decree.

At the date of the deed of October, 1854, Callan was heavily in debt—several suits impending over him and maturing to judgments, to which the property in question would have been subject. The conveyance was made to a brother, for the consideration, as stated in the deed, of $4,900. The premises conveyed, according to the estimate of witnesses who were well acquainted with them, were worth at the time, exceeding *$15,000, assuming the title [*479 to be good, which will be noticed hereafter. The vendor continued to possess and occupy the property after the conveyance the same as before, leasing the buildings and collecting the rents in his own name, and not accounting to the vendee for the same. Indeed, the vendee seems to have taken no part in the management of the property; nor does it appear that he has exercised any act of ownership over it since

the purchase, and down to the taking of the proofs in these cases.

In the answer of Callan, the vendor, to the bill of Statham and others, to the charge that the consideration mentioned in the deed was not paid, he simply states that it had been fully paid by his brother, the vendee. The vendee, for his answer, adopts the answer of his codefendant.

In their answer to the bill of Sherman, they concur in stating that $4,000 of the consideration was paid by the surrender of a note the vendee held against the other party, and $900 in cash, and that the payment was not made in presence of any third person.

No proof was given by the defendants in respect to the payment of the consideration, with a view of sustaining the allegation in the answers. They rely entirely upon the rule of pleading, that the answers are responsible to the bill, and to be taken as true till overthrown by proof on the other side. As they aver the payment was a transaction between themselves, and the principal part a note held by the vendee, which he surrendered, the evidence in respect to which is, therefore, exclusively within their own knowledge, it would have been more satisfactory if they had given some proof in support of the answers, especially when there were other accompanying circumstances, tending to excite distrust and suspicion as to the bona fides of the deed.

As it respects the defect in the title, relied on to reduce the value of the property, it appears that J. F. Callan, in November, 1840, took a lease of this property from one W. Robinson, trustee of Alice Jennings, Alice joining in the lease for the term of her natural life, for the annual rent of $200; and in which lease it is agreed 480*] that, upon the death of the said *Alice, the lessee shall have the right to purchase the estate for the price of $3,000; upon the payment of which, Robinson binds himself and his heirs to convey the title. Alice died in May, 1851, and Robinson some years earlier.

It is insisted on the part of the defendants, that the heirs of Robinson, and also of Alice, refuse to carry into execution this contract, and have refused to accept the $3,000. There is some obscurity upon the evidence, as it respects the precise state of this question at the time of the deed from Callan to his brother, in October, 1854. It is claimed, on the part of the judgment creditors, that this money had been paid and that the deed from the heirs was kept back in fraud of their rights. Perhaps the better opinion is, upon the facts, that the money has not been paid and that the property is subject to this incumbrance. It is clear, however, that there is no serious embarrassment in the way of clearing the title on payment of the money.

It appears by some arrangement, not particularly explained, with the heirs, after the death of Alice, Callen agreed to pay the interest on the $3,000, and which has been paid down to the month of July, 1854; and the case shows that, upon the payment of the purchase money, with the interest, from the period last mentioned, the title can be obtained. It would have been remarkable if this right of purchase had not been preserved, as it appears Callan has put on the property improvements to the amount of from $7,000 to $10,000.

The question as to the title is only important as entering into the estimate of the value of the property, and as tending to rebut the undervaluation of the price, as charged in the bill. It is clear, however, admitting the property to be subject to the payment of $3,000, that the price was considerably below its true value.

But, independently of this consideration, there are other facts in the case that may well justify the decree below—the most important, perhaps, the unsatisfactory evidence on the part of the Callans in respect to the payment of the consideration stated in the deed. This proof was vital, in order to uphold a deed in other respects surrounded with suspicion. The *evidence was in their possession; and [*481 their admission that the transaction was secret made the proof still more indispensable on their part. The want of it, under the circumstances, is nearly, if not quite, fatal to the validity of the deed as against creditors.

The continuance of the vendor in the possession and occupation and full enjoyment of the premises, the same after the deed as before, and absence of interest in the subject manifested by the vendee, are circumstances not satisfactorily explained; also, the heavy indebtedness of J. F. Callan, and suits pending and maturing to judgment—all well known to the vendee.

We are satisfied the decree of the court below is right, and should be affirmed.

HENRY OELRICKS and Gustav W. Lurman,
Plffs. in Err.,
v.
BENJAMIN FORD.

(See S. C. 23 How. 49–65.)

Usage, when admissible to explain instrument—effect of, how limited—cannot add to or vary contract—ambiguity—surety—verbal negotiations, prior to written contract—when contract binds principal, not agent.

There must be ambiguity or uncertainty upon the face of a written instrument, arising out of the terms used by the parties in order to justify extraneous evidence of usage; and, when admissible, it must be limited in its effect to the clearing up of the obscurity.

It is not admissible, in order to add to or engraft upon the contract new stipulations, nor to contradict those which are plain.

Proof of usage is inadmissible where there is no ambiguity or uncertainty in the terms of a contract, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract.

Where plaintiff agrees to deliver flour, in consideration of which the defendants agree to pay the price, parol evidence, of usage to superadd as a surety a given sum of money, is inadmissible.

Any conversations and verbal understanding between the parties at the time, were merged in the contract, and parol evidence is inadmissible to engraft them upon it.

The court below was right in excluding the evidence of the usage from the jury; 1, because the usage was not proved; and 2, it was incompetent to vary the clear and positive terms of the instrument.

NOTE.—*Usage and custom; admissibility of, in construction of contracts*—see note to Adams v. Otterbach, 14 L. ed. U. S. 805.

Where the name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale through his agent—this fixes the duty of the performance upon him, and exonorates the agent.

Argued Apr. 19, 1860. Decided Apr. 30, 1860.

IN ERROR to the Circuit Court of the United States for the District of Maryland

This was an action of assumpsit brought in the court below by the defendant in error, to recover damages resulting from the alleged breach of a certain contract.

The trial resulted in a verdict and judgment in favor of the plaintiff for $12,161 damages, and $68.50 costs; whereupon the defendants sued out this writ of error.

The facts of the case are very fully stated by the court.

Messrs. **William F. Frick, J. P. Benjamin,** and **J. Nelson,** for plaintiffs in error:

The plaintiffs in error in this court will insist:

1. All the evidence on the case ought properly to have been submitted to the jury, and was sufficient, if they believed it, to establish the existence of an usage, among a certain class of flour dealers in the city of Baltimore, accustomed to deal in "time contracts," under which either the buyer or seller might demand security, by way of a margin to be put up by both, whenever the faithful performance of such a contract should be considered doubtful by either party.

2. There was evidence in the cause, which ought properly to have been submitted to the jury, tending to show that both the agent of the plaintiff below and the defendants, made all their "time contracts" for flour, with reference and subject to such an usage.

3. The usage, as proved, was a reasonable and lawful usage.

4. The effect of the usage was not to vary and contradict the contract; but to add to it something incidental and not inconsistent with it; and that on this ground proof of the usage was admissible, although the contract was in writing. The agreement for a "time" sale of flour, on certain terms and for a margin, being one and simultaneous, and a part only of the contract having been reduced to writing, parol evidence of the residue was properly admissible.

5. The agent of the plaintiff below had a right to contract in reference to the usage so as to bind his principal.

6. That not only by the rules of legal presumption, but by necessary inference from the facts, the credit in this case was given exclusively to the agent, and the principal had no right of action on the contract; and that even if this were otherwise, the rule of damages, as applied to the case, was erroneous.

1. The proof shows the existence of a distinct class of traders, accustomed to deal in "time" contracts for flour. The custom contended for, is confined to that class of dealers.

The custom is simply that a right is reserved to both parties to call for a "margin."

The usage, as proved, goes further. It definitely fixes the time at which the security may be demanded, its nature and amount, and the right of the demanding parties forthwith to rescind the contract on the refusal or failure of the other to comply with the demand. The evidence on the part of the plaintiff in error came fully up to the standard required.

2. The true and only object of introducing evidence of usage, is to ascertain and give effect to the intentions and understanding of the parties to a contract. The proof must, therefore, be such as to show that the parties knew and adopted the usage as part of their contract, or, as it is commonly expressed, that they contracted in reference to it.

The validity and binding effect of usage does not depend upon the extent to which it is adopted, but upon the fact whether or not the contract is made in reference to it. Unless this were so, there could be no such thing as a valid usage confined to a particular place, or business, or branch of business, or to the business of particular individuals or companies. Yet, all such exist and have been legally recognized, and *a fortiori* where the usage of the particular company or individual is expressly referred to, and made part of the contract.

Gabay v. *Lloyd*, 3 Barn. & C. 793; *Salmon Falls Mfg. Co.* v. *Goddard*, 14 How. 456; *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Mills* v. *Bank of U. S.* 11 Wheat. 438; *Loring* v. *Gurney*, 5 Pick. 16; *McDowell* v. *Ingersoll*, 5 S. & R. 101; *Knox* v. *Rives*, 14 Ala. 249.

3. It is admitted that the custom must be reasonable and lawful. The theory on which a usage is adopted is, "that it is a part of the contract." Therefore, any and every rule of law which may be controlled by the positive and express stipulations of parties may be controlled to the same extent by usage. The true scope of the rule is, that no usage can make valid a contract which the law prohibits, or incorporate elements in the contract which are, in themselves, unlawful. Tested by these rules, the custom proved in this case is neither unreasonable or unlawful. It is an incident to the contract, without which the contract itself is amenable to the charge of being unfair and immoral. This usage, properly understood, is designed to protect the fair and responsible trader from the insolvent gambler, and to convert what might be in its design a wager merely, into a valid contract in its effect.

4. While it is clear that evidence of usage is not admissible to vary or to contradict, either expressly or by implication, the terms and provisions of a written contract; it is equally so, that in commercial transactions extrinsic evidence of custom and usage is admissible, to annex incidents to written contracts in matters in respect to which they are silent.

Hutton v. *Warren*, 1 Mees. & W. 475.

Hence, an established custom may add to a contract stipulation not contained in it, on the ground that the parties may be supposed to have had these stipulations in their minds, as a part of their agreement, when they put upon paper or expressed in words the other part of it.

2 Pars. Cont. 49, and cases in note z; *Renner* v. *Bank of Columbia*, 9 Wheat. 581; *Bank of Washington* v. *Triplett*, 1 Pet. 25; *Syers* v. *Jonas*, 2 Welsb. H. & G. 111; *Queen* v. *Inhab. of Stoke upon Trent*, 5 Ad. & E. N. S. 303.

Where the agreement between the parties is one and entire, and only a part of this is reduced to writing, it would seem that the residue of the contract, though not resting on usage, may be proved by extrinsic evidence; and

this even where the residue of the contract, resting in parol, may operate when disclosed, to put the legal rights and responsibilities of the parties in reference to the subject matter of the contract, in a different position from that in which the written part of it places them.

2 Pars. Cont. 65; *Jeffery* v. *Walton*, 1 Stark. 267; 2 Eng. C. L. 385; *Knapp* v. *Harden*, 6 Car. & P. 745; 25 Eng. C. L. 630; 1 Greenl. Ev. § 304; *Coates* v. *Sangston*, 5 Md. 131.

5. Bell, being the general agent in Baltimore of the defendants in error, for the sale and purchase of flour for him, had authority to make a "time" subject to the call for a "margin," so as to bind his principal. That the principal in New York, in authorizing his Baltimore agent to sell flour for him generally on "time" contracts in the latter market, was bound by the usages of the "time" flour trade in that market, is clear.

Pollock v. *Stables*, 12 Q. B. N. S. 765; *Sutton* v. *Tatham*, 10 Q. B. 27; *Bayliffe* v. *Butterworth*, 1 Welsb. H. & G. 425.

The principal cannot defend himself on the ground that he did not know of the general or special usage.

Story, Ag. §§ 60, 96; *Bank of Washington* v. *Triplett*, 1 Pet. 34.

6. The instruction given by the court below had the effect of withdrawing from the jury all the evidence showing that the credit given in the transaction was to the agent, Bell, exclusively.

The rule laid down by Story as a presumption of law is that "a foreign factor buying or selling goods, is ordinarily treated, as between himself and the other party, as the sole contracting party; and the real principal cannot sue or be sued on the contract."

Story, Ag. § 423; see, also, more especially §§ 268, 290, and 400.

This is the established English doctrine.

Russ. Fact. & Bro. 288; 2 Liv. Ag. 249; *Paterson* v. *Gandasequi*, 15 East, 62; *Addison* v. *Gandasequi*, 4 Taunt. 574; *Thomson* v. *Davenport*, 9 Barn. & C. 78; *Smyth* v. *Anderson*, 7 Man. Gr. & S. 21, 62 Eng. C. L.

The rule, as stated by Story in the four sections above quoted, has never been directly questioned in this country, except in one case (*Kirkpatrick* v. *Stainer*, 22 Wend. 244), and then by a divided court.

It is reaffirmed by him (and in that case examined) in note 1 to § 268, 5th edition of 1857, Story, Ag., and has been adopted in *McKenzie* v. *Nevius*, 22 Me. 143; *Alcock* v. *Hopkins*, 6 Cush. 490; *Merrick's Estate*, 5 Watts & S. 14.

It is, however, an open question whether the rule extends to the different states of the Union, as jurisdictions foreign to each other. There are *dicta* in 22 Wend., above referred to, to the effect that it does not. But the point has never been expressly made and decided in that way.

On the contrary, in *Newcastle M. Co.* v. *Red River R.* 1 Rob. La. 145, it was directly held that it did apply to the different states as a reasonable presumption; and this would seem to be the true doctrine.

The term used in the books is principals "beyond seas;" and in construing these words in acts of limitation, they are held to refer to other states of this union.

And so bills of exchange are foreign bills when drawn by a party in one state upon one in another state. Story, Bills, §§ 22 and 23; *Buckner* v. *Finley*, 2 Pet. 586.

So, both Scotland and Ireland are foreign to England for the purposes of this rule.

This rule, in the absence of any evidence on the question "to whom credit was given," creates a conclusive presumption of exclusive credit to the agent. It is of course liable to be rebutted, but the onus is on the principal. In this case there is nothing to remove the weight of presumption. On the contrary, the proof is all the other way.

The absconding, of itself, was a virtual abandonment of the contract by Bell.

Roper v. *Coombes*, 6 Barn. & C. 534; *Planche* v. *Colburn*, 8 Bing. 14; *Keys* v. *Harwood*, 2 Com. B. 905; *Dubois* v. *Delaware Can. Co.* 4 Wend. 285.

If it did not give an absolute right to the other party to treat the contract as rescinded, it, together with the insolvency, reasonably entitled him to ask for security for its performance.

In every contract of purchase and sale, so long as it is executory and the rights of third parties do not intervene, the insolvency of either party qualifies his rights, and adds to the ordinary rights and remedies of the other.

See *Smith* v. *Bowles*, 2 Esp. 578; 1 Pars. Cont. 2d ed. 477; Story, Sales, § 321; *Sands* v. *Taylor*, 5 Johns, 395; *Girard* v. *Taggart*, 5 Serg. & R. 34; *Vargas* v. *Newhall*, 15 Me. 317.

Messrs. **George William Brown** and **F. W. Brune, Jr.**, for defendant in error:

The defendant in error contends:

First. The evidence is not sufficient to establish a general usage in Baltimore, by which either party to a contract to deliver flour at a future day is entitled to demand a margin or a security of the other.

Second. Such usage, if proved, would not be valid and binding, because:

(*a*) It is not reasonable and certain. It opens the door to fraud and deception, and offers facilities to parties to escape from contracts which appear likely to occasion loss.

(*b*) The usage is not generally known in Baltimore.

(*c*) Usage may explain the meaning of terms, but cannot avail to contradict or vary a written contract. To permit it to do so, would be in violation of a settled rule of evidence and of the statute of frauds.

Third. If the conversation with reference to the usage is of any avail at all, it can only bind Bell personally, and was intended only to do so.

Fourth. The testimony of Ballard would be inadmissible to show the usage of Bell in reference to his own contracts, in a case like this, where it would vary or contradict a written contract; but it certainly cannot bind the plaintiff, who does not appear to have had any knowledge of notice thereof.

Fifth. Even if the usage be proved, and be good in law, and binding on the plaintiffs, the defendants cannot avail themselves of it, because the margin was expressly claimed on the ground of contract, and not of usage.

Sixth. Because the notice was not addressed by Ballard to the plaintiffs in New York, but

was directed to Bell in Baltimore, and sent to his counting-room after he had disappeared.

Seventh. Bell was not the plaintiff's agent for the purpose of receiving any such notice; and even if he were, a notice addressed to an absconding agent and sent to his counting room and so sent, in fact, because the agent was known to have disappeared, is not sufficient to bind the principal. Good faith and fair dealing require that the notice should have been sent to the plaintiff in New York.

Eighth. But the notice did not give the plaintiff reasonable time to comply, even if it had been communicated to him by telegraph, which it was not. It was left at Bell's counting-room before 12 M. on the 21st, and gave notice to deposit $5,000 in the Merchants' Bank of Baltimore on the following day.

Ninth. The defendants did not comply with their own notice—they stated that on the 22d they would deposit $5,000 in the Merchants' Bank, and required Bell to do the same; but they made no such deposit, and therefore, under no circumstances, could the plaintiff be required to do so.

Tenth. The defendants had no right to require the arbitrary sum of $5,000 in cash, on a contract on which, at the time of the demand, they were in fact losers; and therefore no security at all was necessary.

Eleventh. Nor had the defendants the right to select the place of deposit, under penalty of a cancellation of the contract.

Twelfth. Nor had Ballard, the broker who made the contract, any right to give a notice to put up a margin.

Thirteenth. The instructions of the court are correct and cover the whole case. The rule of damages as laid down is sustained both by reason and authority.

Fourteenth. Ford is principal, and has a right to sue.

Green v. *Kopke*, 36 Eng. L. & E. 396; *Mahoney* v. *Kekule*, 14 C. B. 390; *Kirkpatrick* v. *Stainer*, 22 Wend. 244; *Taintor* v. *Prendergast*, 3 Hill, 72; 3 Rob. Pr. 57; 2 Kent, Com. 8th ed. 630, marg. 818.

The following authorities are relied on to establish the proposition that the written contract cannot be varied or contradicted by the proof of usage; that the alleged usage is not properly proved; and if proved, is not valid.

U. S. v. *Buchanan*, 8 How. 83, 102; *Adams* v. *Otterback*, 15 How. 545; *Brittan* v. *Barnaby*, 62 U. S. (21 How.) 538; *Foley* v. *Mason*, 6 Md. 50; 1 Greenl. Ev. §§ 275, 278, 281, 284, 288, 292-294; *Coxe* v. *Heisley*, 19 Pa. 247; *Macy* v. *Insurance Co.* 9 Met. 363; *Bowen* v. *Stoddard*, 10 Met. 381; *Adams* v. *Wordley*, 1 Mees. & W. 374; *Magee* v. *Atkinson*, 2 Mees. & W. 442; *Trueman* v. *Loder*, 11 Adol. & E. 596; *Allen* v. *Dykers*, 3 Hill, 597; *Hinton* v. *Locke*, 5 Hill, 437; *Gross* v. *Criss*, 3 Grat. 262; *Macomber* v. *Parker*, 13 Pick. 182; *Hone* v. *Mutual Ins.* Co. 1 Sandf. 137; *Barlow* v. *Lambert*, 28 Ala. 710; 1 Sm. Lead. Cas. 307-309, margin; 3 Cranch, 31; 1 Met. 199; 4 Mees. & W. 140; *Bourne* v. *Gatliff*, 11 Clark & F. 45, 70; *Ford* v. *Yates*, 2 Man. & G. 549; Browne, St. Frauds, 116, §§ 118, 448, 451; 2 Pars. Cont. 59.

The contract is valid, and the rule of damages is properly laid down by the court. 2 Pars. Cont. 485; *McNaughter* v. *Cassally*, 4 McLean, 530; *Stanton* v. *Small*, 3 Sand. 230; *Hibblewhite* v. *McMorive*, 5 Mees. & W. 462; *Mortimer* v. *McCallan*, 6 Mees. & W. 58.

The notice in this case was not sufficient.

1 Pars. Cont. 64; Story Ag. §§ 28, 29, 30, 140, 246; *Bank of U. S.* v. *Davis*, 2 Hill, 451; *Graddon* v. *Price*, 2 Car. & P. 610; *Fulton Bank* v. *N. Y. & S. Canal Co.* 4 Paige, 128; *Willis* v. *Bank*, 4 Adol. & E. 39; *Harper* v. *Hampton*, 1 Harr. & J. 715; Dunlap's Paley, Ag. 187; Russ. Fact. 314, 315; *Osborn* v. *Bank of U. S.* 9 Wheat. 830; 4 How. 336; 9 How. 552; 11 How. 222.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Maryland.

The suit was brought by Ford against the defendants in the court below upon the following contract:

Baltimore, November 7, 1855.

For and in consideration of one dollar, the receipt whereof is hereby acknowledged, I have this day purchased from J. W. Bell, agent for Benjamin Ford, New York, for account of Oelricks & Lurman, Baltimore, ten thousand barrels superfine Howard street or Ohio flour, deliverable, at seller's option, in lots of five hundred barrels, each lot subject to three days' notice of delivery, and payable on delivery, at the rate of nine dollars and twenty-five cents per barrel, viz.:

*2,000	barrels,	seller's option,	all	Dec. 1855. [*60
4,000	"	"	"	January, 1856.
4,000	"	"	"	February, 1856.
10,000				

L. E. Ballard, Broker.

Approved:

Oelricks & Lurman.

The 2,000 barrels deliverable in December were delivered, accepted, and paid for, as per contract. The 4,000 barrels to be delivered in each of the months of January and February were duly tendered to the defendants and payments demanded, and which were refused.

The only objection to the acceptance of the flour at the time tendered was the refusal of Ford to a demand made upon his agent to deposit $5,000 in one of the banks in Baltimore to secure the punctual delivery of the flour at the time mentioned. This demand for a deposit of money was denied by the plaintiff, on the ground that the contract contained no such stipulation.

After much testimony given by both parties on the trial, on the subject of a usage among the dealers in flour in the city of Baltimore to demand on time contracts a deposit of money (or margin, as it is called), and the right to rescind the contract if refused, the court charged the jury, that if they shall find, from the evidence, the defendants entered into the contract given in evidence, and that the plaintiff offered to deliver the flour therein mentioned according to its terms, and that when the offer was made he had the requisite quantity of flour to comply with the contract, and could have delivered it if the defendants had been willing to receive it, and that they had refused, then the plaintiff

was entitled to recover. The court further instructed the jury, that the rule of damages was the difference between the contract price of the flour and the market value in the city of Baltimore on the several days of the tenders, with interest on this sum, in the discretion of the jury. The jury found for the plaintiff.

61*] *One of the principal grounds of objection to the ruling of the court is, its refusal to submit the question of usage, which was the subject of evidence on the trial, to the jury.

The witnesses, introduced by the defendants to prove the usage, speak in a very qualified manner as to its existence, as well as to the instances in which they have known it to have been adopted or acquiesced in; and all of them admit they have no knowledge that it was general among the dealers. Some of them state that they recognized and had acted upon a custom in their own business, under which either party to the contract might require a margin to a reasonable amount, to be put up to secure the performance, and that the contract might be rescinded if the party refused; that they could not say such was the general custom; that different persons have different customs; some consider there is such a usage, and some do not. One witness states that he had, at all times in his business, considered it to be a right which might be exercised by either party to a time contract, whenever he apprehended a risk; that if the party was solvent, he supposed there was no right to demand it; another, that in his business he had always considered such contracts to be subject to the right of either party to demand the margin; that the occasion of exercising it was rare, as contracts made by his house were made with responsible persons; that he did not know that this was a general usage in Baltimore. The broker who negotiated the contract for the defendants states that he considered it a clearly understood right of both parties to such contracts to demand a margin to a reasonable amount; that he entertained the belief, from conversations with various merchants on the subject; that he recollected but one instance where, when the demand was made, the margin was put up, which was a margin of twenty-five cents on the barrel in a contract for 500 barrels.

There were ten witnesses, flour merchants for many years in the city, who state that they knew of no such usage.

It will thus be seen, from a careful analysis of the evidence, that the defendants wholly failed to prove any general or established usage or custom of the trade in Baltimore, as claimed in the defense. Every witness called on their 62*] behalf fails to *prove facts essential to make out the custom in the sense of the law; on the contrary, most of them expressly disprove it. They express opinions upon the subject of a margin as a right to be exercised in their own business, but admit that it is not founded upon any general usage; and none of them speak of its having been claimed or exercised in his own business but in one or two instances. Whether a usage or custom of the kind set up existed in the trade in Baltimore was a question of fact to be proved by persons who had a knowledge of it from dealing in the article of flour. Opinions of persons as to what rights they might exercise in their own business in respect to time contracts fall far short of any legal proof of the fact, especially when they admit that there was no general usage of the kind known to them.

Then, as to the precise limit or character of the custom claimed, the opinions of the witnesses are various and indefinite. The margin, they say, must be reasonable, but the pretended usage contains no rule by which a reasonable margin may be determined. It is said the amount may be referred to merchants. But there is no evidence that this is a part of the custom, or that any such mode of adjusting it ever occurred in the trade. Some of the witnesses state, that the margin must be a sum of money sufficient to make the party safe according to the state of the market. One states that, at the time the demand was made in this case for a margin, flour had fallen, and the price lower than the price in the contract; yet this, in his judgment, did not affect the right to make the demand, as the general opinion among dealers was, that the price would advance; that there were great fluctuations in the price, and that, in such a condition of things, a reasonable margin would depend upon the extent and character of the fluctuations, and upon the speculative ideas of the future value of flour.

The broker of the defendants, who purchased this flour, states his view of the reasonableness of the margin, which is the difference between the intrinsic value of the flour and its speculative value; by intrinsic value, he says he means the cost of the production; and by speculative value, the price at *which it was rating [*63 above its intrinsic value; and to a question what, in his opinion, would be a reasonable margin under the custom, when flour in the market was lower than the contract price, he answered that he considered the demand reasonable in this case, because he believed flour was going up to $12 per barrel. It would be difficult to describe a custom more indefinite and unsettled.

But, independently of the total insufficiency of the evidence to establish the usage, we are satisfied, if it existed, the proof would have been inadmissible to affect the construction of the contract. This proof is admissible in the absence of express stipulations, or where the meaning of the parties is uncertain upon the language used, and where the usage of the trade to which the contract relates, or with reference to which it was made, may afford explanation, and supply deficiencies in the instrument. Technical, local, or doubtful words may be thus explained. So, where stipulations in the contract refer to matters outside of the instrument, parol proof of extraneous facts may be necessary to interpret their meaning. As a general rule, there must be ambiguity or uncertainty upon the face of the written instrument, arising out of the terms used by the parties, in order to justify the extraneous evidence, and when admissible, it must be limited in its effect to the clearing up of the obscurity. It is not admissible to add to or engraft upon the contract new stipulations, nor to contradict those which are plain. 2 Kent, Com. 556; 3 *Ibid.* 260, and note; 1 Greenl. Ev. § 295; 2 Cromp. & J. 249, 250; 14 How. 445.

Applying these principles to the contract before us, it is quite clear that the proof of the

usage attempted to be established was inadmissible, and should have been rejected. There is no ambiguity or uncertainty in its terms or stipulations, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. The plaintiff agrees to deliver a given number of barrels of flour on certain days, at the price of $9.25 per barrel, in consideration of which the defendants agree to receive the flour, and pay the price. This is the substance of the written 64*] contract. But the *defendants insist, that besides the obligations arising out of the written instrument, the plaintiff is under an additional obligation to give security, whenever called upon, for the faithful performance; and this, by the deposit in bank of the sum of $5,000. The written instrument bound only the personal responsibility of the plaintiff; the parol evidence seeks to superadd, not a responsible name, as a surety, but, in effect, the same thing, a given sum of money. The parol proof not only adds to the written instrument, but is repugnant to the legal effect of it.

It was also urged on the argument that this contract was entered into between the defendants and the agent of the plaintiff, with the understanding at the time that it should be subject to the usage; but the answer to this is, that no such usage existed; and if it did, the terms of the contract exclude it. Any conversations and verbal understanding between the parties at the time were merged in the contract, and parol evidence inadmissible to engraft them upon it.

We are satisfied the court below was right in excluding the consideration of the evidence of the usage from the jury: (1) Because the usage was not proved; and (2) if it had been, it was incompetent to vary the clear and positive terms of the instrument.

An objection has been taken on the argument, which was not presented to the court below, but which, it is insisted, is involved in the exception to the charge; and that is, inasmuch as it appears upon the evidence that the plaintiff was a resident of New York, and the contract made at Baltimore, in the state of Maryland, by an agent, the presumption of law is that the credit was given exclusively to the agent, the principal being the resident of a foreign state, and hence, that the contract, in legal effect, was made with the agent, and not with the principal, and the former should have brought the suit.

This doctrine is laid down by Judge Story in his work on Agency, and which was supposed to be the doctrine of the English courts at the time, and founded upon adjudged cases. Story, Ag. § 268, and note; §§ 290, 423. It did 65*] *not, however, at the time, receive the assent of some of the courts and jurists of this country, 2 Kent, Com. pp. 630, 631, and note; 22 Wend. 224; 3 Hill, 72. And the doctrine has recently been explained, and Judge Story's rule rejected by the English courts. In the case of *Green* v. *Kopke*, 36 Eng. L. & Eq. 396, 399, 1856, the court denied that there was any distinction, as it respected the personal liability of the agent, whether the principal was English or a foreigner. The Chief Justice observed: "It is in all cases a question of intention from the contract, explained by the surrounding circumstances, such as the custom or usage of the trade when such exists. No usage," he observes, "was proved in the present case, and I believe none could have been proved." Again, he observed: "It would be ridiculous to suppose that an agent, for a commission of one half per cent, is to guaranty the performance of a contract for the shipment of 1,000 barrels of tar." The case was finally put upon the intent of the parties, as derived from the construction of the contract, and which was, that the defendant contracted only as agent, and not to make himself personally liable. Willes, J., doubted if evidence of custom was admissible to qualify the express words of the contract, so as to make the agent liable.

See, also, 14 Com. B. p. 390; *Mahony* v. *Kekule*, 5 El. & B. pp. 125, 130.

In the present case, the broker's note, and which is approved by the defendants, affixing the firm name, is too clear upon the face of it to admit of doubt as to the person with whom the contract was made. The purchase is from "J. W. Bell, agent for Benjamin Ford, of New York," and the case shows that Bell had full authority. The name of the principal is disclosed in the contract, and the place of his residence, as the person making the sale of the flour, through his agent. This fixes the duty of performances upon him, and exonerates the agent.

The judgment of the court below, affirmed.

EDWIN G. ADAMS, *Plff. in Err.*,
v.
SAMUEL NORRIS.

(See S. C. 23 How. 353-368.)

Mexican will—probate not necessary to admit as evidence—what execution of, valid—evidence of custom as to when competent and prevailing—instructions to jury—declarations of testator—question for jury.

Mexican will, not inadmissible as testimony, because it had never been admitted to probate, and because the witnesses that were present at its execution had never been examined to establish it as an authentic act.

Is not null, because it does not appear on the face of the will that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained.

Such testaments are not required to make full proof of themselves; and the observance of formalities, which do not appear on the face of the will, may be shown by testimony *dehors* the instrument.

Evidence of a custom in California, as to the manner of making wills, was competent.

And if it became prevailing and notorious, so as that the assent of the public authorities may be presumed, upon principles existing in the jurisprudence of Spain and Mexico, the acts of individuals, in accordance to it, are legitimate.

The instruction to the jury, that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made, embraced all that was necessary.

Proof of the signatures of the deceased witnesses and of the testator, and of a declaration by him that he had made a will with a similar devise, was competent.

It was a proper question to be submitted to the jury, whether under the circumstances of the case.

NOTE.—*Usage and custom; admissibility of, in construction of contracts*—see note to Adams v. Otterbach. 14 L. ed. U. S. 805.

it was probable the formalities required by the law were complied with.

Argued Apr. 17, 1860. Decided Apr. 30, 1860.

IN ERROR to the Circuit Court of the United States for the Districts of California.

This was an action of ejectment brought in the court below, by the plaintiff in error, to recover seven eighths of the *rancho* "Del Passo," granted on December 20, 1844, by Governor Micheltorena to Eliab Grimes.

The plaintiff claimed as heir at law of said Grimes. Defendant claimed under his devisee by codicil.

The trial resulted in a verdict and judgment in favor of the defendant; whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **C. Cushing, J. P. Benjamin, R. H. Gillet, L. Janin,** and **E. L. Goold,** for plaintiff in error:

We assume that it is the Hispano-Mexican law in force in Mexican California.

The rule of public law is general, that the validity of a devise of real estate depends on the *lex loci.*

2 Kent, Com. p. 518; Faelix, Droit Int. Pr. 3d ed. liv. 2, tit. II., ch. 1; *Ennis* v. *Smith,* 14 How. 400; Sto. Confl. L. § 474; Perkins' Jarm. Wills, 1.

If the question were affected by the consideration of domicil or citizenship, or of *locus rei actae,* the result would be the same here; for if a will, it was a will made in Mexican California, by a Mexican Californian, there domiciled, and of land situated in Mexican California.

Hence the legal questions involved are to be judged by the Hispano-Mexican law, subject to no other qualification, if any, than construction of that law by the state courts of American California.

The Hispano-Mexican law, regarding the execution of wills, is found in Pandectas Hispano-Mejicanas, vol. XI., p. 604, No. 3290, 3291; Novisima Recopilacion, l. 1 and 2, tit. 18, lib. 10; Recopilacion, l. 1 and 2, tit. 5, lib. 5; Leyes de Toro, No. 3, amending the Ordenamiento de Alcala.

All these legislative provisions are to the same effect, so far as pertinent here, and with the commentaries of the received legal expositors, are assumed to be the law of the subject-matter.

Suggestion occurs, however, in a late case, that of *Tevis* v. *Pitcher,* hereinafter cited, 10 Cal. 465, that although the construction of the devise is so subject to the Hispano-Mexican, yet the proof of the will is not, but depends on the common law of the United States—that is to say, English law, whether common, equity, ecclesiastical, constituting together the basis of the unwritten municipal law of the common law states.

And on these premises, the court in that case proceeds to infer that to establish it, there is need only to prove the handwriting of the signers.

We do not admit the applicability or the soundness of these legal suggestions.

Messrs. **E. M. Stanton, Reverdy Johnson,** and **Edmund Randolph,** for defendant in error:

1. The testamentary instrument under which the defendant claims, belongs to the class known as open wills, which took effect as a deed at the death of the testator, previous to the establishment of the present state government of California, and is not required by the laws of the state to be probated.

Grimes's Estate v. *Norris,* 6 Cal. 621; *Castro* v. *Castro,* 6 Cal. 158; *Panaud* v. *Jones,* 1 Cal. 508; *Tevis* v. *Pitcher* 10 Cal. 465.

2. Under the Mexican law, three witnesses to an open or unsealed will, without an *escribano* or alcalde, were all that were required; and under the custom existing in California prior to the establishment of the state government, two were sufficient.

Panaud v. *Jones,* 1 Cal. 504; *Castro* v. *Castro,* 6 Cal. 158; *Tevis* v. *Pitcher,* 10 Cal. 465.

3. Custom may be proven, and when proven has the effect of law.

Panaud v. *Jones; Castro* v. *Castro,* above cited; *Von Schmidt* v. *Huntington,* 1 Cal. 55; *Tevis* v. *Pitcher,* 10 Cal. 465.

4. A usage or custom once recognized by judicial decision, becomes the law of the land, and no further proof is necessary to establish it, and no evidence is admissible to contradict the fact as laid down by the court.

Cookendorfer v. *Preston,* 4 How. 326; *Edie* v. *East India Co.* 2 Burr. 1221; *Posten* v. *Rassette,* 5 Cal. 468; *Tevis* v. *Pitcher,* 10 Cal. 465.

5. The rule of evidence is the law of the forum, and such law must prevail in all judicial proceedings.

Story, Confl. L. § 258, 2, note and authorities cited; *Bank U. S.* v. *Donnally,* 8 Pet. 361, 373; *Lewis* v. *San Antonio,* 7 Tex. 308; *Tevis* v. *Pitcher,* 10 Cal. 465.

6. The witnesses being all dead, the will is to be proved by proving the handwriting of all the subscribers to it.

Price v. *Brown,* 1 Brad. 291, and authorities there cited; *Jauncey* v. *Thorn,* 2 Barb. Ch. 39; *Peebles* v. *Case,* 2 Brad. 226; Matt. Pres. Ev. 42; *Hands* v. *James,* 2 Com. 531; *Brice* v. *Smith,* Willes, 1; *Croft* v. *Pawlet,* 2 Str. 1109; *Tevis* v. *Pitcher,* 10 Cal. 465.

7. The will in this case has three competent attesting witnesses—the number required even by the strict rules of the Mexican law.

Panaud v. *Jones,* 1 Cal. 504; *Tevis* v. *Pitcher,* 10 Cal. 465.

8. By custom, as established by proof in this case, and by judicial decision in the case of *Panaud* v. *Jones, Castro* v. *Castro,* and *Tevis* v. *Pitcher,* two witnesses are sufficient, and the will is good.

9. Upon proof of the signatures, the witnesses being all dead, the presumption of law arises, that all the formalities essential to the due execution of the will were complied with.

Price v. *Brown,* 1 Brad. 291; *Jauncey* v. *Thorn,* 2 Barb. Ch. 40; *Peebles* v. *Case,* 2 Brad. 129; *Tevis* v. *Pitcher,* 10 Cal. 465.

And presumptions are to be liberally indulged in favor of the due execution of wills, when, from lapse of time or other circumstances, it may be difficult to prove the facts directly.

Jauncey v. *Thorn,* cited above.

10. The admissions of the testator were admissible as rebutting evidence.

1 Phil. Ev. 189; 1 Moody & Rob. 525; 1 Phillim. 447; 1 Hawks's Law & Eq. 268; 12 Pet. 151.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff claimed, as the assignee of heirs at law of Eliab Grimes, deceased, the title and possession of an undivided seven eighths of a parcel of land in Sacramento county known as the *rancho* del Paso, containing ten square leagues, being the land granted to Eliab Grimes by Micheltorena, governor of California, the 20th December, 1844. The defendant resisted the claim as the assignee of Hiram Grimes, who is a devisee of the land by a codicil to the last will of Eliab Grimes, which is in the Spanish language, and of which the following is a translation:

Seal first—eight dollars.

Provisionally empowered by the maritime custom-house of the port of Monterey, in the department of the Californias, for years eighteen hundred and forty-four and eighteen hundred and forty-five. Pablo De La Guerra.

Micheltorena.

[SEAL.]

I, Eliab Grimes, a Mexican citizen by naturalization, having to add a codicil to my testament heretofore made, and desirous of doing it in conformity with law established in this republic, do make and declare it to be of my will and intention, in presence of the alcalde of this jurisdiction, his secretary, and two witnesses of assistance, as follows:

Codicil 2d. I give and bestow to Hiram Grimes, my nephew, all the right and title 357*] which the government concedes *to me to the *rancho* known (or named) as the "*rancho* del Paso," in Upper California, situated on the American river, as is delineated and appears in the plan and title, the original of which exists in the public archives of Monterey, together with all the cattle, horses, and other animals, that are on said *rancho*, as also all the buildings and laboring and cooking utensils, and all other property of mine which is met with on said *rancho*, deducting always a certain portion of all the cattle, horses, and other animals, and of their produce, for those who have had the care of said *rancho*, in payment of their services, according to the agreement made.

And in order that it may be evident, I sign in the manner above expressed this 18th day of April, 1845, at the *pueblo* of San Francisco de Asis, and at the same time there remains deposited a copy in the archives of the same.

Eliab Grimes.

Before me, in the absence of the two alcaldes. Roberto T. Ridley, *Sindico*.

Witnesses:

Nathan Spear.
Guillermo Hinckley.

The verdict and judgment in the circuit court were in favor of the defendant; and the cause is presented to this court upon exceptions to decisions of the presiding judge in the course of the trial.

The defendant, to sustain the codicil, established, by the admission of the plaintiff, the genuineness of the signatures of the testator and of the witnesses to the codicil, and that they were all dead, the testator having died in 1848. He also adduced the testimony of a number of witnesses to prove the existence of a custom in California as to the mode of making wills prior to any change in the Mexican law by the state government, and that Grimes, shortly before his death, had informed a witness that he had devised his place of del Paso, with the stock on it, to Hiram Grimes, his nephew, and desired of him some aid for his nephew in the settlement of his affairs. No other testimony is reported in the bill of exceptions. It was contended, on behalf of the plaintiff, that the *codicil was not competent [*358 as evidence, nor sufficient to transfer property.

1. That the codicil had never been admitted to probate in California, and that the proof of the signatures to the codicil was not sufficient to establish its validity.

2. That there is no statement in the paper itself tending to show that the disposition was dictated by the testator in presence of the witnesses, or read over to the witnesses in the presence and hearing of the testator, they being present at one and the same time, without interruption or turning aside to any other act, and having been so dictated, or so read over, was declared by the testator to the witnesses to be his last will and testament.

3. That three witnesses of assistance are necessary to the validity of a will, and that the *sindico*, not having professed to act as a witness, and being without authority to receive wills in that capacity, the codicil is void for want of the sufficient number of witnesses, and that this deficiency could not be cured by proof of any custom at variance with the written law.

The court did not support these objections, but instructed the jury that a will, executed under the Mexican laws, in presence of only two witnesses, affords no sufficient proof of the execution. But if they should be satisfied, from the proofs in this case, that a uniform and notorious custom existed uninterruptedly for the space of ten years in California, which authorized the execution of wills in the presence of two witnesses only, and which custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, then the proof of such a custom, and for such a length of time, will operate a repeal of the prior law, and that two witnesses will be sufficient. On the contrary, if a custom of the character described and for the period mentioned was not proved to their satisfaction in such case, if three witnesses have not attested to the codicil, it is a nullity.

The court further instructed the jury, that if, from the evidence and under the instructions given, they should find three witnesses required, and they will inquire whether each and all of *the three witnesses to the will is or are [*359 competent; that the will being written in the Spanish language, if either of the witnesses did not read or speak that language, and could not understand the disposition of the property made by it, and that the testator was in the same predicament, such witness would be incompetent, and unless the custom was established, the codicil would be null; but if the custom was established, that custom would control the case; and if the signatures of the testator and of a sufficient number of witnesses are established, in the absence of countervailing testimony, the jury may infer a due execution of the will. This selection from some twenty

exceptions will sufficiently present the questions that were considered in the circuit court and have been discussed at the bar of this court.

These instructions require an examination of the law of California, previously to its organization as a state, relative to the execution of a testament, and the modification of that law by the revolution made in its legal system after that event. The law of Spain was introduced into Mexico, and forms the basis of its jurisprudence. By the laws of the Council of the Indies, it was provided in all cases, transactions and suits, which are not decided nor provided by the laws contained in that compilation, nor by the regulations, provisions, or ordinances, enacted and unrepealed concerning the Indies, and by those which may be promulgated by royal orders, the laws of the kingdom of Castile shall be observed comformably to the law of Toro, with respect as well to the substance, determination, and decision of causes, transactions, suits, as to the form of proceeding. The Partidas (6 part, tit. 1, I. 1, 2) describes two kinds of wills. "The one is that which is called, in Latin, *testamentum nuncupativum*, which means a declaration openly made before seven witnesses, by which the testator makes known, by words or in writing, who the persons are whom he institutes as his heirs, and the manner in which he disposes of his other property." This form of will is of Roman origin, and can be traced to the modes of testamentary disposition employed in the time of the republic. Originally the form was wholly nuncupative, but the 360*] use of writing *was allowable before the *testamentum in scriptis* was introduced.

The Partidas proceeds to describe the other form of will—"that which is called, in Latin, *testamentum in scriptis*, which means a declaration made in writing, and in no other way. This will ought to be made before seven witnesses, called at the instance of the testator for that purpose. Each of the witnesses ought to write his name at the end of the will; and if one of them should not know how to write, either of the others may do it for him, at his request. We also say that the testator ought to write his name at the end of the will; and if he should not know how, or could not write, then another may do it for him, at his request."

The witnesses were formerly required to superscribe and seal as well as sign the will. If the testator desired to conceal the contents of his will from witnesses, he could do so, either by writing the will, or procuring it to be written, and inclosing it in an envelope, and by writing his name and causing the witnesses to write their names on the envelope, with the declaration that the paper contained the last will and testament of the testator.

The essence of the *testamentum in scriptis* consists in the writing, and whether it was published to the witnesses who subscribed and attested it, or was concealed from them, was not a fact of any consequence. But the writing contained in the envelope was subject to no formality. It might be written by the testator, or by the hand of another. His signature to the will itself was not required.

The anouncement to the witnesses that it was his will, and their attestation of that declaration, and the sufficiency of the seals, were the only securities against forgery or fraud. Other formalities were added, and a rigid exaction of those that were prescribed, rendered this form of testamentary disposition onerous. On the other hand, the nuncupative or oral will was subject to the objections that the witnesses might die, or fail to remember the declarations of the testator, or misrepresent them. In the process of time, the form of making a will orally became unfrequent. The olographic will and the mystic will *served [*361 the purpose of those who desired to conceal the disposition of their property; while the written will, prepared by a public officer, and attested by witnesses, was the form commonly used on the continent of Europe.

The last-named form, with a reduced number of witnesses, was permitted in Spain by the law of Toro. This testament might be made before a notary public, but he was not indispensable. If made before a notary public, there should be three witnesses of the vicinage; but if there was not a notary, five witnesses were necessary, unless they could not be had, in which event three witnesses of the place, or seven strangers, would be sufficient. 1 Tapia Febrero, 364.

The authentication of the will by the intervention of judicial authority is also of Roman origin.

Savigny traces the changes in that administration, and explains the manner in which this system penetrated the jurisprudence of Europe (1 Sav. hist. du droit Ro., 83); and the result, as it affects the question under consideraton, is clearly ascertained in the writings of the civilians.

Ricard says: "It results from what has been established, that the depositions of the seven witnesses before the judge, when the nuncupative will has not been drawn up in writing at the time it was made, is in a manner of the essence of the testament, since it could not have effect without those depositions." . . .

"But in respect to those that were drawn up in writing," he says, "the opening and reading that were made after the death of the testator contributed nothing to the validity of the testament, and served only to verify the seals of the witnesses, and to render the testament public. We see, however, from laws of the title, in what manner shall testaments be opened (*quem ad mob. testam. oper.*) in the Code and Digest, that it was the ordinary practice for those who were interested in the execution of the testament to apply to the prætor, who obliged the testamentary witnesses to come before him to admit or deny their signatures and seals, and of which he made a *proces verbal;* and that this is the practice in the countries where the Roman law prevails."

Ricard des don. 1325–1398.

*The Mexican jurists agree that the [*362 written testament from its form is not a public and authentic act, and that it is necessary, to the full enjoyment of their rights, that those interested in the will should invest it with that quality. They show that such a person may compel the production of a will from private custody, and that the witnesses may be examined in reference to all the circumstances relative to the execution of the will, and the capacity and death of the testator; and if it shall result from these that the testament is legal, the

judge may order it to be protocoled, and it obtains the faith due to an authentic or public act. These writers describe the measures to be taken in case of the death or absence of the witnesses, in order to obtain the same result. 2 Sala Mex. 127, 128; 2 Curia Felip. Mej. 327; 2 Febrero, Mej. ch. 25, § 5.

We do not consider it necessary to inquire whether the elevation of this writing to the grade of an authentic act was a necessary condition to the support of a suit upon it by an heir or legatee in the ordinary tribunals in the department of California. We think it is clear that the heir was not restrained from entering upon the inheritance, by the fact that this was not done; and that there are circumstances that would have authorized the heir to maintain a suit, even though the testament could not be produced. The right exists independently of that evidence. Merlin, verbo preuve, Gab. des preuves, 668,450. This testator died in 1848. His devisee seems to have taken possession of the property bequeathed to him. There is no testimony of any action by the tribunals in California previous to the organization of the state government. We know that the political condition of California from the time of the death of the testator until the organization of that government was chaotic, and no inference can be drawn from such an omission. Immediately after the organization of that government, the common law of England was introduced, and the ancient legal system of the department abrogated. No provision was made for the probate of wills that had been executed before the introduction of that system. "The statute of the state," says the supreme court of 363*] California, "fails *to require wills executed before its passage to be probated;" and "this was not a *casus omissus;*" but "the legislature actually intended to exclude them from the operation of the statute altogether, leaving their validity to rest upon the laws under which they were made.

Grimes v. *Norris*, 6 Cal. 621.

And in *Castro* v. *Castro*, 6 Cal. 158, they say that a will is regarded by the courts of England and the United States as a conveyance, and takes effect as a deed, on proof of its execution, unless there be some express statute requiring it to be probated." Conceding, therefore, that, under the Mexican system, the preliminary proof of the will before some public authority was necessary to give it probative force in a court of justice, that condition has been altered by the statutes of California before adverted to.

Our conclusion is that the codicil was not inadmissible as testimony, because it had never been admitted to probate, and because the witnesses who were present at its execution had never been examined to establish it as an authentic act. The next inquiry will be whether the codicil is null because it does not appear on the face of the will that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained. The laws that prescribed these formalities do not require that express mention shall be made of their observance under the penalty of the nullity of the testament.

In *Bonne* v. *Powers*, 3 Mart. N. S. 458, the question arose in Louisiana upon a will made in 1799, before the change of government.

The Supreme Court says: "The Spanish law did not require, as our code does, it should appear on the face of the instrument itself that all the formalities necessary to give effect to a will previous to the signature of the testator and the witnesses had been complied with." In *Sophie* v. *Duplessis*, 2 La. Ann. 724, the Supreme Court says: The principle invoked by the defendants, that a will must exhibit upon its face the evidence that all the formalities required for its signature have been fulfilled, has no application to nuncupative testaments under private signatures. Such testaments are not required *to make full proof of themselves, [*364 and the observance of formalities which do not appear on the face of the will may be shown by testimony *dehors* the instrument. Biec, in his supplement to Esriche, reports the case of a mystic will attached for nullity, because the solemnities required for those of that class, in the law of the Partidas, before cited, did not appear to have been followed. The supreme tribunal of justice in Spain sustained the will. *Sap. al. dic.* v. *Testamento.* And the same conclusion is maintained by the French jurists upon similar statutes. *Merl. Rep.* v. *Testament.*

In order to show that the codicil was valid and translative of property, the defendant introduced evidence of a custom in California as to the manner of making wills, and the jury were instructed that the evidence was competent; and that, if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. The civilians state that customs which are opposed to written law are held to be invalid, unless they have been specially confirmed by the supreme power of the state, or have existed immemorially; and it is not material whether they consist in the nonobservance of the written law, or in the introduction of principles or practices opposed to such law; that every valid custom presupposes a rule, observed as binding by the persons who are subjected to it by an unbroken series of similar acts; and that it belongs to the sound, legal discretion and conscience of the tribunals to determine by what testimony such a custom can be established.

Lind's Study of Juris, 14, 17, and note.

The Spanish codes recognize these principles. They say, to establish a custom, the whole or greater part of the people ought to concur in it; that ten years must have elapsed amongst persons present, and twenty at least amongst persons absent, in order to its being introduced; that it may be proved by two sentences of judges or judgments given upon or according to it; that, being general and immemorial, it may repeal or alter the anterior law, the approbation of the prince being supposed or presumed.

De Asso & Rodri. Inst. ch. 1; 1 Febrero, 55.

*The custom under consideration is [*365 one of a general nature, and its existence for the period must be assumed from the verdict of the jury. It is a rule of property pervading in its application, and necessary to be known in order that judicial administration should be carried on. The recognition of such a rule, if it exists, was, therefore, to be looked for from the

superior and supreme tribunals of the state of California. In the case of *Panaud* v. *Jones*, 1 Cal. 497–505, the Supreme Court says: "The custom with respect to the execution of wills, so far as the testimony goes, appears to have prevailed generally and for a long time in California. It may have been the universal practice from the first settlement of the country." In *Castro* v. *Castro*, 6 Cal. 158, this observation is cited, and the court says: "That it is shown from the testimony of various witnesses, that two [witnesses to a will] were sufficient under the customs of California." The same fact is restated in the case of *Tevis* v. *Pitcher*, 10 Cal. 465.

Nor is such a change in the mode of transfer of property a singular fact in the history of the American states. Several cases are mentioned in the opinion of the court in *Panaud* v. *Jones*, above cited, and a similar instance is mentioned in *Fowler* v. *Shearer*, 7 Mass. 14.

Nor is the existence of such a departure from the written law extraordinary, when the circumstances of the early history of the department are understood. The most important of the arrangements for the colonization of the department related to the establishment of the military districts and *presidios*, and the mission establishments in close proximity to them. The priests and soldiers were the most conspicuous and influential members of the department, and exerted supreme influence in its political and economical arrangements. The Spanish laws relieved the soldier from the inconvenient formalities that attended the execution of the ordinary nuncupative or closed testament, and authorized him to make a nuncupative will before two witnesses, or an olographic will.

The canon law distinctly reprobates (*præscriptam consuetudinem improbamus*) the requirement of seven or five witnesses for the testation of a will: "*secundum quod leges humanæ* 366*] *decernunt;*" . . . "*quia vero a divina lege et sanctorum Patrum institutis et a generali ecclesiæ consuetudine id noscitur esse alienum cum scriptum sit, in ore duorum vel trium testium stet omne verbum.*" Decret. Greg. lib. c, tit. 26 ch. 16.

The precept and example of these dominant classes in the department may possibly have exercised a controlling influence in forming the habitude of the population on this subject. And if it became prevailing and notorious, so as that the assent of the public authorities may be presumed, upon principles existing in the jurisprudence of Spain and Mexico, the acts of individuals, in accordance to it, are legitimate. This codicil was written in the Spanish language; and it is to be inferred that there was testimony that the testator and one or more of the witnesses understood that language imperfectly.

The instructions of the circuit court required the jury to find that the testator dictated the contents of the codicil to the witnesses, they being assembled at the same time, and that it should be then read in the presence of all, so that it was understood by all, and that the testator should then have declared it to be his last will; and the court informed them that if the testator did not understand the language, and there was not present any one who explained and interpreted the codicil in the presence and hearing and understanding of the witnesses, the document was not a valid instrument; and also, if neither the testator nor a sufficient number of the witnesses understood the language of the codicil, that it was not valid.

The Roman law did not require the witnesses to a Latin will to understand the Latin language: *nam si vel sensu percipiat quis, cui res adhibitus sit, sufficere.*" It is admitted by the civilians that a testator may dictate his will in his own language, and the will may be drawn in another, provided that the witnesses and notary understand both. The object of the law is that the instrument shall express the intentions of the testator, and it does not require the reproduction of his exact words. Whether the witnesses should understand the language of the will, has been the subject of much contest among those writers; and names of authority may be cited in favor of *either opinion. [*367 But the current of judicial authority seems to have decided it is not necessary that the witnesses to a testament should comprehend the language in which it is written; and the same authority has settled that the witnesses should understand the language of the testator.

16 Dalloz. jur. gen. tit disposi. entre vifs. et test. No. 3126.
3 Trop. don. & test. No. 1526.
2 Marcad. Exp. 15.
Escriche dicc. verb. interprete.

The instruction of the presiding judge to the jury, that the testator and witnesses should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made, embraced all that it was necessary to be said upon this part of the case.

The last inquiry to be made refers to the weight to be given to the testimony adduced in support of the *factum* of the codicil. This consists of the proof of the signatures of the deceased witnesses and of the testator, and of some declaration by him that he had made a will with a similar devise. We comprise, among the witnesses to the will, Ridley, the *sindico*. It does not appear that a *sindico* was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor is it clear that the *sindico* in the present instance expected to give any sanction to the instrument by his official character. He attests the execution of the will, and we cannot perceive why the description of himself which he affixes to his signature should detract from the efficacy of that attestation.

The binding force and legal operation of this codicil are to be determined by the law, as it existed when the codicil was made. But the mode in which it should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of the trial. The evidence of the signatures of the testator and witnesses was competent; and it was a proper question to be submitted to the jury, whether, under the circumstances of the case, it was probable the formalities required by *the [*368 law were complied with. As suppletory proof that the testator had made the codicil, and was acquainted with the contents of the instrument, the admission or declaration offered as evidence was competent testimony.

Upon a review of the whole case, our opinion is, there is no error in the record, and the judgment of the Circuit Court is affirmed.

JUAN M. LUCO and Jose Leandro Luco,
Appts.,
v.
THE UNITED STATES.

(See S. C. 23 How. 515–543.)

Mexican land claim—should be found in the archives—testimony of officers cannot supply or contradict records.

Mexican title to Rosa, after a careful examination of the testimony, is pronounced false and forged.

As a general rule, no grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the *espediente*, or some part of it be found on file among the archives where other and genuine grants of the same year are found.

The testimony of the late officers of that government cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives.

Argued Apr. 12, 1860. Decided Apr. 30, 1860.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case and a full statement of the facts appear in the opinion of the court.

Messrs. **C. Cushing** and **C. Benham,** for appellants:

Are the papers false?

Upon this issue the theory of the defense is that the claimants have forged two several grants to the land claimed; that the first was a very base counterfeit, which would not serve as a title paper; that consequently they procured another (as to whether a forged one or an antedated one, counsel and court below both seem to be indifferent); that that other is the one upon which we now rely. These propositions they claim to have proved directly by the testimony of two of their witnesses, Horace Hawes and Raphael Guirado, and indirectly by circumstances attendant upon the title, its history and the mode of conduct of the case.

There is an attempt to dispose of what militates against this theory of defense, by impeachment, cross-examination, analysis and comparison.

On our part, in reply, we contend, in the first place, that the testimony of Hawes and Guirado must be rejected, and that the case stands as if their depositions had never been taken and that it will be considered upon the other testimony alone.

Leaving Hawes and Guirado out of view, we find that the testimony of other witnesses has been taken to maintain the theory they were expected to establish. In discussing it, I shall follow the order of the court below in its opinion rejecting the claim. That opinion is not in the record; but it has been printed, and as I am informed, very kindly furnished to the court by the distinguished gentleman who delivered it,—the Honorable Ogden Hoffman. That opinion does full justice to the case of the government.

The opinion makes the following points against the claimants:

1. The claim was not presented in time, and no explanation of the fact was given.

2. The archives afford no evidence of the genuineness of the papers.

(*a*) The grant is not registered there.

(*b*) There is no record of approval there.

(*c*) There was no *espediente* there; but on the contrary all there is of it, the petition and marginal decree of concession, was produced from the claimant's custody; no explanation was given as to where it had been; who had it; how or under what circumstances we had got it.

(*d*) The grant is not numbered, and no gap is left for it in the numbers on the *espedientes* made about the time of its date, or in the numbers of entries of grants in the so-called book of Toma de Razon.

3. There was no possession. Rosa himself has so declared.

4. No claim of ownership, recognized and acquiesced in by the public authorities, or even by the neighbors and *colindantes.*

5. The signatures are forged.

6. The seal on our grant is false.

7. The description of Pico's office, written at the head of the grant, is not the proper one.

8. The principal witnesses for the claimants are impeached.

9. It is strange that other grants made about that time were not approved until the next ordinary session of the departmental assembly.

10. The mere fact of so many suspicious circumstances arraying themselves against us, though each may be answered, is overwhelming against us.

These points were discussed *seriatim* by the counsel. But the discussion being chiefly confined to the evidence, only the following brief abstract of parts of the argument is here given.

The testimony offered to prove a forgery is that of certain persons introduced as experts.

This testimony is inadmissible.

At the time it was offered, Pio Pico had not been called to disprove his signature. He should have been called by the government in the very beginning.

When the object is to disprove handwriting the supposed maker is the best evidence and must be called.

1 Phil. Ev. 223–225, p. 43, and note 918; 2 Phil. Ev. 555, and note 423; 3 Phil. Ev. p. 1332, *et infra*, p. 1337; *Gurney* v. *Langlands*, 5 Barn. & Ald. 330.

To say the least, it argues very ill for the conviction on the minds of the government agents of the forgery, that they did not call Pio Pico. McKnight, Orlando, who thinks Pico's signature was made by Covarrubius; that it is stiff and clumsy, while certain specimens are, as he says, natural and without restraint. This person is not accustomed to Spanish documents, and confesses that he does not consider himself an expert in relation to them.

Purdy, J. H., who thinks the same as McKnight, and finds the capital p, and the *rubric* differently shaped from specimens shown him confesses also that he does not know the Spanish language; is not accustomed to compare Spanish documents; does not consider himself

NOTE.—*Parol evidence to vary or contradict a writing.*—See note, 35 L. ed. U. S. 860.

an expert in relation to them; and does not see well.

It is submitted that this testimony is entitled to less than the usual weight of the best of the kind. It is pronounced by all the books the weakest and most unreliable of testimony.

1 Phil. Ev. 493, note 918, p. 1332.

The opinion of other witnesses is taken. not because of their skill as experts, but of their assumed knowledge of Pico's signature. These persons do not agree in the reasons they give for their opinion.

"If witnesses, concurring in the result, clash in their reason, this will take from the general force of their testimony, however confident they seem."

Constable v. *Steibel*, 1 Hagg. Eccl. 56.

Their conclusions are drawn from dissimilitude appearing on comparison, and if admissible, which we contend they are not, they are entitled to little consideration as against those drawn from similitude.

Young v. *Brown*, 1 Hagg. Eccl. 556; *Bell* v. *Norwood*, 7 La. 96; *Constable* v. *Steibel*, 1 Hagg. Eccl. 56; *Murphy* v. *Hagerman*, 1 Wright, 292; *Crisp* v. *Walpole*, 2 Hagg. Eccl. 531.

It is thought that all is said and attempted to be proved against the genuineness of Pico's signature, is mere refining in the presence of the proofs of genuineness offered on the part of claimants.

Pio Pico himself says, upon inspection of a traced copy of the title papers, that the signatures appear to be his, and that he believes he put them there at the time they purport to have been put there. This was testimony in chief, and is palpably from inspection of the papers, not from recollection. When cross-examined, he admits at first that he speaks from inspection. But he finally appeals to his recollection, and confirms the genuineness therefrom.

Many witnesses also prove the genuineness directly.

A forger would have been unlikely to adopt a rare mode of making the most striking letter.

It is absurd to say Pico's signature is a forgery in the presence of his testimony. He would as soon have antedated for us as sworn falsely for us.

Pico should have been impeached. He has not been.

This is all the testimony which tends to establish a forgery, exclusively. The other testimony in the case is equally applicable to antedating as to forgery.

It is said that the seal on our grant differs from that on our certificate of approval, which latter is admitted, and proved by the government's own witness to be genuine; and that, inasmuch as Covarrubias says he does not remember more than one seal, the impression on our grant is false.

We do not admit that the difference claimed to exist between the impression on the grant and that on the approval proves, by any means, that they were made by different stamps. These stamps were very rude; they were prepared for printing by greasing them and holding them on the blaze of a candle, until the soot and grease made a coloring matter; they were then applied to the paper, not by a machine, which would give a just impression, but by the hand.

The differences visible in the two impressions consist only of minute differences between the spaces of parts of the objects on the impressions, or of differences in the relative angles of two or three letters of the inscription. All these differences are mechanical, only occasioned either by the want of uniform density and proportion in the lamp black and grease with which the impression is made, or in the want of precision or uniformity in the action of the hand in applying the stamp. There seems a greater difference as found occurring accidentally in all such impressions, and they may be produced experimentally at will with any stamp, either employing wax, or still more, employing lampblack and grease.

As to any deduction to be drawn from our not producing an impression from the archives similar to the one impugned, we protest against it. If the government desire to predicate an argument upon the fact, if fact it is, that the archives present no impression like the one in our grant, it should have been proved. We do not admit that there is any ground of suspicion in this circumstance. Until it is proved that there is but one die, there is no reason to suspect the genuineness of the seal at all. It has the same legend and device as the others have.

This seal is vindicated by the two other seals; they are admitted to be genuine, and the stamp that made them is proved to have been delivered into the hands of Frémont as early as the change of flags; the presumption is that it has remained in the custody of the government ever since.

The seal was not necessary upon these papers; it was not required by law. Covarrubias would not have put on a false seal when none is necessary. He is the man who made the grant. He says so, and it is in his handwriting. He knew the law. He was the very man to know exactly what was required; he had been secretary of state.

It is affirmatively proved to be genuine.

"After proving the seal, it will be presumed to have been properly affixed, and it will lie on the opposite party to show that it was affixed by a stranger."

Lord Brounker and Sir Robert Atkyns, Skin. 2, cited in 3 Phil. 1062, note 717.

If it be supposed we found two blank papers with the genuine seals on them, we ask, why did we not write the grant and approval on them, and the petition and marginal decree on an unsealed one? This theory is forbidden by the fact that this is not the stamped seal, the habilitating seal, but it is the governor's seal, put on acts in his office, to attest their genuineness as his, not to show the paper was lawful. If it be supposed that we had access to the genuine stamp, why not use it on all the papers?

Or, if we forged the stamp, why not make a facsimile? We have as fine artists in San Francisco as there are in the world, and the seal is a very rude one.

Some of the witnesses for the claimants are sought to be impeached, and many witnesses examined for that purpose; but all of those who are attacked are so corroborated, that even if successfully impeached as to character, they must be believed in this instance.

The attack, however, upon their character gives us no concern. We conceive we have repelled it by proof of good character, and we

are perfectly contented to submit the matter to the judgment of the court, upon the testimony of our witnesses in support.

After we have repelled the suspicion arising from each circumstance, we are gravely told it still remains that we were surrounded by many suspicious circumstances.

In the first place, it is to be observed that there are not so many circumstances as the theory of the attack upon this title presupposes. On the contrary, they are but few. There are two or three great facts in the case; each of these is attended by minor circumstances which follow it as necessary consequences; and yet these two or three facts are marshaled with consummate generalship, not alone, but in the van of all these followers.

Thus, we have the petition in our own hands —an irregularity, if you please, a suspicious one; but certainly, its suspicious character is not heightened by the other facts of which it was the cause, namely: absence of our grant from the so-called book of Toma de Razon from Jones' list, from list of numbers on the entries in that book, and the fact of our *espediente* not bearing any number on itself. Again: De la Rosa is a garrulous, eccentric, and perhaps unhappy old man, a fact irrelevant in itself, but very significant in view of his declarations, seeming poverty, and dependence, and petty occupations.

Of course, we cannot answer these groups of circumstances collectively—they have no relations *inter se;* we must answer them severally, dealing with isolated circumstances by themselves; it is the bundle of fagots, not susceptible of being broken when united, but quite successfully to be destroyed if taken apart, and broken one by one.

It is absurd to say that the suspicious circumstances are severally explained, and yet collectively survive. It is submitted, the claim is valid and must be confirmed.

Messrs. **J. S. Black,** *Atty. Gen.*, and **P. Della Torre** for appellees.

[The argument of these counsel was able and elaborate in support of the defense, based on the fraudulent character of the claim. As it was chiefly confined to the discussion of the facts and evidence, it is not deemed of importance to this report.]

Mr. Justice **Grier** delivered the opinion of the court:

The appellants, Juan Manuel Luco and Jose Leandro Luco, filed their petition with the board of commissioners for ascertaining and settling land claims in California, on the 13th of September, 1854. This was after the time limited by the act of Congress of 1851 (9 Stat. at L. 631). But, on their application, Congress passed a special act (July 17, 1854, 10 Stat. at L. 784) authorizing the presentation of their claim.

They claim under a grant made to one Jose de la Rosa, dated 4th of December, 1845, and purporting to be signed by Pio Pico, as acting governor, and countersigned by Jose Maria Covarrubias, secretary. This document was deposited in the surveyor general's office on the 25th of October, 1853, and had attached to it a paper, purporting to be a petition, by Jose de la Rosa to the governor, setting forth that the government was indebted to him in the sum of $4,650 for services as printer, and praying for the *sobrante*, or lands remaining between certain ranches of Vallejo and others.

The boundaries of the land prayed for are set forth very *distinctly, but without any [*533 limitation as to the quantity of land contained therein. On the margin of this petition is the usual order for title, purporting to be signed by Pio Pico on 8th of November, 1845.

There is also attached a paper purporting to be a certificate of approval by the departmental assembly, certified by the signatures of Pio Pico and Jose M. Covarrubias, and dated 18th of December, 1845.

This grant is for land within certain boundaries, and unrestricted as to quantity. Its confirmation was vigorously opposed by the counsel for the government. They alleged that the documents produced to support the claim were forgeries, supported by perjuries of persons who had conspired to defraud the government of an immense body of valuable land. Upon this issue the parties went to trial before the commissioners, who found in favor of the United States. The case went by appeal to the district court, where much additional testimony was taken, a thorough investigation made, and these documents were again adjudged to be forgeries.

The appeal to this court compels us, however unpleasant the task may be, to pass upon this issue of fact, in which the character and conduct of others, besides the parties, will necessarily be made the subjects of discussion.

This claim first made its public appearance in 1853, after the lands had been surveyed by the United States government as vacant. Previous to such survey, the public officers had used every diligence to discover whether any person possessed any title or claim to these lands, but the inhabitants of the district, and the owners of adjoining lands, were all ignorant of any claim, by possession, grant, or otherwise.

The lands within the boundaries of this alleged grant amount to 270,000 acres, or thereabouts.

The person to whom the grant purports to be made was almost a pauper, and, though not actually a servant, yet a dependent of General Vallejo, residing in Sonoma, gaining a precarious livelihood by making and mending clothes and tinware, acting as alcalde, printer, gardener, surveyor, music teacher, and attending to a grocery and billiard table for *Val- [*534 lejo; and during all this time, from the date till the public appearance of this title, wholly unaware of his wealth and immense possessions, and always representing himself as a poor man, while he had in his possession a title to 270,000 acres of valuable land.

The archives of the Mexican government furnish not the slightest trace of any such grant; although all the other grants made in the same year and month, and on the same day, are carefully recorded and registered, and the *espedientes* found on file.

These facts might well justify the government officers in questioning the authenticity of this grant, whatever the character and standing of the parties might be, who pretend to establish it by their testimony.

The claimants, in order to establish their title, examined Jose M. Covarrubias, who was

secretary of the governor, Pio Pico, at the time the grant purports to have been signed. He testifies that "it is in his handwriting, and the attestation is his signature; that he does not remember to have seen Pio Pico sign it; but that his signature appears to be genuine, and he believes he signed it."

We shall have occasion to notice the testimony of this witness more particularly hereafter. At present we only say that there is no reason to doubt the truth of his statement, so far as he attests his own acts; but that he wrote and signed it on the day it bears date, needs confirmation; for, if it was so written and signed by him on that day, he should be able to give some reason why it does not appear on the register with the other grants made on the same day. It is true, he attempts to do this by alleging that he registered it in some other book not found in the archives, but he cannot give a reason why all other grants were on the book found, and this one alone in some unknown register. If it was so written and signed by him on the 4th of December, 1845, it is incumbent on the claimants to give some account of it —to show why it was kept secret till 1853. If in possession of the grantee, why it was not produced and laid before the commissioners; why the petition and marginal order forming part 535*] of the *espediente*, if *there was one, is found in the possession of the grantee; and where and when the certificate of approval was found and kept.

These and many other questions, which demand a solution, the claimants have not endeavored to answer. But they endeavor to prove—(1st) That this grant was seen about the time it bears date; and (2d) that Rosa had a ranch on this tract of land, with a stock of cattle and horses, and resided on it, for a time at least, with his wife and family, up to 1849, claiming it as his own.

The chief witnesses to establish these facts, besides numerous others, called to prove the possession, are Jose de la Rosa, Mariano G. Vallejo, and his brother, Salvador Vallejo. More than twenty witnesses have been called to prove that the character for veracity of these persons is so bad that they should not be believed on their oaths. As many testify to their good character, and especially to that of Mariano G. Vallejo.

There is proof also of declarations of Rosa that Vallejo was indebted to him or his false swearing for the property he possesses: "That the only right way of swearing was by the priest, with the Catholic cross," and that "he was not afraid of the laws from the way the Americans swore witnesses."

Such testimony of admissions is of very little value, and is, generally, not worthy of regard; and the testimony as to character is so equally balanced that we do not feel at liberty to reject any portion of it for that reason. There are many more satisfactory tests of the truth of parol testimony than that of character of the witnesses. Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination *will generally involve the latter in a [*536 web of contradictions, which will be in a measure evaded by the other, with the answer that he "does not recollect." Where many witnesses are produced to the same facts, and they contradict one another in material circumstances, they prove themselves unworthy of credit.

It would be a tedious, and we believe an unnecessary task, to examine severally the testimony of the 120 witnesses examined in this case, and test their respective credibility on the principles we have stated. With the exception of a few remarks on the testimony of the witness already alluded to, we shall, therefore, content ourselves with stating the result of our examination, without an attempt to vindicate its correctness by exhibiting the process by which it has been attained.

Jose de la Rosa was called by the claimants and examined. Having sold to the claimants without general warranty, he was a competent witness. He was the person who might elucidate and explain the many difficulties and suspicious circumstances connected with this transaction, if they were capable of explanation. But, instead of it, we find his examination in chief exceedingly brief. He is asked to prove the signatures of Pico and Covarrubias from his knowledge of their signatures. He is then asked if he ever had in his possession this grant, and when and where he received it. To which he answers that "he received it from Don Mariano G. Vallejo, in Sonoma, in the latter part of December, 1845."

Hs is then asked if he ever had in his possession the certificate of approval, and when and where he received it. To which he answers that it was delivered to him by Vallejo in the beginning of the year 1846.

With this meager statement of matters, impossible to be contradicted except by Vallejo himself, the claimants conclude their examination in chief. The cross-examination fully confirms the wise caution of the claimant's counsel in not troubling the witness with too many questions.

When asked to explain his circumstances since 1846, he answers, that he is rich; that his wealth consists in money at present; formerly in horses, cows, oxen, houses, and land, and *a house in Sonoma. "Of mares and [*537 horses (he says) I have probably had five hundred, but not all at one time. From 1846 to 1847 I had 500 head of cattle;" that in 1846 he had four hundred upon the *rancho* of Julpines. Now, all this has been proved by numerous witnesses to be utterly false. It would be tedious to notice all the absurdities and contradictions of himself, to be found in this cross-examination, as to the mode in which he has disposed of his wealth.

With regard to the existence of this grant, Mariano G. Vallejo testifies that he received it by a courier from the governor in December, 1845; that he handed it to Rosa, "and he was much pleased." That this was the only paper

received by him, and that is all. On cross-examination, he said he had seen the petition before he saw it on the files of the Land Office, but not the approval.

Again; in answer to another question he denies ever having seen any paper but the grant at the time he received it, or afterwards, till he found the three papers connected together in the Land Office. In this he contradicts not only himself, but Rosa, who says he received the certificate of approval from him.

This testimony, instead of solving the difficulty as to the origin and history of this grant, leaves it in greater obscurity than it was before.

The testimony offered to prove the possession and improvements is so contradictory as to furnish material evidence of its untruth. One witness describes the house built by Rosa as made of poles; another declares that it was an adobe house, and that Rosa resided in it with his family; and as the house was near the Sacramento road, he had frequently seen them in it, and their cattle, horses, etc., on the land, up to the year 1849; another, that the house was more than 8 leagues from the road. One says that he lent Rosa horses to convey his family to the *rancho;* another, that he took them in a boat; while Rosa himself ignores the boat, and swears he had horses of his own, and had no need to borrow, and that his family or himself had never resided anywhere but in the town of Sonoma, forty miles distant from the land—some-
538*] times visiting his **rancho* for two or three days. Another, after swearing to the fact of residence by Rosa and family on the land, admits, on cross-examination, that he never saw the land.

The testimony for the United States establishes beyond a doubt that the whole of this testimony is a mere fabrication; that Rosa never resided on the land; that he had no cattle or horses, but lived in the town of Sonoma, a dependent of General Vallejo; with difficulty gaining a precarious support from his numerous avocations; always declaring to the tax assessors that he had no real property, except a small lot in Sonoma, and no personalty beyond a cow and a horse.

Thus far, the testimony produced by the claimants, instead of dispelling the suspicions attached to this grant, has only increased them —forcing on our minds the conviction that a grant attempted to be supported by perjury must necessarily itself be false.

The first public appearance of this claim, therefore, cannot be dated earlier than the 18th of March, 1853, when Jose de la Rosa makes his conveyance to the claimants, reciting this paper of 4th of December, 1845, for the alleged consideration of $15,000. This deed describes the land by boundaries, and is entirely silent as to quantity.

Now, we need not have recourse to the testimony of Rafael Guirado of the conversation overheard in the house of Vallejo between him and the claimants, and the alleged confessions of Vallejo with regard to this grant. Some doubts have been cast upon the character of this witness for veracity, and the testimony of such declarations and admissions is generally worthy of little reliance. Nevertheless, his story has an air of probability when connected with other evidence in the case, that forbids the conclusion that so great a simpleton as Guirado could ever have invented it.

The United States, in order to support this issue, are not bound to show by whom a scheme of fraud has been concocted, or how, when, and where, it was executed. It will be sufficient if they can show facts inconsistent with the allegation that the deed in contest existed on the day or year of its date. It is possible that the officers of the late government *may exe- [*539 cute grants since their power has ceased; and when called to prove their authenticity, may forget to mention the fact that their deeds are antedated. We regret to say that the testimony in this case justifies and demands this assertion.

Three facts, tending to prove the authenticity of this grant, are proved by claimants: (1) That the petition now produced in connection with the grant was signed by Jose de la Rosa; (2) that the marginal order on the same is in the handwriting of Covarrubias, the secretary, being the only instance in which he has been known to have acted as clerk to make such entry; (3) the *titulo* and certificate of approval are in his handwriting and signed by him.

Admitting these facts to be proved, we must inquire whether there is sufficient evidence to convince us that these documents were not executed at the time of their date, but some seven years thereafter.

I. We have already shown that this grant made its first public appearance in 1853, when it suddenly came forth, as is alleged, from the chest or pocket of Jose de la Rosa, and was immediately transferred to the claimants.

II. That the grantee himself, examined as a witness, can give no consistent or probable history of its origin, or why he had always lived in ignorance of it; or, if its existence was known to him, why he kept it a secret, or why a poor and garrulous old man should never mention it to friend or neighbor till about the date of its public appearance; or what possible motive could be found for a millionaire living as a pauper for so many years, and then disposing of his immense estate for a trifle.

III. We have shown, also, that the testimony of the witnesses, called to prove a long possession and claim under this title, is a tissue of falsehoods.

These facts alone would be sufficient to condemn this grant, and show that it had no existence before 1852; but if any doubts should still exist, that which remains to be stated will certainly dispel them.

IV. It is proved that the counsel to whom the claimants first made application for his services to obtain a confirmation *of this [*540 grant, on examination of the document presented to him as evidence of title, refused to be so employed, because the deed produced was a palpable forgery; that it was not the instrument now produced; that it had the signature of the secretary, Covarrubias, forged so badly that his name was twice misspelt in different ways, while the present is written by Covarrubias himself and is, consequently, free from such blunders.

It has been argued that this testimony should be rejected as incompetent, because counsel has revealed the secrets of his client. To this it is

answered that the relation never existed, the counsel having refused to stand in that relation to the claimants. The right of privilege from examination was neither claimed by the counsel nor by the claimant, and the witness being examined without objection, we are not required to decide how far a counselor who has been requested and refused to be a partaker with persons attempting to defraud the government may plead his privilege, and refuse to answer. Having answered, without objection, it cannot affect his credibility that he is willing to expose a fraud under these circumstances. As a witness, his testimony is unimpeached and uncontradicted, and unwillingly confirmed by Covarrubias.

V. When the application was made to Congress, the petition and certificate of approval do not appear to have been found, and were not annexed to the grant till it appeared on file in the land office.

VI. There is no attempt to account for the fact that the petition, instead of being annexed to the *espediente*, is found in the hands of claimants, and not among the archives, where the *espedientes* of all the authentic grants made in that year are found. To account for this fact, Covarrubias, in his first affidavit, testified "that it was the practice of the office to return the petition with the grant." But when his deposition was taken, with cross-examination, he is forced to confess the untruth of the first statement, and admits, what is a well known fact, that the petition formed part of the *espediente* always preserved on file among the archives.

VII. No trace of this grant is to be found among the archives of the government; it is not 541*] found on the registry of *grants for that year, while authentic grants made in that year and month, and day of the month, are found on the files and registry.

VIII. The seal on this paper differs from that found on authentic grants of the same date, and Covarrubias himself admits that there was but one seal used in the office while he was secretary. This seal, on careful examination by persons qualified to judge, is proved to be a forgery.

IX. The signature of Pio Pico and his rubric, when compared with a large number of his authentic signatures found in the archives, and those made on the same day in which the grant in question is dated, is found to differ in many particulars from that found on this paper. His official signatures are remarkable for their uniformity. Many excellent judges have carefully scrutinized and compared these signatures, and declare the signatures in question are forgeries. Two of them express the opinion that the person who wrote the body of the instruments made the signatures also.

We have ourselves been able to compare these signatures by means of photographic copies, and fully concur (from evidence "*oculis subjecta fidelibus*") that the seal and the signatures of Pico on this instrument are forgeries; and we are the more confirmed in this opinion by the testimony of Pico himself, found on the record. In a brief affidavit made on the 9th of June, 1853, he swears, without hesitation, that "the document bearing date December 4, 1845, was signed by him." But in his deposition taken in this cause on the 27th of February, 1857, while this issue was pending, he appears to testify with very great caution. He seems to have drawn out a certain formula of words on which it is clear that a conviction of perjury could never be sustained, whether his testimony was true or false. The answer is in these words, and three times repeated in the very same words:

"I cannot now remember in regard to the original document mentioned in said interrogatory, but the signature, as appears in the traced copy, appears to be my signature, and I believe it was placed there by me at the time the document bears date." His memory appears to be much weaker than his faith, as it *might [*542 have been supposed that such a sale of territory would have attracted his attention sufficiently to be remembered forever after.

X. This certificate of approval by the departmental assembly bears date at a time when the public records and minutes of that body show that it was not in session. It is dated on the 18th of December, 1845, and the resolution of approval appears to have passed on the 11th of the same month.

The records of the proceedings of the assembly at the close of 1845, and beginning of 1846, are preserved. They show that on the 8th of October, 1845—

"The sessions of the assembly were suspended for the rest of the year, in consequence of permission having been granted to the Senores deputies, who reside out of this capital, to retire to the places of their residence, in view of the injuries they must suffer in consequence of their salaries due them respectively, as functionaries, not being paid."

A publication of the foregoing in all the *pueblos* of the department was ordered to be made, October 11th, 1845.

The next session of the assembly, as shown by its journals, was on the 2d March, 1846. The journals state that the governor and certain deputies, who are named, had "assembled for the purpose of reopening the ordinary sessions, which, by a resolution of the body, had been suspended for the balance of last year, whereupon the proceedings of the 8th day of October of the last year were read and approved," etc.

It is evident that no ordinary session of the assembly was held on the 11th December, the day on which this grant is certified to have been approved.

It is contended, however, that extraordinary sessions were held, of which no record was kept and the testimony of several witnesses has been taken, to establish the fact.

But this attempt to supplement or falsify these records has wholly failed, and more especially as it appears that all the other grants admitted to be genuine, and which are of a date later than the adjournment, were presented and approved after the assembly reassembled, on the 2d of March, 1846; and the form of words used in the certificate of approval of this one *differs from the eleven others, dated [*543 between November 22d, 1845, and December 19th, 1845.

In conclusion, we must say that, after a careful examination of the testimony, we entertain no doubt that the title produced by the claim-

ants is false and forged; and that, as an inference or corollary from the facts now brought to our notice, it may be received as a general rule of decision, that no grant of land purporting to have issued from the late government of California should be received as genuine by the courts of the United States, unless it be found noted in the registers, or the *espediente*, or some part of it, be found on file among the archives, where other and genuine grants of the same year are found; and that owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of that government cannot be received to supply or contradict the public records or establish a title of which there is no trace to be found in the public archives.

Let the judgment of the District Court be affirmed.

GEORGE W. DAY, Bowen Matlock, Isaac H. Frothingham and George W. Warner, *Appts.*,
v.
WILLIAM A. WASHBURN and John A. Keith.

(See S. C. 23 How. 309-312.)

Motion to dismiss—when denied—merits.

Where the record suggests many points connected with the real merits, and in respect to proper pleadings in equity, which cannot be considered upon motion to dismiss, the court will refuse the motion, but will allow it to be brought to the notice of the court again, when the case shall be argued upon its merits.

Motion filed Apr. 20, 1860. Decided May 1, 1860.

APPEAL from the Circuit Court of the United States for the District of Indiana.

The case is sufficiently stated by the court.

On motion to dismiss.

Mr. **R. W. Thompson** for appellants.

Mr. Justice **Wayne** delivered the opinion of the court:

Albert G. Porter, Esquire, a counselor of this court, and who was concerned as counsel in the court below for certain petitioners, claiming an interest in the matter in controversy adversely to the appellants, asked to be permitted, as *amicus curiæ* to move for the dismissal of this appeal, alleging for cause that it had been irregularly brought to this court, in this particular, that the appeal had been taken only by a part of the complainants, and that such of them as had been omitted were not parties to the appeal.

The record discloses the following facts:

The appellants filed in the circuit court a bill to set aside, as fraudulent, a conveyance of property, and to subject it to the payment of their claims against William A. Washburn and associated with him as a defendant John A. Keith, the grantee of the conveyance. The bill was separately answered by Washburn and Keith, and proceedings were had in the case until at December term, in 1858, the issue was made up upon bill, answer, replication, and exhibits. 311*] At that term of *the court, December 21, 1858, a number of persons claiming also to be creditors of Washburn, filed a petition by their counsel, Hall, McDonald, and Porter, praying to be made parties to the bill, as complainants, and to be permitted to share in such distribution as might be made out of the property charged to have been fraudulently conveyed by Washburn to Keith, in the event of the courts decreeing that it had been so done, and that it was liable for the payment of Washburn's creditors. The court directed these petitioners to be made parties to the bill of the appellants, as complainants, and under that order the decree now appealed from was made.

But before the decree was rendered, the cause was referred to a master, to report the sums due to the creditors, as they were then appearing to be so in the original bill and other proceedings of the cause. It was done. Subsequently a decree was rendered, declaring Washburn's conveyance to Keith void and fraudulent. In consequence of it, a large sum was made out of the property and deposited in court for distribution. And the court decreed that it should be ratably distributed between the appellants and those other creditors of Washburn who by its orders had been made parties to the original bill. It is from this decree that the appellants have brought the case to this court. They had insisted, before the court rendered its decree, that being the original complainants, they were entitled to have their claims paid in full, and that the remainder of the fund might then be distributed, in the discretion of the court, *pro rata*, amongst the other creditors of Wasburn. But the court overruled the motion, and ordered the money to be paid ratably to the creditors. It is from this decision and decree that this appeal has been brought, so as to have it decided, whether, in the particular just mentioned, it is not erroneous.

It also appears that the appellants were judgment creditors of Washburn when they filed their bill to set aside his deed to Keith, and that the other creditors, who have been made participants in the fund to be distributed, are not so. And we gather from the proceedings in the cause, that their application to be made parties to the original bill was with the view *to defeat the appellants of any legal or [*312 equitable priority which they may have acquired for the payment of their claims over the other creditors, either from their being judgment creditors, or from their vigilance in first filing a bill to set aside the conveyance from Washburn to Keith. We do not mean now to decide those points upon this motion, nor any other point connected with the merits of this controversy. All such points will claim the attention of the court upon the argument of the case hereafter. The record also suggests an inquiry, whether those persons who were made parties to the original bill and who have become, by the decree of the court, participants in the fund to be distributed, were necessary parties to the bill, or were allowably so. in their then attitude in respect to their claims against Washburn. And in no other way can the question of right between themselves and these appellants in the fund be reached; for the former, having accomplished their purpose, for which they were made parties, are neither willing to appeal from the decree nor to be considered as parties to this appeal.

The record, indeed, suggests many points connected with the real merits of the controversy, and others in respect to proper pleadings in equity, which cannot be considered and de-

termined upon a motion to dismiss the appeal summarily for any irregularities in the process by which it has been brought to this court. We therefore refuse the motion for the dismission of the appeal, allowing it, however, to be brought to the notice of the court again, when the case shall be argued upon its merits.

This course has often been taken by this court upon a motion to dismiss a case, for irregularities in the appeal or writ of error, similarly circumstanced as this is.

THE UNITED STATES, *Appt.*,
v.
VICENTE P. GOMEZ.

(See S. C. 23 How. 326-341.)

Motion to dismiss—dismissal is not affirmance—effect of—order for dismissal, when vacated.

On motion of the Attorney General to vacate the order dismissing the cause, and to recall the mandate, it appeared that no appeal had been granted, and that the cause was not before this court when the appellee made his motion to docket and dismiss it. Motion granted.

A motion to docket and dismiss a cause from the failure of the appellant to file the record within the time required by the ruling of this court, when granted, is not an affirmance of the judgment of the court below.

It only remits the case to the court below, to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it.

That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus.

The case being before the court also upon a motion for mandamus, they will not consider it, because this court had no jurisdiction of the case when it was dismissed, and the appellee had no right to make that motion.

In a case in which the court had no jurisdiction, and the judgment in the court below had been obtained by contrivance, the court will vacate the order for the dismission of the case, and recall the mandate.

Argued Feb. 10 and Apr. 13, 1860. Decided May 1, 1860.

APPEAL from the District Court of the United States for the Southern District of California.

The case is sufficiently stated by the court. See, also, the opening statement in the abstract of appellee's brief given below.

Mr. **J. S. Black,** *Atty. Gen.*, for appellants,

Messrs. **R. H. Gillet, Reverdy Johnson,** and **D. E. Sickles,** for appellee:

This is a California land case, which was docketed and dismissed in the Supreme Court, and a mandate sent down to the district court for the southern district of California, where the cause was originally tried and decided in favor of Gomez.

There are now pending in this court four motions:

1. A motion by the Attorney General to vacate the order of dismissing the cause, and to recall the mandate.

2. A motion by Gomez, for a mandamus to the said district court, to compel it to file the mandate, and to remit the execution of the decree of the district court confirming said land claim.

3. A like motion by Gomez, for a like writ to compel the said district court to dismiss proceedings before it by the United States, to open the decree below, and to grant a new trial.

4. A motion for a mandamus to compel the surveyor general of California to survey the land comfirmed to Gomez by the decree of the district court.

These four motions are to be heard at the same time in this court:

First. An appellate court will not allow the clerk who sent up the transcript, to impeach his own record by *ex part* affidavits, or otherwise.

Second. The question whether Sloan & Hartman were the attorneys of Gomez in the district court. not having been denied by the latter, nor questioned by the court at the time, cannot now be inquired into by the opposite party.

Third. There is evidence of notice of prosecuting the appeal in the district court without reference to the paper signed Hartman & Sloan.

The appearance of the United States on the hearing is evidence of the service of notice, and they are estopped from setting up that they were not properly there. At all events it shows a waiver of notice, and stands upon the same ground as appeals and writs of error in the Supreme Court, where appearance has always been held sufficient, rendering a citation unnecessary.

Wood v. *Lide*, 4 Cranch, 180; *Brockett* v. *Brockett*, 2 How. 241; *Yeaton* v. *Lenow*, 7 Pet. 220; *Buckingham* v. *McLean*, 13 How. 150.

Fourth. The inferior court has no authority to determine whether the appellate tribunal had jurisdiction of the cause before it, but was bound to obey the mandate of the latter.

In *Skillern's Exec.* v. *May's Exec.* 6 Cranch, 267, this court said: "It is too late to question the jurisdiction of the circuit court, after the cause has been sent back by the mandate."

In *Ex parte Sibbald* v. *The U. S.* 12 Pet. 488, this court said: "The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate; they can examine it for no other purpose than execution; or give other or further relief; or review it upon any matter decided on appeal, for error apparent; or intermeddle with it further than to settle so much as has been remanded."

"After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate."

In *West* v. *Brashear*, 14 Pet. 51, this court said: "The mandate of the Supreme Court to the circuit court must be its guide in executing its judgment or decree on which it issued."

In *Chaires* v. *The U. S.* 3 How. 611, this court said: "The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done."

In the *Bradstreet Case*, 7 Pet. 634, this court granted a mandamus against Judge Conkling, requiring him to cause certain records to be made up in certain cases, and to enter judgment.

The authority to issue a mandamus, was considered in *Stafford* v. *The Union Bank of Louisiana*, 58 U. S. (17 How.) 275, 283.

Fifth. The court cannot now go behind its decision and reconsider it after the term at

which the cause was docketed and dismissed, the mandate having been issued and served.

Sixth. The court below had no authority to entertain and grant the motion of Gitchell to open the decree, reinstate the cause, and hear further testimony after the term at which the decree was made.

Ex parte Sibbald v. *The U. S.* 12 Pet. 488; *Cameron* v. *McRoberts*, 3 Wheat. 591.

Seventh. If the decree could be reopened and the cause reinstated, it could not be done upon the evidence and grounds stated in the judge's return.

Eighth. The defendants not applying to the court to consider and determine the question whether the cause was properly appealed from the land commission, the judge was not authorized to investigate and determine that matter on his own motion.

Ninth. Whether the cause was properly appealed and properly in the district court, cannot be tried here as an original question, and can only be heard upon appeal.

Tenth. The effect of recalling the mandate, and vacating the rule to dismiss the appeal, and refusing the writs of mandamus asked for, would continue and promote litigation, and withhold from an innocent purchaser his legal rights.

Eleventh. It is the duty of the surveyor general of California to survey this land claim.

Mr. Justice Wayne delivered the opinion of the court:

This cause was docketed and dismissed in this court upon the motion of the appellee, and a mandate sent to the district court from which the transcript of its record was obtained, for proceedings to be taken by that court to give the complainant the benefit of its confirmation to the land in question.

331*] *The Attorney General now moves for the rescission of the order of dismission, and that the mandate may be recalled.

He does so, alleging that no appeal had been granted to the United States, in the court below, by which the cause could be brought to this court for its revision; because there was then pending in the court below, when the claimant obtained the transcript, a motion for the review of the decree which had been given confirming the claimant's title; secondly, that the court had also under its advisement a motion concerning an appeal.

And the Attorney General further alleges that the appeal from the decision of the board of land commissioners rejecting the petition, and also that the appeal from the district court to this court, are fraudulent.

The charges as to the first two rest upon the records which the appellee presented to this court, to have the cause docketed and dismissed.

The Attorney General relies upon depositions and other papers which are on file in the district court for southern California, and which have been transmitted to this court by Judge Ogier, to establish the charge of a fraudulent combination between the then district attorney of the United States, Pacificus Ord, Esquire, and the claimant of the land in controversy, and his assignees, to allow them to obtain from the district court a reversal of the land commissioners' decree rejecting the claim.

W. C. Sims, the clerk of the district court for the southern district of California, deposes that the document on file, giving notice that the claimant intended to prosecute an appeal from the decree of the board of land commissioners, is in the handwriting of Mr. Ord, with the exception of the figures No. 278 and the signature of E. O. Crosby.

The purpose for which this affidavit was made is to show the interested connection between Mr. Ord and the claimant of the land, from the beginning of the institution of his suit to establish his right, and its influence upon the official conduct of Mr. Ord afterward, in every proceeding in the cause, after it had been removed from the northern district of California to the southern.

*Mr. Ord was originally the attorney [*332 of Gomez before the board of land commissioners, and filed his petition there as such on the 9th February, 1853. He was not then district attorney, but he became so on the 1st of July, 1854, before the land commissioners decided the case against his client. After his appointment, and after an order had been obtained, at his instance, to remove the cause from the northern district of California to the southern, of which he was the district attorney, and whilst the cause was pending in the latter, he took from Gomez, for the nominal consideration of $1.00, a transfer to himself for one half of the land in controversy. This Mr. Ord admits in his affidavit presented to this court by counsel. The conveyance to him bears date on the 24th of November, 1856. It was acknowledged on the same day, by Gomez, before a notary public of the county of San Francisco, and was, at the request of Mr. Ord, recorded in the county of Merced on the 26th November, 1857; was also filed for record in the county of Fresno on March 26th, 1858, and again recorded by Mr. Ord, in Monterey county, the 3d May, 1858. A copy of that conveyance is now before us. These dates show that no record of the conveyance to him was made until after the claim had been confirmed by the district judge, upon his representation that, as district attorney, there was no objection to its confirmation; in other words, that he thought the claim a valid claim, and was within the rulings of the court in other claims of the same kind.

We shall cite the notice in its words, for, as it had been in fact the subject of the court's action, and could not have been so without the knowledge of Mr. Ord, and without his agency, it devolves upon him the task to disprove the declarations of Mr. Hartman of the forgery of the name of the law firm of Hartman & Sloan to the paper. We ought to remark, however, that Mr. Sloan, of the firm, is not shown by any paper to have had any personal agency in the matter. The notice is: "Now, on this day, came the parties, the appellant by Hartman & Sloan, and the appellee by P. Ord, United States District Attorney: whereupon, on motion of the attorney of the appellant, it is ordered that the transcript and papers *transmitted [*333 from the northern district court be filed in this court, and that the petition for a review of the same be entered thereon, and that the claimant

have leave to proceed in said cause, the same as if it had been originally filed in this court." On the same day, a petition was filed for a confirmation of the claim.

After the confirmation of it in the manner as will hereafter be stated, Mr. Sloan, upon being told of the motion, and that it was signed by the firm of Sloan & Hartman, but, in fact, as if the style of their firm was Hartman & Sloan, made his affidavit under a commission instituted by Judge Ogier, that neither as a member of the firm of Sloan & Hartman, nor otherwise, was he ever retained or employed in the case; that he never wrote nor authorized to be written any petition or other paper in the case; that he never had seen such a petition; that he had never authorized anyone to use his own name, or that of the firm of Sloan & Hartman, in the case; and that, if the paper was signed as it is represented to be, it had been without any consultation with him, or his consent or approbation.

The notice for a review of the decision of the board of land commissioners by the district court, signed, as has been said, by E. O. Crosby, and wholly in the handwriting of Mr. Ord, was given after his connection as attorney for Gomez had ceased, and after he had become the half owner of the land. Mr. Crosby does not appear afterwards in the suit as the retained attorney of Gomez, nor does it appear in any other proceeding in the record of the case that he ever was so. It does not appear that Mr. Crosby was ever recognized by the land commissioners or by the district court as the attorney of Gomez, from which we infer, as the notice was in the handwriting of Mr. Ord, that Mr. Crosby was his agent for the purpose of obtaining a review of the case in the district court. Afterward, upon its being found out that the land in controversy was in the southern district of California, and not in the northern, a petition was filed for its removal to the southern district, which was granted.

At this point began those irregularities which, 334*] until *explained, must leave an unfavorable impression in respect to Mr. Ord's discharge of his official obligations to the United States.

The motion made for the removal of the cause to the southern district is said to have been signed by E. W. F. Sloan, Esquire, and presented by him in open court; and the order, said to have passed, recognizes that as a fact. On the same day, the firm of Hartman & Sloan is reported in the transcript to have filed a notice of appeal with the clerk of the district court for the southern district. The paper has all of the formality and substance which such a paper should have, but Hartman & Sloan deny the fact of having had any agency in making such a motion; and these separate affidavits would be sufficient to sustain their disclaimer, were it not, so far as Hartman is concerned, that his subsequent conduct in the case shows a connection between himself and Mr. Ord, which throws suspicion upon both; and that is agravated by Hartman's deposition, by that of other persons, and by the narrative given by Mr. Ord of his conduct in the suit.

Hartman then makes his affidavit, that he had no knowledge who made and caused the petition to be filed, nor by whose authority and direction the same was done. But he states that, whilst attending the June term of the southern district court in 1857, Mr. Ord, then United States District Attorney, asked him if he would do him the favor to present a claim to the court for confirmation, stating it was a case in which there would be no opposition on the part of the government. That, not suspecting there would be anything wrong about a claim to which the government had no objection, he consented to do so; that, on the same day, the court being in session, and he being seated at the bar table, Mr. Ord passed to him the transcript in the case of *Gomez* v. *United States*, which he read to the court without any remarks, supposing it to be the case of which Mr. Ord had spoken to him; that after he had finished reading it, Mr. Ord remarked to the court that there was no opposition upon the part of the government to a confirmation; whereupon the court replied, that there being no objection, the claim would *be con- [*335 firmed, as a matter of course. Mr. Hartman continues his narrative of his further connection with the case and with Mr. Ord, six months after, at the December term of the court, when it was held at Los Angeles. He says that then Mr. Ord remarked to him that it had been omitted, at the time of the confirmation of the claim, to have a decree signed by the judge; that Mr. Ord requested him to draw a decree, and to present it to the judge, to be signed *nunc pro tunc*. He says that he did so without knowing or suspecting that Mr. Ord had an interest in the land claimed by Gomez. This statement by Hartman of his agency in the confirmation of the claim, and in getting a decree upon it six months afterward at the instance of Mr. Ord, is denied by the latter in his affidavit, excepting as to his declaration to the court that the government had no objection to the confirmation of the decree. The latter he admits in stronger terms than have been given. We shall use the affidavit for other purposes, and will have it printed in connection with this opinion, in justice to Mr. Ord, that the relations between himself and Mr. Hartman may be properly estimated from their respective declarations concerning it, only remarking now that there is proof that Mr. Hartman had subsequently declared himself to have been the attorney of Gomez in the case; that he had been so in all that he had done in the case; and that he had charged and demanded a fee for his services. It is not necessary for us to attempt to reconcile these differences, but it has certainly turned out unfortunately for Mr. Ord, in raising a violent presumption, from the manner in which they acted in the cause, that there was a concert between them to reverse the decision of the commissioners, and to obtain a decree in the district court for the claimant.

Besides the motion of the Attorney General to vacate the order dismissing the cause, and to recall the mandate, a motion has been filed by the claimant for a mandamus to compel the judge of the district court to file the mandate, and to permit the execution of the decree confirming the claim. Another motion has also been made by the claimant for a mandamus to compel the judge to dismiss the proceedings before it upon the part of the United States, to

336*] open the decree, and to *obtain a new trial. And there is also a third motion for a mandamus to compel the surveyor general to survey the land confirmed to Gomez.

We shall not go into the consideration of these motions, but will confine ourselves to that of the Attorney General, using, however, such depositions as have been made under each of them, which correspond with and confirm the record presented to the court by the appellee, when he moved to have the cause docketed and dismissed.

Judge Ogier, in a return made to the first motion for a mandamus, certifies that the cause was tried by him upon the appeal from the land commissioners, and that he gave a judgment confirming the claim under the following circumstances:

Mr. Hartman presented the cause to the court, stating only its title and its number upon the docket, and Mr. Ord appeared for the government, and stated that there was no objection by the United States to its confirmation. As a matter of course, without inquiry or examination, that he directed a judgment of confirmation to be entered, but that no decree was given at that term of the court, nor was a motion made for one, or any motion for an appeal by the United States to the Supreme Court. At a subsequent term of the court, E. J. McKewen, representing Mr. Ord, made a motion for an appeal in this cause and in several others; that, being then in doubt if an appeal could be given after the expiration of the term of the court at which judgment was rendered, he took the subject under an advisement, and that then Mr. McKewen suggested that the same point was under consideration in another case before the Supreme Court, which determined him to reserve his decision until that point was ruled here; then that Mr. Hartman offered a judgment of confirmation, Mr. Ord assenting thereto, on behalf of the United States, and it was ordered.

The case remained in this condition, the right of the United States to an appeal being reserved until the 7th day of December, 1858, when Mr. Gitchell, having succeeded Mr. Ord as district attorney, filed a motion for leave to withdraw Mr. McKewen's motion for leave to appeal, and also filed another motion for a rehearing of the 337*] cause, substituting the last for a *motion which had been made by Mr. Stanton, then in San Francisco, and also representing the United States as its specially retained attorney. A day was then fixed, with the consent of all the parties, for hearing the pending motion. When the day arrived, Mr. Gitchell made a motion for a continuance, with an affidavit setting forth that the decree which had been given for the confirmation of the claim had been fraudulently obtained from the court, Mr. Ord having become the owner of half the land in controversy by a conveyance from the claimant, and that he had conspired with Gomez, or his assignees, to permit the judgment to be given for Gomez without a contest on the part of the United States. A copy of the conveyance from Gomez was filed with the consent of the claimant.

Mr. Gitchell's motion for a continuance was refused on the ground that the proper motion under his charges was to ask for leave to file a bill of review. But Judge Ogier, feeling and thinking that he had improvidently given a judgment of confirmation, did continue the hearing of the motions to obtain proofs, if any could be had, concerning the contrivance by which he had been imposed upon. A commission was issued by him for that purpose, and under it Mr. Sloan made the affidavit denying all connection and attorneyship for Gomez, as has already been recited in this opinion. The case then remained in the district court as it was when the motions which were made, without any further action upon that for an appeal.

This narrative has been given from documents, depositions, and declarations of the parties concerned in the case, and also by other persons, apparently disinterested, in respect to the land. They will be found either on the record upon which the cause was docketed and dismissed in this court, or in the book of exhibits sent to this court by Judge Ogier, which were obtained to enable him to act understandingly upon the merits of the case. The case being still before the court, we do not perceive any irregularity in the proceedings. Besides the motion for granting the appeal, the court had jurisdiction of the cause to determine what proceedings the claimant was entitled to, *under the circumstances of the case, [*338 to get the benefit of the decree, by survey or otherwise.

We will now proceed to show, from the record of the case filed in this court by the claimant, and from the official declarations of the clerk of the district court from whom the record was obtained, that this court had no jurisdiction in the case when it was docketed and dismissed.

Mr. Sims, the clerk of the court, deposes that in this case a transcript was called for by letter, signed W. W. McGarrahan; that, when that letter was received, no appeal had been allowed to carry the case to the Supreme Court, and that a motion for that purpose was still under the advisement of the court. The deputy-clerk, Mr. Coleman, however, sent to McGarrahan a transcript, which was received by McGarrahan; and that not being satisfactory, it was returned to the clerk, with a letter from McGarrahan, stating in what particulars it was deficient; and among them, that it was deficient in not having a copy of the order for an appeal to the Supreme Court, which McGarrahan suggested would be found on the minutes of the court. To this letter a reply was given by Mr. Stetson, who had succeeded Mr. Coleman as deputy, containing an order for an appeal, as it appears on the transcript before us. It is difficult to determine how such an order found its way into the second transcript of the record, when it was not in the first, and when the clerk deposes that no such order had ever been given. The order for an appeal may have been drawn in anticipation of the action of the court upon the pending motions, and left in the clerk's office unintentionally, and supposed by the deputy-clerk to have been passed by the court, or it may have been drawn by Mr. Ord and left in the office, to keep up the semblance of his having faithfully represented the United States in the case, or it may be that some one of the parties interested in the land had surreptitiously placed it in the transcript to accomplish the purpose of having the case docketed and dismissed in this court. Dates will, in some

measure, throw light upon the matter. It was written and dated on the same day that the court took under its advisement the motion relating to the appeal. Such antagonism in 339*] *the action of the court upon the same subject-matter of such importance as this was, would, indeed, be extraordinary; and the record shows that it does not exist.

It is a delicate and most unwelcome task which we are performing; but it must be done in order that violated justice may be vindicated, and that official purity of conduct in our courts may be preserved and be unsuspected.

The record upon which this case was docketed and dismissed, in connection with the book of exhibits sent to this court by Judge Ogier, establish, in our view, the following facts:

That Mr. Ord became the purchaser of half the land in controversy from Gomez, the claimant, when he was the district attorney of the United States; that whilst he was district attorney, he prepared in his own hand the paper signed by S. O. Crosby, for the removal of the cause from the board of land commissioners to the district court; that Mr. Ord did not, officially, as district attorney, represent the United States in the case in the district court, in any one particular, but allowed it to be done by others, who were interested in establishing the claim of Gomez, to whom he gave his official confidence, and who are shown by the record not to have been the retained attorney of Gomez; that he permitted a judgment to be taken against the United States without argument, or the production of proof to establish the validity of the claimant's right to the land, by saying to the court, in his official character, that the United States had no objection to the confirmation of the claim. And it is established by the record itself that no appeal has been given to the United States by the court below. Mr. Ord admits that he relies upon the declaration only of the person to whom he confided the order which he drew for an appeal, that it had been granted by the court.

Under such circumstances, we conclude that no appeal had been granted; that the cause was not before us when the appellee made his motion to docket and dismiss it.

A motion to docket and dismiss a cause from the failure of the appellant to file the record 340*] within the time required by the *rule of this court, when granted, is not an affirmance of the judgment of the court below. It remits the case to the court to have proceedings to carry that judgment into effect, if in the condition of the case there is nothing to prevent it. That is for the consideration of the judge in the court below, with which this court has nothing to do, unless his denial of such a motion gives to the party concerned a right to the writ of mandamus. The case is before us, also, upon such a motion, but we do not consider it upon the ground that this court had no jurisdiction of the case when it was docketed and dismissed, and that the appellee had no right to make that motion, under the rule of this court. All that we shall now do will be to correct an irregularity in the order given by this court in a case in which we believe it had no jurisdiction, and because the circumstances of it disclose that the judgment in the court below had been obtained by contrivance, and with the consent of the district attorney, in violation of his obligations to the United States, from which he necessarily anticipated a benefit, being then owner of half the land in controversy.

In vacating the order for the dismission of the case, and recalling the mandate, we do no more than to correct a proceeding improvidently allowed by the court, under a misrepresentation to it of the actual condition of the cause in the court below. Orders of the same kind for misrepresentation have often been made and allowed. We cite two cases from the English reports. In *Stewart* v. *Agnew*, in Shaw's Reports, it was held to be incompetent to repeal a case formerly argued, and on which judgment had been pronounced by the House of Lords, but that the judgment might be amended on a point in which no decision had been given by the court of session, and on which no argument had been had, through misrepresentation stated in the House of Lords by the party against whom the judgment was pronounced. 1 Shaw, App. Cas. 413.

In *Ex parte White* v. *Courtenay*, 4 H. of L. Cas. 313, it was ruled upon petition that a judgment of the House given on appeal cannot be reversed; but when such appeal and judgment have been obtained by suppression *and [*341 misrepresentation, the House will afterwards discharge the order granting leave to appeal, and the order constituting the judgment thereon.

Much was said in the argument of this motion concerning declarations and a correspondence of the Attorney General in relation to an appeal having been taken in the court below for the United States. It matters not what they were, or how the attorney treated the matter, if he was deceived as to the actual fact of an appeal having been allowed. If it turns out to be that it had not been, any admission to the contrary cannot affect the United States.

Since the case was argued, the counsel for the claimant, with the consent of the Attorney General, has placed before us an affidavit made by Mr. Ord, in explanation of his conduct in the trial of the cause in the district court, embracing his connection with Gomez, and his purchase from him of half of the land in controversy. We believe it to be proper to give him the benefit of his own narrative and, therefore, shall direct his affidavit to be printed in the forthcoming volume of the reports of this term of the court, with this opinion. (See Appendix to this volume.)

We direct that the order for docketing and dismissing this cause shall be vacated, and that the mandate which followed it shall be recalled.

The motion of the Attorney General for such purpose is granted.

THE STATE OF ALABAMA, *Compt.*,
v.
THE STATE OF GEORGIA.

(See S. C. 23 How. 505–515.)

Cession to the United States of Georgia—extent of—line of, on Chattahoochee river—navigation of river.

By the contract of cession between the United States and Georgia, Georgia ceded to the United

States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee river and along the western bank thereof.

This language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.

The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water as expressed in the conclusion of the preceding paragraph.

By the contract of cession, the navigation of the river is free to both parties.

Argued Dec. 14, 1859. Decided May 1, 1860.

THE bill in this case was filed in this court, under its original jurisdiction, by the State of Alabama against the State of Georgia, for the purpose of ascertaining the boundary line between said States.

The facts involved in the case sufficiently appear in the opinion of the court.

Messrs. **E. S. Dargan, P. Phillipps,** and —— **Belser,** for complainant:

The object of the bill is to ascertain and fix the precise line that separates Alabama from the state of Georgia.

The decision in the case of *Howard* v. *Ingersoll*, 13 How. 381, does not fix the line with such degree of certainty as to enable either state to say without controversy, here is the limit of my jurisdiction. For this purpose this bill is filed.

The legal question depends upon the construction of the compact or deed of cession by which Georgia ceded to the United States her right and jurisdiction to the territory that now forms the state of Alabama, north of the 31st degree north latitude. The particular words are, "beginning on the western bank of the Chattahoochee river, where the same crosses the line between the United States and Spain, running thence up said river Chattahoochee and along the western bank thereof," etc.

To fix the precise point let us commence at the beginning.

On the western bank of the Chattahoochee river, where the same crosses the line between the United States and Spain, running thence up said river Chattahoochee and along the western bank thereof, etc.

This point must be on the bank and where the river crosses said line. To fix the point, therefore, we must find the line that separated the United States from Spain at the time the deed was executed. This line was the 31st degree of north latitude, and the beginning point was where the river crosses this line. Therefore, we must go to the river on this line and drive our beginning stake. This stake must be at the river, but on the bank. Is it to be driven at high or low water mark? That question will solve the case. For if at low-water mark there is nothing which will justify diverging from low to high water in our ascent up the river, and *e converso*, if we are to begin at high-water mark, taking the deed for our guide, we cannot fix this stake at any point other than at the usual or common low-water mark; for it would be unreasonable to suppose that the parties to the deed of cession contemplated either very high or very low water. They meant the river in its usual or ordinary state or condition, and along the line of the river but on the bank in the then condition of the river, they intended the land should run.

If we are to look to the word "bank," we find that this term, properly understood, will fix the line at the same point. This means the rising ground above low-water mark, or ordinary low-water mark, and which is usually covered by high water or freshets. True it is that at some places the bank may be almost perpendicular, and rise many feet above the highest flow of the water; but such places are most usually and aptly called bluffs.

Such being the meaning of the term, all must see at once that it is an indefinite guide, when we seek by it to fix on a precise point of locality; for the term "bank of a river" may cover more or less space; at some places it may be but a few feet, at others it may cover a space from fifty to a hundred yards.

Vattel, pp. 263, 264.

"If the terms used by the contracting parties be vague or indefinite, or if they are susceptible of a more or less extended signification, we should look to the nature of the things to which these terms relate, and presume the intention of the parties to be in accordance with reason and equity."

I assert that locating the line at high-water mark would be detrimental to Alabama and without benefit to Georgia, because on the banks of the Chattahoochee have sprung up towns and villages, and the space between high and low water mark is used for landings, etc. If Alabama has no jurisdiction over this space, she cannot punish for crimes or offenses there committed, and it must be done by Georgia. This would be alike inconvenient to Georgia and prejudicial to Alabama; hence the convenience of the parties, as well as reason and equity, designate the line of low or ordinary water as the line intended by the parties.

Handly v. *Anthony*, 5 Wheat. 374.

The case of *Howard* v. *Ingersoll*, 13 How. 381, I do not conceive to be an authority upon the question presented in this case. The court were unanimous in reversing that case, but the opinion settles nothing as regards this.

[The following propositions and authorities were also given by the counsel for the complainants:]

By the common-law rule, the riparian owners of land have the center of the river as their boundary, where the river is not navigable. Rivers not navigable are those not affected by the ebb and flow of the tide.

Hendrick v. *Cook*, 4 Ga. 242; *Bullock* v. *Wilson*, 2 Port. 436; *Ex parte Jennings*, 6 Cow. 528.

To limit this general right of ownership, there must be a clear and distinct reservation. If this is left in doubt, the general right will prevail.

Deerfield v. *Arms*, 17 Pick. 42; *Morgan* v. *Reading*, 3 Sm. & M. 405; *Middleton* v. *Pritchard*, 3 Scam. 521; Vatt. Law Nat. 121.

The "shores" and "banks" have the same significance. The former applies to that portion

of a river where the tide ebbs and flows; the latter, to the portion of the land between high and low water mark, where the tide does not ebb and flow.

Starr v. *Child*, 20 Wend. 152; 4 Hill, 376; *Arnold* v. *Mundy*, 1 Halst. 1.

To exclude the general right of the riparian, it is not sufficient to describe a line "running down the stream by certain courses and distances," if they are not marked on the ground, nor by the designation of marked lines or monuments, standing on the "margin of the stream."

Cockrell v. *McQuinn*, 4 Mon. 64; *Bruce* v. *Taylor*, 2 J. J. Marsh. 161; *Cold Springs* v. *Tolland*, 9 Cush. 495; *Coovert* v. *O'Conner*, 8 Watts, 470.

The mere description of a boundary as on, or to, or by a "bank," will not exclude a stream, any more than the boundary on the margin of a stream.

Ang. Wat. 22; *Ex parte Jennings*, 6 Cow. 536; *Lamb* v. *Rickets*, 11 Ohio, 314.

Having regard to the parties to the grant, and the use to which the granted premises were to be applied, the construction must be the same as if the lands were described as lying to the west of the river.

Handly v. *Anthony*, 5 Wheat. 374; *Garner's case*, 3 Gratt. 655.

Act of Congress, 7th April, 1798.

Messrs. **Charles J. McDonald, C. C. Gibson,** and **L. Stevens,** for the defendant:

After stating the case substantially as the complainants' counsel stated it, the counsel said: Georgia contends that there is no room for interpretation, and that the language taken in its usual, common sense, is intelligible and well understood, and cannot be made plainer by any interpretation.

It is respectfully contended that these articles are to be acted upon by this court and considered in the same light as independent sovereignties ought rightfully to act upon and regard them, in deciding for themselves under the law of nations. It is a great and leading maxim of the law of nations, that it is not permitted to interpret what has no need of interpretation.

Vattel, II. ch. 17, § 263.

Counsel referred to the dictionaries of Walker and Webster as to the meaning of the word "bank." The language used imports that the line through the entire distance over which the controversy extends, is *on* the bank of the river, on its surface, and that the bank supports it; and that because, for a part of this distance, the bank is inundated at times, while for the balance, the water never reaches its summit, does not vary the case. The bank is there, and the line is on it, unmoved by floods or ebbs. Every bank must have a lower margin, a side and a summit, and it follows that an object placed on the bank can be neither on its lower margin nor on its side, but on its summit. The bank of a river is that outer bed line so marked by the running of the water of the river that "it requires no scientific exploration to find or mark it out. The eye traces it in going up or down the river in any stage of the water."

Howard v. *Ingersoll*, 13 How. 381.

This outer bed line most usually distinguishes itself by an acclivity rising above and from the well marked bed of a river, readily discerned by the eye from the appearance and condition of the soil, and in the meaning of the terms of this cession, most clearly, a line "on" and "along," this bank, is upon the most elevated part or place of that acclivity.

But it is contended that the word "bank" has another meaning, which would place it on the margin of the stream when from the drought it had receded to its lowest point; or that the bank of the river is made the boundary by the articles of agreement, and not a line of the bank. As such a pretension is made, we must seek for what was probably the intention of those who drew up the agreement.

Vattel, II. ch. 17, § 270.

It is to be presumed that superfluous words are never used in such treaties; but if the construction contended for by Alabama be correct, the following words are without meaning: "of a line beginning on the western bank of," and "along the western bank thereof;" for, by simple ceding all the jurisdiction and soil west of Chattahoochee river, the territory west of the river would have been ceded, and no part of the river. It could never have been the intention of the parties, therefore, that the line should run along on the low-water mark of the river.

Counsel then referred to the Constitution of Georgia, 1798; the act of the legislature of Georgia, February, 1799, empowering certain commissioners to sell to the United States all or any part of the territory, etc., etc., and the act of the succeeding session of the legislature, appointing an additional commissioner, as sustaining his view that the state of Georgia never intended to relinquish any part of its right to the jurisdiction of the Chattahoochee river.

The government of the United States in this transaction was not obtaining a cession from a stranger. That government held nothing in antagonistic interest with Georgia, could not covet aught of Georgia she did not will to pass, nothing that did not comport both with her interest and dignity to cede. It could not have entered into the purposes of the United States to accept such a grant as this, that should ever receive "an extensive interpretation." Clearly the United States did not purpose to become either the sole or joint owner, with Georgia, of any part of the Chattahoochee river, and we claim as a just conclusion in the consideration of this cause, upon well established principles, that it was the duty of the United States to have explained herself clearly and fully, and to have inserted in the cession such terms as would have fully notified Georgia that it was the purpose of the United States government to acquire "jurisdiction and soil;" in that part of the bed of the Chattahoochee river that lies west of the low-water mark of the river.

Vattel, II. ch. 17, § 245.

It is a sufficient reply to the claims set up in this bill, in behalf of the citizens of Alabama living upon and owning the lands adjoining the Chattahoochee river, that if citizens live upon the soil of Georgia, their allegiance is to Georgia, and she holds herself amply able and always ready to protect them in all that might be prejudicial to them.

Mr. Justice **Wayne** delivered the opinion of the court:

This case involves a question of boundary between the states of Alabama and Georgia.

Alabama claims that its boundary commences on the west side of the Chattahoochee river at a point where it enters the state of Florida; from thence up the river along the low-water mark, on the western side thereof, to the point on Miller's Bend, next above the place where Uchee creek empties into such river; thence in a line to Nickajack, on Tennessee river.

Georgia denies that the line intended by the cession of her western territory to the United States runs along the usual low-water mark of the perennial stream of the Chattahoochee river, but that the state of Georgia's boundary line is a line up the river, on and along its western bank, and that the ownership and jurisdiction of Georgia in the soil of the river extends over to the water line of the fast western bank, which, with the eastern bank of the river, makes the bed of the river.

511*] *The difference between the two states must be decided by the construction which this court shall give to the following words of the contract of cession: "West of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof."

In making such construction, it is necessary to keep in mind that there was by the contract of cession a mutual relinquishment of claims by the contracting parties, the United States ceding to Georgia all its right, title, etc., to the territory lying east of that line, and Georgia ceding to the United States all its right and title to the territory west of it.

We believe that the boundary can be satisfactorily determined and run in this suit, from the pleadings of the parties, notwithstanding their difference as to the locality and direction of it on the Chattahoochee river.

Georgia is interrogated in certain particulars in the bill, which the complainant thinks will produce answers illustrative of the right of Alabama to the boundary which is claimed. Georgia answers them separately, having previously given a correct and literal copy of the contract. It is as follows: "The state of Georgia cedes to the United States all the right, title and claim, which the said state has to the jurisdiction and soil of the lands situated within the boundaries of the United States south of the state of Tennessee, and west of a line beginning on the western bank of the Chattahoochee river, where the same crosses the boundary line between the United States and Spain; running thence up the said river Chattahoochee, and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee (being the first considerable stream on the western side above the Cussetas and Coweta towns) empties into the said Chattahoochee river; thence in a direct line to Nickajack, on the Tennessee river; thence crossing the said last mentioned river; and thence running up the said Tennessee river and along the western bank thereof, to the southern boundary line of Tennessee."

In answer to the first question, Georgia ad-512*] mits what is *alleged in the bill in relation to the definition of the boundaries of the territory of Alabama by an act of Congress, passed in 1817, and the subsequent grant of admission of the state of Alabama into the Union with the same boundaries in the year 1819; and the conclusion from it is, simply, that the eastern boundary line of Alabama is the western boundary line of Georgia, but that, so far as that line runs along the western bank of the Chattahoochee river, Georgia denies that it runs along the usual or low-water mark; but, on the contrary, Georgia contends that it runs along the western bank at high-water mark, using high-water mark in the sense of the highest water line of the river's bed; or, in other words, the highest water line of that bed, where the passage of water is sufficiently frequent to be marked by a difference in soil and vegetable growth.

Georgia also answers affirmatively the other interrogatory in the bill with the same qualification, that what she claims is a right to exercise jurisdiction over all lands up to the water line of the western bank of the river's bed.

Georgia also says that, while she regards the description of the banks of the river given in the bill as highly drawn, she admits it to be more applicable to the southern part of the bank than to that part of it sixty or seventy miles above the thirty-first degree of north latitude. It is admitted that in some places the banks are flat, but that in other places, especially in the upper portion of the river, the banks are generally steep and well defined, so much so as to be familiarly known as the "Bluffs of the Chattahoochee;" and that the banks of the river in a number of places along the dividing line between the two states are low and flat, and that in freshets the water spreads as far as half a mile beyond the line to the west, and in a few places further than the western line of the river's bed, over low lands, which Georgia does not claim to be under its jurisdiction.

These declarations and admissions upon the part of Georgia simplify the controversy, and narrow it to the claim of the respective parties, as heretofore set forth.

The contract of cession must be interpreted by the words *of it, according to their [*513 received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, and the writings of publicists in reference to the settlement of controversies between nations and states as to their ownership and jurisdiction on the soil of rivers within their banks and beds. Such authorities are to be found in cases in our own country, and in those of every nation in Europe.

Woolrych defines a river to be a body of flowing water of no specific dimensions—larger than a brook or rivulet, less than a sea—a running stream, pent on each side by walls or banks.

Grotius, ch. 2, 18, says a river that separates two jurisdictions is not to be considered barely as water, but as water confined in such and such banks, and running in such and such channel. Hence, there is water having a bank and a bed, over which the water flows, called its channel, meaning, by the word "channel," the place where the river flows, including the whole breadth of the river.

Bouvier says banks of rivers contain the river in its natural channel, where there is the greatest flow of water.

Vattel says that the bed belongs to the owner of the river. It is the running water of a river

that makes its bed; for it is that, and that only, which leaves its indelible mark to be readily traced by the eye; and wherever that mark is left, there is the river's bed. It may not be there to-day, but it was there yesterday; and when the occasion comes, it must and will—unobstructed—again fill its own natural bed. Again, he says, the owner of a river is entitled to its whole bed, for the bed is a part of the river.

Mr. Justice Story, in *Thomas* v. *Hatch*, 3 Sumn. 178, defines shores or flats to be the space between the margin of the water at a low stage, and the banks to be what contains it in its greatest flow; Lord Hale defines the term "shore" to be synonymous with flat, and substitutes the latter for that expression. Mr. Justice Parker does the same, in *Storer* v. *Freeman*, 6 Mass. 436, 439.

Chief Justice Marshall says the shore of a **514***] river borders on *the water's edge; and the rule of law, as declared by the court in 5 Wheat. 379, is, that when a great river is a boundary between two nations or states, if the original property is not in either, and there be no convention about it, each holds to the middle of the stream.

Virginia, in her deed of cession to the United States of the territory northwest of the Ohio, fixed the boundary of that state at low-water mark on the north side of the Ohio; and it remains the limit of that state and Kentucky, as well as of the states adjacent, formed out of that territory. 3 Dana (Ky.) 278, 279; 5 Wheat. 378; Code of Virginia, 1849, pp. 49, 34; 1 St. Ohio, 62. By compact between Virginia and Kentucky, the navigation is free. A like compact exists between New York and New Jersey, as to the Hudson river and waters of the Bay of New York and adjacent waters.

Webster's definition of a bank is a steep declivity rising from a river or lake, considered so when descending, and called acclivity when ascending.

Doctor Johnson defines the word "bank" to be the earth arising on each side of a water. We say properly the shore of the sea and the bank of a river, brook, or small water. In the writings of our English classics, the two words are more frequently used in those senses; for instance, as when boats and vessels are approaching the shore to communicate with those who are upon the banks.

Bailey, in his edition of the Universal Latin Lexicon of Facciolatus and Forcellinus, says that ripa, the bank of a river, is *extremitas terræ quod aqua alluitur et proprie dicitur de flumine: ut litus de mare, nam hoc depressum est declive atque humile, ripa altior fere est præruptior;* and again, *ripa recte definitur id quod flumen continet, naturalem vigorem cursus sui tenens.*

Notwithstanding that there are differences of expression in the preceding citations, they all concur as to what a river is; what its banks are; that they are distinct from the shore or flat, and as to what constitutes its channel.

With these authorities and the pleadings of this suit in view, all of us reject the low-water **515***] mark claimed by Alabama *as the line that was intended by the contract of cession between the United States and Georgia. And all of us concur in this conclusion, that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee river where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee river and along the western bank thereof.

We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.

The western line of the cession on the Chattahoochee river must be traced on the water line of the acclivity of the western bank, and along that bank where that is defined; and in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as that is expressed in the conclusion of the preceding paragraph of this opinion.

By the contract of cession, the navigation of the river is free to both parties.

It was accordingly ordered, adjudged, and decreed by this court, that the bill of complaint be dismissed, and that each party pay its own costs in this court; and it is further ordered by this court, that the clerk do forthwith send to the Executive of each of the aforegoing states a certified copy of this decree.

THE UNITED STATES, *Appt.*,
v.
ELLEN E. WHITE, Administratrix of Charles White, Deceased.

(See S. C. 23 How. 249–255.)

Lands—government will not litigate rights of contesting claimants—necessary parties.

Where the case involved the title of Miranda, as contradictory to the title of Ortega; held, that the United States officers are not bound to settle this dispute between these parties in these proceedings. Nor should either party be permitted to carry on their litigation, by assuming to act for the government.

Nor can this court be thus compelled, on an appeal by the Attorney General, to become the arbiters of a dispute in which the government has no concern.

The act of Congress (3d March, 1851, § 13), points out the mode in which contesting claimants may litigate their respective rights to a patent from the government.

Instead of an appeal to this court to settle the rights of M. in a proceeding in which he is no party, the claimants under him, if there be any, should proceed in the mode pointed out by the act.

Decree of the district court reversed and set aside, and the record remitted without intimating an opinion as to the validity of the grant to O.

Argued Feb. 1, 1860. *Decided May 4, 1860.*

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by Charles White, for the confirmation to him of a claim to a certain tract of land.

The board of commissioners entered a decree confirming the claim. The district court having affirmed this decree, on appeal, the United States took an appeal to this court.

The facts, upon which the decision in this court rests, appear in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **J. J. Crittenden** for appellants.

Messrs. **E. L. Goold, C. Cushing, V. E. Howard, R. H. Gillet,** and **P. Phillips** for appellee.

The argument, being confined to the evidence, is not here given.

Mr. Justice Grier delivered the opinion of the court:

It is clear, from the evidence in this case, that, as against the United States, either Ortega or Miranda has a just claim to a confirmation of his title to the tract in dispute. But whether Ortega was landlord, and Miranda his tenant, or which of the claimants has attempted to overreach the other, are questions in which the government has no interest. The United States officers are not bound to settle this dispute between these parties in these proceedings. Nor should either party be permitted to carry on their litigation, by assuming to act for the government, and thus take the advantage of their opponents, by fighting under its shield and at its expense. The district attorney of California had neither interest nor authority to represent Miranda in order to defeat Ortega; nor can this court be thus compelled, on an appeal by the Attorney General, to become the arbiters of disputes in which the government has no concern.

The patent, issued in pursuance of the act of Congress, which authorizes these proceedings, is conclusive only between the United States and the claimants. It does not affect the interest of third parties.

The act of Congress (3d March, 1851, § 13) points out the mode in which contesting claimants may litigate their respective rights to a patent from the government.

Instead of an appeal to this court to settle the rights of Miranda in a proceeding in which he is no party, the claimants under him, if there be any, should proceed in the mode pointed out by the act, which provides: "That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the **254*]** same; a copy of which petition shall *be served upon the adverse party, thirty days before the time appointed for hearing the same. And it shall and may be lawful for the district judge, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same until the title thereto shall have been finally decided; a copy of which order shall be transmitted to the Commissioner of the General Land Office; and thereupon no patent shall issue until such decision has been made," etc.

It appears from the record that Valentine, who purchased the title of Miranda at sheriff's sale, had filed his claim before the board of commissioners for confirmation, and afterwards withdrew his petition. Now, if Miranda or his assignee makes no claim; if he admits the tenancy, and does not allege that Ortega has fraudulently overreached him, the government surely has no right to claim that the land shall be considered as part of the public domain. It cannot set up Miranda to defeat Ortega, or the contrary, admitting, as it must, that either of them can show a claim worthy of confirmation in the absence of the other. Nor can third persons be admitted to interfere, to use the claim of one to defeat the other.

If the heirs or assigns of Miranda object to the issuing of the patent to Ortega or his assigns their remedy is clearly pointed out. They can have their rights tried where the witnesses are known, where they may be examined *ore tenus* before the court, or before a jury, if the court chooses so to order. They have a far better tribunal to settle this question than if they were permitted to appeal to this court, to guess out the truth from conflicting depositions.

Now, if this court should enter a judgment affirming that of the district court, it would appear as if we had decided the title of Ortega to be superior to that of Miranda, and that Miranda was the tenant of Ortega. This we are unwilling to do: for, if there be bona fide claimants of the Miranda title, such a judgment might seem to conclude them. Nor can we reverse the judgment, for this would imply that we consider Miranda had the better title, and that he or his assignees *might be justi- [***255** fied in attempting to get the judgment of this court in their favor, in this oblique and irregular manner, under the protection of the Attorney General.

We have concluded, therefore, to remand the record to the district court, with directions to suspend further proceedings till the heirs or assigns of Juan Miranda, if they see fit so to do, may have an opportunity to contest the claim under Ortega, according to the provisions of the 13th section of the act of 3d March, 1861, entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," and have such further proceedings as to justice and right may appertain.

And now, to wit, May 1, 1860, the court, having reconsidered the opinion and order before made in this case, do now order and adjudge that the decree of the district court in favor of the appellees be reversed and set aside, and the record remitted for further proceedings in the case.

We do this that the district court may not be trammeled in their future consideration of the case on all its merits, but without intimating an opinion as to the validity of the grant to Antonio Ortega. It is due to the Attorney General to say that, on the argument of the case, he challenged this grant as fraudulent; and it is because we do not think the whole evidence on that point was fully developed on the former trial below, that this order is made.

BENJAMIN HANEY, Charles Ogden and John Trenchard, *Libts. and Appts.*,
v.
THE BALTIMORE STEAM PACKET COMPANY, Owners of the Steamers Louisiana and George W. Russell.

(See S. C. 23 How. 287-309.)

Collision—rules of navigation—lookout.

Collision between steamboat and schooner.

The schooner kept on her course; the steamer did not diverge from her course till within ten seconds or less of a collision, and then the order on the steamer was to starboard the helm, instead of porting it, in contravention of the rules of navigation.

The steamer had a right to pass on either side, but it was her duty to keep clear and give a wide berth to the sailing vessel; having neglected this duty till the danger of a collision was imminent, such a movement only increased the danger of a collision.

Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts stationed in proper places on the vessels.

Elevated positions, such as the hurricane deck, are not so favorable situations as those on the forward deck, near the stem.

Argued Apr. 26, 1860. Decided May 4, 1860.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed in the district court of the United States for the district of Maryland, by the appellants, to recover damages resulting from a collision. The district court entered a decree in favor of the libellants. This decree, on appeal, was reversed by the circuit court, and a decree entered dismissing the libel; whereupon the libellants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **Wm. Mead Addison** and **R. R. Battee**, for appellants:

1. It is the right and duty of sailing vessels when meeting steamers, to hold their course, and of the steamers, to give way to them.

St. John v. *Paine*, 10 How. 583; *The Oregon* v. *Rocca*, 59 U. S. (18 How.) 572.

2. The schooner, from the time the steamer hove in sight until a moment or two before the collision, steadily held her course. The answers of the defendants; the evidence of the witnesses for the defense, and the evidence of the libellants, all concur in this; and there is not a witness who alleges the contrary.

3. It was the right of the schooner to change her course, when her continuing to hold it would have caused her to be run down.

N. Y. & Liverpool U. S. Mail Steamship Co. v. *Rumball*, 62 U. S. (21 How.) 372.

4. If the danger of being run down was imminent, and the schooner made a false maneuver when a right one would have saved her, even then the steamer is responsible; for she ought not needlessly to have run so close to the schooner as to excite such well founded apprehensions of danger, as to have disturbed the judgment of those in charge of her.

The Genesee Chief, 12 How. 444.

5. The account of the disaster set up in the answer, and given by Captain Russell and second mate, Ward, is incredible, because it is impossible it can be correct.

6. The schooner, in attempting to avoid the steamer, turned to the right, and thus conformed to the rule of navigation established and promulgated by the Supreme Court, in the case of *The Oregon* v. *Rocca*, 59 U. S. (18 How.) 572; *The Friends*, 1 W. Rob. 479.

7. The steamer violated said rule by turning to the left, and thereby caused the collision.

8. There was not on the steamer "a trustworthy and constant lookout," "whose whole business was to discern vessels ahead or approaching." The omission is, prima facie, evidence that the steamer is in fault.

The New York v. *Rea*, 59 U. S. (18 How.) 225; *Genesee Chief*, 12 How. 449; *Chamberlain* v. *Ward*, 62 U. S. (21 How.) 458; 10 How. 585.

The pretended lookout was stationed in the pilot house, and not in the forward part of the vessel, where he should have been.

Newton v. *Stebbins*, 10 How. 607; *St. John* v. *Paine*, 10 How. 585; *Chamberlain* v. *Ward*, 62 U. S. (21 How.) 571.

9. The person alleged to have been acting as lookout, was not "actually and vigilantly employed in his duty as lookout" (12 How. 459); but was, in effect, the helmsman.

10. The fact that the steamer was engaged in carrying the United States Mail, furnishes no excuse for proceeding at a speed endangering the lives and property of citizens.

The Rose, 2 W. Rob. 3; *The Iron Duke*, 2 W. Rob. 385; *Rogers* v. *The St. Charles*, 60 U. S. (19 How.) 112.

11. In cases of collision between steamers and sailing vessels, prima facie "the steamer is chargeable with fault." "The exception to this rule must be clearly established by strong circumstances, to excuse the steamer."

New York & Virginia Steamship Co. v. *Calderwood*, 60 U. S. (19 How.) 246; *The Oregon* v. *Rocca*, 59 U. S. (18 How.) 572.

Mr. **Wm. Schley**, for appellees:

In support of the decree of the circuit court, the appellee respectfully insists:

1. The change of the course of the schooner was the proximate and only cause of the collision; and if such change had not been made, the vessels would have passed each other in safety.

2. The change of course on the part of the schooner at the time and under the circumstances, was a gross and inexcusable fault.

3. The pilot house on the steamer Louisiana was the best position for the lookout on the steamer; and there was no want of care and no error of judgment on board the steamer in this respect.

Mr. Justice **Grier** delivered the opinion of the court:

The appellants, owners of a schooner called The William K. Perrin, charge in their libel that between nine and ten o'clock of the evening of 20th of February, 1858, as the schooner, laden with oysters, was on her way down the Chesapeake bay, she was run into and sunk by the steamboat Louisiana; that it was a bright, moonlight night, and the schooner, though of only forty-three tons burden and deeply laden, could be and was seen at the distance of a mile.

The answer admits the collision and the

NOTE.—*Collision; right of steam and sailing vessels with reference to each other, and in passing and meeting.*—See notes to 13 L. ed. U. S. 537; 35 L. ed. U. S. 453; 30 C. C. A. 630.

result of it. It admits, also, the schooner was seen at the distance of two or three miles; that the steamer was proceeding at the rate of fourteen miles an hour, "heading due north," and the schooner holding her course nearly due south. But it alleges, as an excuse, that while the steamboat and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bows of the steamer.

This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false.

There is not the usual conflict of testimony in this case; for the single person on board of the steamer who was able to give any account of the collision, who acted as pilot, and by whose want of vigilance and skill the collision was caused, does not materially contradict, but rather confirms, the testimony of the libellants.

The facts of the case are as follows:

292*] *The steamer Louisiana, of eleven hundred tons burden and five hundred horse power, was on her way coming up the wide bay of the Chesapeake, steering a due north course, between nine and ten o'clock at night. The small heavy-laden schooner is seen two or three miles off, coming in an opposite direction. The captain of the steamer (whose theory of action appears from his own testimony to be, that all small vessels are bound at their peril to get out of the way of a large steamer carrying the United States mail) although he had seen the schooner, and knew that the vessels were approximating at the rate of over twenty miles an hour, retires to the cabin. It was his watch and his duty to be on deck as officer of the deck. He leaves on deck one man, besides the colored man at the wheel, to act as pilot, lookout, and officer of the deck. These two persons constituted the whole crew on duty, besides firemen and engineers. This person who had to perform these treble functions was the second mate. His theory is that the best place for a lookout is in the pilot house, where, he says, "I generally lean out of the window, and have an unobstructed view." Accordingly, as pilot, he remained in the pilot house to direct the steersman; and as lookout, he occasionally leaned out of the window.

The result shows the value of this theory with regard to the place and person proper for a lookout. The schooner kept on her course, as the rules of navigation required her to do, on the presumption that the steamer would diverge from her course so as to leave a free berth to the schooner, as it was the duty of the pilot of the steamer to do. The boats were approximating at the rate of six hundred yards a minute, or one hundred yards in ten seconds. A slight turn of the wheel of the steamboat, if given in due season, would have left a wide berth for the schooner. But this, by his own account, was neglected by this pilot and lookout, till within ten seconds or less of a collision; and then the order was to starboard the helm, instead of porting it, in direct contravention of the rules of navigation.

The steamer, it is true, had a right to pass on either side, and it was her duty to keep 293*] clear and give a wide berth to the *sailing vessel; but having neglected this duty till the danger of a collision was so imminent that it was probable the schooner would be making some movement to avoid destruction, such a movement only increased the danger of a collision.

The man at the wheel of the schooner had his orders to keep steady on his course south. It is proved, without contradiction, that this order was strictly complied with till the pilot or steersman heard the noise of the steamer's wheels; and being warned of her approach by the lookout, he looked under the boom, and discovered the steamer almost on him; when, in order to save his own life and the lives of the crew, he ported his helm and received the blow on the larboard side the schooner, near the stern, instead of the bow. The point of collision confirms, beyond a doubt, this view of the case.

The hypothesis set forth in the answer to excuse this collision, that the boats were passing on parallel lines, three hundred yards apart, and that, when within one hundred or one hundred and fifty yards of passing each other, the schooner turned round and run herself under the bows of the steamer, is not only grossly improbable in itself, but contradicted by the testimony, and is a mathematical impossibility.

With this pregnant example of the value of the theory of lookouts contended for in this case, let us compare it with the rules established by this court. Without referring to the numerous cases, the correct doctrine on this subject will be found laid down by Mr. Justice Clifford, in delivering the opinion of this court in *Chamberlain* v. *Ward*, 21 How. 570.

"Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts stationed in proper places on the vessel." They must "be persons of suitable experience, and actually and vigilantly employed on that duty." "In general, elevated positions, such as the hurricane deck, are not so favorable situations as those more usually selected on the forward deck, near the stem." "Persons stationed on the forward deck are less likely to overlook small vessels deeply laden, and more readily ascertain their exact course and movement."

The entire disregard of these rules of navigation by the *steamer, and the conse- [*294 quent destruction of property, demonstrate their correctness and utility.

In fine, we are of the opinion that the collision in this case, and destruction of the schooner Perrin, was caused wholly by the negligence and inattention to their duties of the officers who navigated The Louisiana, and that the steamboat should be condemned to pay the whole damage incurred by the said collision.

Let the decree of the Circuit Court, reversing the decree of the District Court, be reversed.

Mr. Chief Justice **Taney**, dissenting:

I dissent from the judgment of the court. It is a case of collision on the Chesapeake bay, and involves principles and rules of decision of great interest in the navigation of its waters, where sailing vessels and steam vessels are continually meeting and passing each other in the night as well as in the day. I think it my duty, therefore, to state the principles of law and the evidence in the case, upon which my opinion has been formed.

The rules of law applicable to a case of this description, as established by this court, I understand to be the following:

1. The vessels, whether sailing vessels or steamboats, must be manned and in charge of a crew competent to navigate them on the voyage in which they respectively engaged.

2. It is the duty of each vessel to have a lookout, acquainted with his duty, and faithfully discharging it, and stationed at that part of the vessel which will best enable him to see any impending danger, and promptly warn the helmsman of the point from which it is approaching.

3. It is the duty of a sailing vessel, when meeting a steamboat, to keep on her course, unless she is prevented by the change or direction of the wind; and it is the duty of the steamboat to keep out of her way, passing on the starboard or larboard side, as the steamboat may prefer.

4. Each vessel has a right to act on the presumption that the other knows its duty, and will act accordingly. But if the steamboat fails to shape her course to avoid the sailing 295*] vessel, *in proper time and at a sufficient distance, the steamboat is answerable for the disaster, although the collision may, in fact, have been produced by an erroneous movement made by the sailing vessel in the moment of peril, and intended to avert the impending danger.

5. The distance at which a steamboat should pass must in some degree depend on the wind and weather, and on the light or darkness of the time and the size of the respective vessels. And, in order to excuse an erroneous movement on the part of the sailing vessel, the proximity of the steamboat, her course and speed, must be such that a mariner of ordinary firmness, and competent skill and knowledge, would deem it necessary to alter his course to enable his vessel to pass in safety. But, in order to justify this, the dangerous proximity must be produced altogether by the steamboat.

These principles and rules of navigation are distinctly laid down in the cases of *The Genesee Chief* v. *Fitzhugh*, 12 How. 461, and *The N. Y. & Liverpool U. S. Mail St. Co.* v. *Rumball*, 21 How. 383, 384, and have been recognized and maintained by this court in many other cases of collision between steamboats and sailing vessels. It would be tedious, and is unnecessary, to enumerate them, as they all affirm the same rules of navigation.

I have stated them in separate propositions, because it is of the first importance that they should be clearly defined and understood. And impartial justice requires that they should be administered and enforced where they apply to the sailing vessel, as well as to those propelled by steam. Indeed, it is impossible for the steamboat to perform its duty of keeping out of the way at a safe distance, unless the sailing vessel performs its duty by keeping steadily on her course when the wind will permit. And those who intrust their property in sailing vessels, or their cargoes to the care of persons ignorant of their duty, or incompetent in any other respect, have no just right to ask that others who have committed no fault should be compelled to share in their loss.

Keeping in view these established laws of navigation, I proceed to examine as briefly as I can the testimony; and first *the con- [*296 duct and management of the schooner Perrin, the sailing vessel.

The collision took place near the mouth of the Rappahannock, at about ten o'clock on the night of the 28th of February, 1858. It was a moonlight night, and a vessel under sail, without lights, could be seen at the distance of three or four miles.

The schooner was an oyster boat, of about forty tons burden, and about sixty feet long, and eighteen feet beam. She belonged to Philadelphia, and had obtained a cargo of oysters in the Patuxent river, and sailed from the river about two o'clock of the day above mentioned, down the bay, for the capes of the Chesapeake, bound for her home port. It was a cold night, the wind from the northwest, a stiff breeze, nearly fair, but coming rather from the western land. The sails of the schooner were consequently spread out on her larboard side—that is, on her eastern side, as she went down the bay. She moved at the rate of six or seven miles an hour. Her crew consisted of Charles Ogden, captain, and five other persons, including the oystermen on board; and the latter, when not dredging for oysters, assisted in navigating the vessel.

At half past eight o'clock, on the night of the disaster, the captain and all of the crew, except the witnesses, William J. Miles and Charles Cory, went below to sleep; and from that time until the collision, no one but these two men were on deck, or assisted in any way to navigate the vessel and, therefore, have no knowledge of what led to the disaster.

In weighing the testimony given by these two witnesses, it must be borne in mind that both of them have a direct interest in the result of the case, and will share largely in the damages that they may, by their testimony, recover from the steamboat. Cory says, that two thirds of the oysters belonged to Miles and himself, and Ogden, the captain, after one third and the expenses were taken out. Each of these witnesses, therefore, is giving testimony in his own cause to support his own claim; and they are substantially parties prosecuting the suit, although they appear only as witnesses in the record. They may be admissible from necessity. But it is a departure and *excep- [*297 tion to the general rules of evidence, long and well established in courts of common law and equity, and goes always strongly to their credit; and the facts stated by such witnesses, as well as their manner of stating them, are carefully scrutinized by courts of justice, in considering the case. The wisdom and custom of the common-law rule will, I think be apparent when we examine the testimony of Cory and Miles.

Cory's account of himself is this: He has been following the water as an oysterman four years and a half, during the oyster season; and on such occasions, when he is not dredging for oysters, it is a part of his duty to help to navigate the vessel and to help to look out, and he is always in one of the watches. But he had never before been down the bay below the Patuxent. He was the lookout and the only one, in this part of the voyage. He says he saw the steamboat when about three or three and a half miles off; that he was walking on the larboard—that is, the leeward and eastern side of

the vessel, and saw the steamboat between the night head and fore shroud of the schooner; and she was to the leeward, larboard and eastward; and that, immediately upon seeing her, he said to Miles, the helmsman, "Hadn't you better keep away?"—and, about five minutes afterwards, asked him again, if he hadn't better keep away; and receiving no answer to either question, he seems to have supposed that he had performed his whole duty as a loookout; for he appears to have made no further effort to communicate with the helmsman, and to have taken no further concern in the navigation of the vessel, before the collision happened.

It is evident from this testimony, given by the witness himself, that he was utterly unfit for a lookout, and performed none of his duties. He was not at the bow or near the head of the vessel, nor even on the windward side, where the sails would not have obstructed his view ahead, but was walking on her larboard or leeward side, and must have been aft of the foremast, as he first saw The Louisiana between the night head and the fore shroud. This was no place for a lookout, for the foresail and head sails were directly before him, and made it **298*]** *impossible for him to see the bearing or distance of any vessel approaching directly ahead, or on her larboard or eastern bow. And although he swears that he did, notwithstanding these obstacles, see her to the leeward and eastward of his vessel, he obviously contradicts himself, when he immediately after states that he twice advised the helmsman to alter his course more to the east; for if he really thought the steamboat bore to the east of south, his advice to the helmsman was to put to the schooner directly in her way, instead of avoiding her; nor can the slightest reliance be placed upon his statement that the steamboat was to the eastward, or that the schooner was standing due south when he first saw the steamboat, or that she did not change her course until she luffed to the west a moment or two before the collision; for he had no compass before him; had never before been in that part of the bay, and under such circumstances could form no accurate judgment of the cardinal points of the compass. It was simply impossible that he could know whether the steamboat bore some points to the east or west of south, or that his vessel was heading due south, or two or three points to the east or to the west of south; or whether she did not vary in her course two or three points as she was approaching the steamboat before she changed directly to the west.

It would seem that he placed himself on the larboard side under the lee of the mainsail to shelter himself from the cold northwest wind, and in that situation it is literally impossible that he could know the precise course the schooner steered, or the bearing of the steamboat when he first saw her, and as he approached her; and it is equally impossible that he should have given the advice he did to the helmsman, if he really thought the steamboat bore east from the schooner.

The testimony of Miles, the only other material witness for the libellants, will show that he was as unfit for a helmsman as Cory was for a lookout, and that the facts he states are as little to be relied on.

He says he has been following the water as an oysterman thirteen or fourteen years, and accustomed to take the helm for the last four or five years; and it does not appear that he *was ever before in that part of the [***299** Chesapeake bay; he was standing on the larboard side of the vessel, the same side with the sails, with his right hand on the helm, and from his position could see nothing ahead without going upon one knee, and looking under the boom; and when Cory told him there was a light ahead, he looked under the boom, and saw the Louisiana about one half or three quarters of a point to the eastward of the schooner.

Now, when he saw the steamer approaching, it was his duty, according to the repeated decisions of this court, to stand by his helm, with his eye on the compass, and keep the vessel steadily in her course, and rely on the lookout for information as to the approach and bearing of the steamboat; his own course at the time, he says, was due south.

But instead of doing this, he immediately took upon himself the additional duty of lookout, under circumstances that made it impossible he could perform either. He was on his knee from a half to three quarters of an hour before the collision took place, watching the steamboat under the boom of his vessel. He says, indeed, that he did not watch her all the time, but watched his course; yet he tells us the boom was only three or three and one half feet from the deck and, therefore, in order to look under it, he was obliged not only to go on his knee, but to bring his head down to within two or three feet of the deck; and in that posture, while watching the steamboat, it was absolutely impossible for him to know the exact course he was then steering, or form a correct judgment of the distance or bearing of the steamboat, for the compass was hid from him by the sides of the binnacle in which it stood, and his view ahead, and on the eastern bow of his vessel, obstructed by the foresail and head sails, which were spread out on the same side. And when he speaks of bearings and distances, he speaks, necessarily, not by the compass, but from vague conjectures, and states facts of which he could have no certain knowledge, and was not in a situation to form an opinion upon which any reliance could be placed. He admits that where he stood, with the compass before him, he could not *see the Louisiana, and consequently [***300** could not see how she bore by the compass.

Again; he says Cory was looking out at the time of the collision, and was a competent lookout; yet his own testimony shows that he did not think so, nor placed the slightest confidence in him; for as soon as Cory reported the steamboat in sight, he took upon himself the duty of lookout, as well as helmsman, although he was at the stern of the vessel, and could see nothing ahead except under the boom. And from the time the Louisiana came in sight, he was so absorbed in these double duties, or confused and bewildered by the appearance of the steamboat, that he does not appear to have remembered there was such a person as Cory on deck; he asked no information from him, and did not even hear him when he twice advised him to keep his vessel off; yet Cory was standing within a few feet of him, with nothing but the main sail between them.

and he had heard readily and distinctly when he reported to him that the steamboat was in sight.

He says he kept his course due south. I have already said he could not know the fact, as a large portion of his time was passed in watching the steamboat, with his head in a position which made it impossible for him to see his compass. And with his right hand on the helm, and stooping low on the larboard side to see under the boom, his right arm would naturally and necessarily follow the movement of his body to the larboard, and draw the tiller with it, and cause the vessel from time to time, with such a strong wind pressing on her mainsail, to head towards the west, and edge nearer and nearer to the due north line in which the Louisiana was moving, and thus, by his own incapacity and fault, produce the proximity which so much alarmed him, and induced him suddenly to change his course to the west. It is true, the lookout on board the Louisiana says she appeared to be standing south, and that he did not observe any change until she suddenly luffed to the west. But Captain Russell states, and every seaman knows, that you cannot, in the night, determine the precise course which an approaching vessel ahead is steering; and coming, as this schooner did, with a free wind, she **301*]** might *frequently vary from her general course, from time to time, one or two points, for two or three minutes, and the most vigilant lookout on the steamboat fail to discover it or observe it; yet, at the speed at which she was going, she would, by the slightest movement of the helm to the larboard, or the least relaxation of the hold of the helmsman, head more to the west, and approach nearer to the line of the steamboat, and increase the danger of a collision.

Indeed, Miles admits that his vessel did vary a little, but not enough, he says, to take her from her course; he does not, however, tell us how much she varied, nor what variance he thinks necessary to take her from her course, nor how long it continued, nor in what direction. It is obvious, from what he says of his own position and movements, that every variation from her general course must have been towards the west.

I do not think it necessary to comment further on the evidence given by these two witnesses. Testifying in the manner I have stated, and under the influence of a direct pecuniary interest in the result, I cannot think their statements would be entitled to any weight against the steamboat, even if uncontradicted by other testimony; but in all of its essential parts it is contradicted by disinterested witnesses who were on board of the Louisiana, and I proceed briefly to state the testimony of Captain Russell, and Ward, the second mate, who are the only two material witnesses on behalf of the steamboat. The disaster happened in the captain's watch, during which the second mate, Ward, was the lookout, and charged with the running of the vessel; the wheelsman was a colored man, and could not, therefore, be examined as a witness; but it is abundantly proved that he was an experienced wheelsman, and accustomed to perform that duty on steamboats, and was fully competent and trustworthy.

Captain Russell and the mate have for many years been engaged in the navigation of steamboats up and down the bay, at all seasons of the year; are both pilots of long experience, and well acquainted with the dangers to be apprehended, and are accustomed to meet and pass vessels at all hours of the night *and of the day. Neither of them have [*302 any pecuniary interest in the result of this controversy, and they are both men of undoubted character for intelligence and veracity.

It has indeed been said, that the answer of Captain Russell to the libel, and his testimony as a witness, contradict one another, and that, on that account, credit ought not to be given to his testimony; but I can see no discrepancy between them. In his answer, he speaks in general terms of the disaster and the causes which led to it, and that is all that was proper or usual to state in an answer. When examined as a witness, he enters more minutely into the circumstances, and mentions his momentary absence from the deck just before The Perrin changed her course to the west, but there is no contradiction or discrepancy in this; and it is hardly just to a witness to select a detached sentence from the answer, and another from the testimony, to show an apparent contradiction, when the two papers, read throughout, are perfectly consistent with each other, and substantially the same; and in both his answer and his deposition as a witness he supports and confirms the testimony of Ward, the lookout, in every fact material to the decision of the case. Ward says he was stationed in the wheelhouse, or pilot house, as the place is indifferently called; the house is about sixty feet from the bow, upon the upper deck, and elevated about twenty-five feet; he stood by the side of the wheelsman on the larboard side of the house, and the wheelsman on the starboard, about four feet from him; and the compass was in the wheel-house, in front of the wheelsman.

It has been argued that the lookout ought to have been at the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court must always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout is obviously a question of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed, and the hazards she is *likely to encounter, and [*303 must, like every other question of fact, be determined by the court upon the testimony of witnesses—that is, upon the testimony of nautical men of experience and judgment. It cannot, in the nature of things, be judicially known to the court as a matter of law. All that the law prescribes is the rule that the lookout shall be stationed in that part of the vessel where he can most conveniently and effectually discharge the duty with which he is charged. And all of the experienced pilots who have been examined as witnesses in this case, accustomed to the navigation of the bay, well acquainted with the form and construction of the Louisiana, unite in testifying that the place where Ward was stationed was the best and most suitable;

and they point out the serious disadvantages that might arise from stationing him at the bow. There can hardly be a rule of law which requires a steamboat to station a lookout in a place where he cannot effectually perform his duty. In a vessel propelled by sails, he is uniformly stationed at the bow, because, in any other part of the vessel, his view ahead would be obstructed by the head sails and rigging. But this reason does not apply to steamboats constructed like the Louisiana.

Taking it, therefore, as fully established by proof, that Ward, the lookout, was competent, and stationed in the proper place, I proceed to state his testimony, which is as follows:

He saw the schooner when about three or four miles off. The steamboat was heading a due north course, and the schooner appeared to be heading south, and bore by the compass north half east on the starboard (eastern) side of the steamboat. When the two vessels approached within the distance of three or four hundred yards, the schooner bore north one point east on the starboard side of The Louisiana; and when within about one hundred and fifty yards of the schooner, in order to give a wider space in passing, he headed the steamboat north by west, which left the schooner bearing two points east on her starboard bow. He had just steadied his boat in this course when he discovered that the schooner altered her course, and was heading west across the bay, and continued to hold that course until the col- **304*]** lision took place. The moment he *discovered that the schooner had changed her course, he gave the signal to stop and back, which was instantly obeyed. But the vessels came together before the headway of the steamboat was entirely stopped.

The testimony of this witness, supported as it is by that of Captain Russell, can hardly be impeached by such testimony as that which has been given by such witnesses as Cory and Miles.

And I regard this as the true history of the disaster, and of the movements of the vessels by which it was produced.

The facts established by this proof, that the schooner bore north half east when first seen at the distance of three or four miles, and north one point east when at the distance of about three hundred yards, show that, from the causes I have before mentioned, she had not maintained her course due south during that time, but had been luffing and edging to the west, so as to bring her nearer and nearer to the due north line in which the steamboat was steering; for, if they had approached each other in parallel lines, the schooner would have borne more and more to the east, and would have been directly east when they passed, and would, therefore, when within three hundred yards, have borne more than one point to the east of north. But even then, if she had continued to hold her course due south, and the steamboat had continued hers due north, they would have passed in safety, but nearer, indeed, than a steam vessel of the size of the Louisiana ought to pass so small a vessel as the oyster boat. But when the steamboat changed her course one degree more to the west, it is evident that they would have passed each other, not only in safety, but at a convenient and sufficient distance; for, it will be observed, that, for the distance of one hundred and fifty yards at which the steamboat changed her course, she was proceeding slowly, backing with all the force of her machinery, and with so much effect that her headway was nearly stopped when they came in contact. This is proved by the character of the injury inflicted. It is true that the side of the schooner was broken in, and an opening made, through which the water rushed in, and filled and sunk her in a few minutes. The witnesses for the libellants, *who examined the schooner at Norfolk [***305** after she had been raised and carried into port, say that the blow "had hit the main beam across the break of the quarter, and split it—knocked the knees out from each side of it, and cut her down to light water mark." But it did not even upset her. Cory, indeed, says that her stern was driven under the water. But Miles, who was at the stern, does not support him. On the contrary, he says the blow threw him to the windward (that is, to the opposite side), and that he went up the rigging of his vessel until he got on the bow of the steamboat. He does not intimate that he was in danger of being washed overboard or plunged into the water. Now, with the immense weight and size of The Louisiana, coming stem on, against the broadside of the comparatively slender and frail timbers and planks of this little oyster boat, if the headway of the steamboat had not been very nearly stopped before she struck the schooner, the injury inflicted must have been much greater than that described by the witnesses. If she had been moving at even one third of her ordinary speed, she would unquestionably have buried this little boat in the water, and passed over her. These facts, of themselves, show that her rate of speed for these one hundred and fifty yards, taking it all together, could not have averaged, at the outside, more than four or five miles an hour.

Now, the schooner changed her course to directly west almost simultaneously with the reversal of the engine of the steamboat, approaching her line of movement nearly at a right angle, and was moving from east directly west during the time the steamboat was passing over this one hundred and fifty yards. She was moving, also, with equal or greater speed, for all of the witnesses agree that she was sailing at the rate of six or seven miles an hour; and when she changed her course to west, she was in full headway, with all sails set, and must have maintained, during that time, at least very nearly the speed at which she had before been sailing; and this being the case, she must, in order to bring the vessels into contact, have passed nearly the same distance to the west which the steamboat, while backing, had passed to the north—that is, one hundred and fifty yards; and consequently, if she had held on her course, would *have passed at that dis- [***306** tance, or nearly so, to the eastward of the steamboat.

It has, indeed, been said that the collision was immediate after the change of course by the schooner, and the backing of the steamboat; and calculations have been presented to show that it must have been so, because, from the combined speed of the two vessels, taken together, the one hundred and fifty yards would be passed over in a few seconds. But this argument has no foundation in the evidence; for the

steamer was not proceeding at her ordinary speed, but backing all the way, and had nearly stopped when she came in contact with the schooner. And the latter vessel was not meeting her from an opposite direction, but standing directly across her path, leaving the steamboat to pass over these one hundred and fifty yards, and at the reduced rate of speed of which I have spoken, before the vessels could come together.

In reference to this part of the evidence, it is, perhaps, hardly necessary to notice the evidence of Miles, who says they were within thirty yards of the steamboat when he changed his course to the west. No one, I presume, will think that his testimony in this respect is entitled to any weight, when in conflict with the testimony of Captain Russell and the mate, Ward, who were both in a position to see perfectly what was before them, and accustomed, by long experience, to measure distances on the water by the eye, while Miles was looking under the boom of his mainsail with his head near the deck, and his vision obstructed by the sails and rigging of his own vessel. He was in no position to form a correct judgment of distances any more than of bearings; and even Cory contradicts him, and says that "we did not change our course until we were within one hundred and fifty yards, if, indeed, we were more than one hundred yards from the Louisiana." He, in effect, corroborates the testimony of Captain Russell and Ward.

It has been said, also, that the steamboat ought to have slowed her speed before she approached so near as one hundred and fifty yards to the sailing vessel. But this argument loses sight of the fact that, until the schooner changed her course to the west, those on board of the steamboat had no reason to suppose that 307*] *there was the slightest danger of collision, or any reason for slackening her ordinary speed. They had a right to presume, and, indeed, were bound to presume, that the schooner would steadily hold on the course she was steering, and the steamboat had shaped its course to keep out of her way, and pass her at a safe and convenient distance. And the moment they discovered that the schooner had changed her course, and was heading in a direction that might produce collision, she instantly stopped and backed, and took every measure in her power to avert the danger. But until the change of course by the schooner, there could be no reason and no obligation whatever to slacken her speed; for it can hardly be supposed that a steamboat is bound to stop or slacken her speed whenever she sees a sailing vessel coming in an opposite direction, and wait to see whether she will conform to the rule laid down by this court, and hold her course, or suddenly change it to cross the line in which the steamboat is moving. Such a rule would make steamboat navigation of very little value on the Chesapeake. But unless such is to be the rule, I can see no ground for imputing it as a fault to the steamboat that she did not slacken her speed until she came within one hundred and fifty yards, when it is admitted that the schooner did not change her course to the west until she had come within that distance of the steamboat.

As relates to the general rate of speed of the steamboat, no one acquainted with the navigation of the Chesapeake has ever suggested or supposed that it was dangerous to life or property on that wide bay; and there is no evidence from which such an inference can be drawn. The fact that the Louisiana carried the mail, and was obliged to proceed at the rate of fourteen or fifteen miles an hour, in order to fulfil her contract, certainly gave her no rights or privileges beyond those of any other steam vessel, nor exempted her in any degree from the care, caution and watchfulness in speed, as well as in everything else, required of others. The fact that a contract was made is perhaps some evidence that the public authorities of the United States, having all the means of information within their reach, were satisfied that the rate *of speed required was not dangerous to [*308 the life or property of our citizens who are accustomed to navigate the bay.

It is unnecessary to remark upon the testimony given by the captain of the Keyser, which sailed from the Patuxent in company with the Perrin. He was, he says, three quarters of a mile off, and could in the night, even by moonlight, have no certain and accurate knowledge of the bearing of the colliding objects towards each other as they approached, or the particular incidents of the collision; the more especially as both vessels were ahead of him, and to leeward and hidden from him by his own sails as he stood at his helm. He says, too, that before the collision he paid very little attention, and what he did see was by looking under his boom.

Neither do I attach any importance to conversations and statements made on board the Louisiana after the collision. Declarations made in conversation are apt to be loose and unguarded—are often misunderstood, and, in my judgment, entitled to very little weight in any case, and least of all in a case like this, where the minds of all had been excited and agitated by the scene through which they had so recently passed.

There is no other evidence in the record which appears to be material to the points I am discussing, and I forbear, therefore, to refer to it. This opinion already occupies more space than I anticipated. But, as the full statement of the testimony cannot be given in the report of the case, I have found myself unable to present the facts truly and fairly, as I understand them, in fewer words.

I fully agree with the court, that the strictest supervision should be held over steamboats. But it is impossible for them to perform the duty of keeping out of the way, unless the sailing vessel is held to the correlative duty of keeping her course. Even-handed justice requires that the law of navigation should be as obligatory upon the sailing vessel as it is upon the steamboat. This is a question of property, and the rights of the parties are to be ascertained and determined by the rules of law. And where the evidence shows, as I think it does, that the Louisiana performed her duty, and took *proper measures to keep out of the [*309 way, and her efforts were counteracted and defeated by the sailing vessel, and a collision forced upon the steamboat by the incapacity and misconduct of those in charge of the Perrin, I cannot think that the steamboat should be charged with any part of the damage which the sailing vessel brought upon itself. Those who

intrust their property on the water to incompetent hands have no just right to complain of disasters, and claim indemnity for losses arising altogether from the incapacity and unfitness of those to whom they have confided it, and still less have Cory and Miles, whose incapacity and misconduct were the sole cause of disaster.

And entertaining this view of the controversy I dissent from the judgment of the court.

THE UNITED STATES, *Appt.*, *v.* JAMES R. BOLTON.

(See S. C. 21 How. 341-353.)

Mexican land claim—proof of records necessary, to admit copy of same—conditions not fulfilled and no possession—when claim invalid.

In a Mexican claim, where it appears the claim was not presented to the departmental assembly, and not the slightest evidence exists in the archives of any petition, order, or the record of a grant, held, that claimant was bound to prove that records showing a compliance with the laws of colonization did exist when the copy he produces was given, before he could prove their loss and their contents.

The regulations of 1828 directs that a proper record shall be kept of all the petitions presented and grants made, with maps of the lands granted; this record is the evidence of a grant.

When the government institutes inquiries in reference to the subject, it is entitled to require the production of that official record.

The record evidence which is required to support a claim is considered in the case of Cambuston, 61 U. S. 59, and more at large at this term in the case of Fuentes v. United States.

Where the claim was first made known to the public in 1850, and there is no proof to show that any of the conditions of the grant have been fulfilled, and there was no judicial power sought or obtained, and no claim made for the land as the grantee thereof, to give the community at large any information concerning it; held, that the validity of the grant has not been sustained.

Argued Apr. 5, 1860. Decided May 4, 1860.

APPEAL from the United States District Court for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners in California, by the appellee, for the confirmation to him of a claim to a certain tract of land.

The board of land commissioners entered a decree confirming the claim. The district court of the United States for the northern district of California having affirmed this decree, the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **J. S. Black,** *Atty. Gen.*, and **W. B. Reed,** for appellants:

Points on the part of the United States:

I. That on the facts disclosed in this record the pretended grant of February 10, 1846, and the order for the delivery of the temporalities of the mission Dolores to the priest Santillarn, dated January 15, 1846, are fraudulent.

II. That if the grant be a genuine paper, it is utterly invalid as conferring any right on the grantee, because:

1. It is antedated.

2. If not antedated, it never was delivered.

III. If genuine, not antedated and delivered, it was not made in conformity with the colonization act of 1824, and the order of 1828, as held to be essential in the cases of *The U. S.* v. *Cambuston*, 61 U. S. (20 How.) 59; *U. S.* v. *Sutter*, 62 U. S. (21 How.) 119; *U. S.* v. *Rose*, 64 U. S. (23 How.) 262.

IV. It is invalid under any assumed powers of the departmental assembly, either the departmental act of 28th May, 1845, or Pico's proclamation of October, as a secret and private sale to Santillan, never submitted to the assembly.

V. Aside from any power attributed to the departmental assembly it was invalid as made by Pio Pico before the 15th of April, 1846, when he was sworn as governor, under the authority of the Federal government.

VI. It is invalid as a grant to one who claims to have been administrator of the lands in question.

See Figueroa's Regulations of 1834; Febrero Mej. Econo. tom. II. p. 233, tit. 40, cap. 2, § 5; Civil Code of La. arts. 2965, 2966; Poth. Mandat. Nos. 148, 149, 166, and note on art. 450; Poth. Oblig. No. 513; Toullier, t. 10, p. 482; *Ibid.* 13, p. 300.

On the general principle of the invalidity of a purchase by a trustee or person in official relation, the following authorities, elementary and adjudicated, are referred to:

1 Sto. Eq. 218, 221, 308, 328; *Wormley* v. *Wormley*, 8 Wheat. 421; Sto. Ag. 210, 215; *Davoue* v. *Fanning*, 4 Johns. Ch. 199; *Michoud* v. *Girod*, 4 How. 503.

VII. The conditions of the grant, as well those prescribed by the colonization act, as those specified in the grant itself, never were complied with, and no equity requiring its confirmation is raised against the United States, especially as both the grant itself and the colonization act require a process of judicial possession and definition of limits.

VIII. The claimant is estopped from setting up a secret grant thus obtained, the acts and silence of Santillan from 1846 to 1855, operating as a virtual abandonment of all his rights. This is well established by the general doctrine of equitable estoppels.

See *Pickard* v. *Sears*, 6 Ad. & E. 474; 1 Story, Eq. 384, 204, 220, 695, 769, 770; *Gregg* v. *Wells*, 10 A. & E. 90; *Engle* v. *Burns*, 5 Call. (Va.) 463; *Ibbottson* v. *Rhodes*, 2 Vern. 554; *Nicholson* v. *Hooper*, 4 Myl. & C. 179; 9 Mod. 35; 12 Wend. 57; 11 N. H. 201; 4 Barr. 194; 9 Mod. 37; 1 T. R. 762; 2 Brown C. C. 650; 1 Wood. & M. 417; 16 Me. 146; 2 Cow. 246; 11 N. H. 201; 1 Johns. Ch. 354; 7 Watts, 400; 2 Johns. 573; 12 B. Mon. 255; 23 Me. 131; 17 Vt. 403.

Where a party stood by and saw improvement made on land by persons claiming title and believing themselves owners in fee, and interposed no pretension of title, it was held that he was thereby estopped from making any claim upon the land.

5 Johns. Ch. 184; 16 Barb. 618; 24 Miss. 62; 18 Barb. 435; 9 Ga. 23; see, also, 4 Watts & S. 323; 5 Watts & S. 285; 1 Pa. 309; 4 Pa. 353; 3 Rawle. 437; 2 Pa. 372; 3 Pa. 136; 1 Watts, 152; 6 Watts, 126; 4 Serg. & R. 174; 2 Harris, 59; 2 Pa. 313; 3 Pa. 187; 4 Pa. 177; 7 Watts, 382.

Messrs. **R. J. Walker, J. Mason Campbell, St. George T. Campbell,** and **John W. Dwinelle,** for appellee:

1. The evidence as to the proof of the grant is abundant and conclusive.

II. As to the official character of the person making the grant.

By the act of the Mexican Congress of 6th May, 1822, the "*primer vocal*" of the departmental assembly, being made governor *ad interim* in case of vacancy, Pio Pico as *primer vocal* of the assembly, became provisional governor of the Californias on Micheltorena's expulsion.

See Carey Jones' Report, 15, 98, 111, 109, 101, 73, 78.

Part of the evidence offered by the United States in this case is a grant made by Pico. He was recognized as governor by the supreme government of Mexico.

See, also, 59 U. S. (18 How.) 566; *U. S.* v. *Sutherland*, 60 U. S. (19 How.) 363.

III. As to the subject of the grant, *viz.*, mission lands within the ten littoral leagues. This court has decided that the mission lands were secularized and grantable like other public lands.

U. S. v. *Ritchie*, 58 U. S. (17 How.) 525; *U. S.* v. *Cervantes*, 59 U. S. (18 How.) 555; *U. S.* v. *Sutherland*, 60 U. S. (19 How.) 363.

It has further decided that grants might be made to natives within the ten littoral leagues under the colonization laws.

Arguello v. *U. S.* 59 U. S. (18 How.) 539; *U. S.* v. *Cervantes*, 59 U. S. (18 How.) 555.

That Santillan was a native, is not disputed. Even were he a Mexican Indian (which the United States failed to prove), this court has settled his right to take under the colonization laws, equally as a native of Spanish blood.

U. S. v. *Ritchie*, 58 U. S. (17 How.) 540.

IV. The colonization laws had not been suspended in regard to the Dolores mission lands. No authority has been shown warranting the executive of the national government to suspend the colonization laws. The power of suspension was exercised where deemed necessary by Congress, as the legislative authority.

See Jones's Report, 63.

V. As to the capacity of Santillan to take, being a priest. Bishop Alemany, his diocesan, a prelate of the Roman Catholic church and acquainted with its laws, proves that Santillan was one of the secular clergy, and so authorized to take property, which the regular clergy are not.

VI. Has the governor pursued the course marked out for him under the act of 1824 and the regulations of 1828?

[On this point the counsel reviewed the case at length.]

VII. The foregoing points cover the power of the governor to make, and Santillan to take, the grant. The fact of its actual execution and delivery, its conformity to the regulations of 1828, and the performance of the prescribed conditions by the grantee. But as it appears by the opinion of the commissioners, that it was argued before them that the grant had been executed after Pico had ceased to be governor, and that it was antedated, it may be necessary to argue the question of fraud or forgery. [The argument on this point had reference almost exclusively to the evidence.]

On the question of estoppel, see *Sutter's Case* before commissioners and district court and supreme court of California; also, *Gunn's Case*, 6 Cal. 263.

A sale to a trustee is only voidable on application of *cestui que trust* within a reasonable time.

Hill, Trust. 536; Lewis, Trusts, 470, 474, ch. 16, § 3.

A sale to a trustee under judicial authority is neither void nor voidable.

Hill, Trust. 536.

Mr. Justice **Catron** delivered the opinion of the court:

In March, 1852, the appellee presented his claim to the commissioners for settling land claims in California for a parcel of land situated in the county of San Francisco, and bounded north by what was formerly known as Yerba Buena; northwest by lands of the *presidio* of San Francisco; west by the lands of Francisco Haro; south by the lands of Sanchez; and east by the bay of San Francisco, with a reservation of the curate's house, the church of Dolores, and other previously granted lands within the external boundaries of the tract, which include 29,717 acres; and the claims previously granted within those boundaries are 19,531 acres; leaving, as the unquestioned claim of Bolton, 10,186 acres. The original claimant is Jose Prudencia Santillan, a secular priest, who, together with his general agent, Manuel Antonio Rodriguez de Poli, in April, 1850, upon the recited consideration of $200,000 conveyed it to Bolton, the appellee. An interested party testifies that, in 1851 and 1854, it was worth, at a low estimate, more than two million of dollars. The claim was confirmed in 1855 by the board of land commissioners, and in 1857 their decree was affirmed in the district court. The grant to Santillan bears date the 10th February, 1846. It purports to have been made by Pio Pico, "first member of the assembly of the department of the Californias, and charged with the administration of the law in the same," and to be signed by Covarrubias, as secretary. It recites that the priest Santillan has petitioned for a grant, for his own benefit, of all the common lands known as belonging to the mission of Dolores, as well as the houses of the *rancherias* of the *mission, which were [*344 in a state of abandonment; and that, thereupon, the governor had proceeded to grant them, subject to conditions:

1st. He shall pay, as a compensation for said grant, all the debts that exist against the mission.

2d. He shall petition the proper judge for the judicial possession, in virtue of the grant, of all the lands and houses conveyed; and in the meantime, the possession which he has of the houses and lands, in his capacity of administrator, appointed as such by the prelate of the missions of the college of Our Lady of Guadaloupe, in Zacatecas, for the temporalities of the mission of Dolores, shall serve as legal.

3d. The judge who shall give the possession shall have it measured and marked with the customary landmarks, the contents being three square leagues, more or less.

4th & 5th. That the houses of the curate, and the church of Dolores, and the property which some persons hold under good titles, shall be respected, and that the title be recorded.

The claimant exhibits a letter from Covarrubias to Santillan, dated 15th January, 1846, which informs him of an order made by the

governor to the administrator of the mission to make formal delivery of all the appurtenances of the mission Dolores to Santillan, that he (Santillan) may administer the temporalities of the mission.

In March, 1850, Santillan published a notice in a newspaper in San Francisco, which stated that the governor, Pio Pico, on the 10th February, 1846, had granted to him all the uncultivated lands and all the unoccupied houses appertaining to the mission; that the grant was made and is recorded in the city of Los Angeles, and that it was written by Covarrubias, then secretary of the governor; that in the month of January, 1846, an order had issued to the administrator of the mission, to put Jose Prudencia Santillan in possession of the temporalities of the mission, which was done; and that the grant, being made one month after, recognizes and refers to this order of the government, and provides that the possession under the order was for the purposes of the grant. This notice was designed to warn persons from 345*] trespassing on the land, *or purchasing titles from the justice of the peace, acting in the capacity of alcalde in San Francisco. The grant itself was recorded shortly after in the county records of San Francisco; and in May, 1852, the claim was filed, with a petition demanding its confirmation, before the board of land commissioners, sitting at San Francisco.

In its support, four principal witnesses were relied on, namely, Jose Maria Covarrubias Cayetano Arenas, Jose Matias Moreno, and Narcisco Botello. Covarrubias's deposition was filed with the petition. He was secretary of the government when the grant bears date, and deposes that he wrote the document; that Governor Pio Pico signed it, and that he, Covarrubias, countersigned it as secretary; all of which was done in the secretary's office at Los Angeles, at the time the grant bears date. He says the paper there exhibited was one of those delivered to the party, and that he believes it is a substantial copy, if not a literal one, of an order of the governor for the purposes therein stated.

Arenas states that he was employed as an officer in the office of the secretary of the government; that he saw the grant now filed before the board of land commissioners, produced at the office of the secretary of the government in the month of February, 1846, about the time it bears date. "It is a document given out by the government to *Padre* Santillan." He declares the signature of the governor and secretary to be genuine; that he saw the document made; also, that had the grant remained in the secretary's office, it is probable he should have seen it. Being asked whether a note of the grant was ever made in any book of titles, he answers that there were then only loose sheets of paper kept, on which to note titles at Los Angeles, the regular book being at Monterey; and that a note of this title was made on said loose sheets of paper. "I wrote the note of this title myself." The sheets of paper were stitched together.

Moreno proves that he was appointed government secretary as successor to Covarrubias, and came into office on the 1st day of May, 1846, and continued to act as secretary until the country was conquered in July following. He is asked, on *behalf of the claimant, [*346 "Whilst acting as secretary, did you ever see a paper purporting to be a petition of Jose Prudencia Santillan for a grant of the land of the ex-mission of Dolores, or any other paper in relation to said grant?" and answers, "I never did."

He further states, that he had never seen any such grant, or any papers relating thereto. "All I recollect is that I saw the name of *Padre* Santillan in the book in which the note of titles was taken; it was on the last page, but I do not know whether it was in relation to a grant or not. The book contained nothing but the notes which were taken of titles."

Narcisco Botello deposes, that he was a deputy of the departmental assembly during the first four months of 1846, and served as one of the committee on public lands; and during that time the original *espediente* and grant made to Santillan, of the mission of Dolores and its lands, came up for action before the assembly; that the title was duly submitted and approved. He swears to its confirmation in the most precise terms. To meet this evidence, it is suggested for the United States that the assembly never acted on sales of land made by the governor of mission property; and this may be true, but the grant to Santillan was not a sale of the mission of Dolores. It is in form an ordinary colonization grant, made according to the act of 1824 and the regulations of 1828, and under their authority; nor can the recital in it—that Santillan shall pay the debts of the mission—affect the title. The title is vested, whether the debts were or were not paid. The petition and grant were undoubtedly proper papers to be submitted to the assembly for approval.

Under the acts of colonization, the records of the departmental assembly in 1846, during the time that Botello says he acted on the committee of public lands, are well preserved. The different meetings and daily proceedings of that body are minuted in regular form in the journals. From these it appears that its first session for 1846 commenced on the 2d day of March, and on that day Norega and Arguello were appointed the committee on public lands; and in the session of the 4th of March, Señor Botello obtained a leave of absence *for [*347 a term not exceeding three months. His absence is usually noted at the end of each day's proceedings, and his name does not again appear as an acting member until the 15th of June. On the 1st of July he was elected temporary secretary of the assembly, in the absence of Olvera, the regularly appointed secretary. Botello certainly did not belong to the committee of public lands during the year 1846.

The first report of the governor to the assembly respecting the disposal of lands was of forty-five grants to sundry individuals, and was made the 8th day of May, and referred to the committee. The committee reported favorably, and the grants were confirmed in the session of June 3d. The decree of confirmation includes grants down to May 3d, 1846. That of Santillan is not among them.

The decrees of confirmation are distinct, regular, and definitive, and there is no reason to suppose that any grant that had been made was reserved from the assembly. And, in addition,

Moreno proves that, whilst he acted as secretary to Governor Pico, he never sent to the departmental assembly any *espediente* or grant of lands to Santillan. And as it was his official duty to do so, he can hardly be mistaken. We deem it true beyond controversy that Botello was not one of the committee on vacant lands; that the claim of Santillan was not presented to the departmental assembly; and that the statement of Botello, in his deposition of his official relation to this grant, is without any foundation in truth.

Covarrubias having stated that *Padre* Santillan filed a petition for a grant of the mission lands of Dolores, and that Governor Pico made an order on which the grant was founded, it becomes necessary to inquire whether such petition and order ever existed in the archives; and secondly, the probability of their being lost, as not the slightest evidence now exists in the archives of any petition, order, or the record of a grant.

Moreno states that he took possession of all the archives, when he came into office as successor of Covarrubias. Arenas says this was the next day after Covarrubias had resigned, in February, 1846. Moreno states that it was on the 1st day of May, 1846. It is certain that 348*] Moreno submitted to the *assembly the titles confirmed in June. He proves that no such papers were ever seen by him; and as he was examined on behalf of the claimant to prove the authenticity of this grant, and whatever might conduce to that end; and as he was interrogated relative to the existence of papers properly connected with it, if authentic, and remaining in the public repository under his official care; and as he denies knowledge of the deposit or existence of such papers,—his testimony raises a strong presumption that the requirements of the colonization laws were not complied with on this subject. We are confirmed in this opinion by the examination of other testimony.

Arenas says he took the name of the title and the number and date of the grant; that is to say, of the grant then before him, and then delivered to Santillan. But he says nothing of the petition nor decree conceding the land. All that Covarrubias states is that there was a petition and decree of the governor, on which papers the grant was founded. But he does not swear that they were filed or recorded.

As respects the probability of a loss of Santillan's title papers, Moreno proves, that when the United States forces suppressed the Mexican government of California, in August, 1846, by order of Governor Pico, he deposited the archives belonging to the secretary's office in boxes, and placed them in the house of Don Louis Vigines, in Los Angeles; and he knows nothing further of them. And Olvera proves that he made a similar deposit of the records of the departmental assembly at the house of Don Louis Vigines. This occurred about the 10th of August, 1846. He says that he then had *espedientes* in his charge as secretary of the assembly. How many does not appear. Up to this time, it is not assumed that any documents were lost.

Commodore Stockton directed the removal of these archives, and for that purpose they were taken possession of by Colonel Frémont; and after some delay and some exposure, they were eventually delivered to Captain Halleck, of the United States army, at Monterey, then acting Secretary of State under the Military Governor of California. Captain Halleck proves that *when delivered to him they [*349 were in a bad condition, being much torn and mutilated. They were shortly after arranged, numbered and labeled.

It is a historical fact, that the *espedientes* and grants made for some ten years before the year 1846 are referred to in an index, and in a register known as the Toma de Razon—the former made by Manuel Jimeno, who was the government secretary before Covarrubias. And as the title papers to which reference is made in this index, and the register, are found in the archives as they now exist, it is reasonable to suppose that those *espedientes* made in 1846 were carried with equal safety, as they came into Colonel Frémont's hands, according to the testimony of Moreno and Olvera, in the same condition; and according to the testimony of others, they were transported in the same manner, and were continued in the same custody; and it is true that the *espedientes* of 1846 are apparently as well preserved as the others; but from the loss of the Toma de Razon, and the absence of a contemporary catalogue like Jimeno's index, we have not the same assurance of their entire existence.

Be this as it may, the claimant was bound to prove that records showing a substantial compliance with the laws of colonization did exist when the copy he produces was given to Santillan before he could be heard to prove their loss and their contents.

In deciding on this controversy, we are to be governed by the laws and usages of the Mexican government administered in the Department of the Californias (as respects the granting of lands) before the conquest of the country, and according to the principles of equity. These are the rules prescribed by the act of March 3, 1851, § 11 (9 Stat. at L. 631).

The laws and usages applicable to this claim are found in the regulations of 1828.

Lands were to be granted "for the purpose of cultivating or of inhabiting them;" and the mode of obtaining a grant is prescribed to be by an address to the governor, setting forth the petitioner's name, profession, etc., describing distinctly, by means of a map, the lands he asks for. Then the governor *was to obtain [*350 the necessary information whether the petition embraced the legal conditions, both as regards the land and the applicant. This being done, the governor was required to proceed to make an order for the formal grant to be drawn out, which he should execute.

Sec. 11 directs that a proper record shall be kept of all the petitions presented and grants made, with maps of the lands granted.

This record is the evidence of grant. It being made, the governor (§ 8) shall sign a document, and give it to the party interested, to serve as a title, wherein it must be stated that said grant (to wit, the record) is made in exact conformity with the provisions of the laws. In virtue of this document issued to the party, possession of the lands shall be given. But the document is not sufficient of itself to prove that the governor has officially parted with a portion

of the public domain, and vested the land in an individual owner. This must be established before the board of commissioners by record evidence, as found in the archives, or which had been there, and has been lost. The *titulo* given to the party is merely a certificate by the governor of the acts that have been done in the regular course of official procedure towards the disposal of a part of the public domain. Among individuals, this certificate serves the purpose of evidence. But when the government institutes inquiries in reference to the subject, it is entitled to require the production of that official record, which it has prescribed to its officer, for its own security, and as a necessary condition of a legal administration, and a necessary precaution against fraud. That a petition was presented by Santillan is stated incidentally, but indistinctly, by a single witness (Covarrubias); and this unsatisfactory statement is disproved by the absence of the record and the evidence of his successor, Moreno. The claim, as presented to the board of commissioners and the district court, has no legal foundation to rest upon.

The degree of record evidence which is required to support a claim of the above description is considered and adjudged in the case of *U. S.* v. *Cambuston*, 20 How. 59, and more at 351] large *in the decision made at this term in the case of *Fuentes* v. *The United States;* so that a further consideration on that head is not required in this case.

Such being the legal condition of this claim, the next question is, how does it stand on its equities.

The grantee is one of the eighteen secular priests who were in California. He arrived at the mission of Dolores either in 1844 or 1845, probably in the latter year. He was of Indian extraction, and is necessitous and distressed circumstances. A number of witnesses say he subsisted on alms. A grant to a priest for his own benefit is a singular fact in California. The bishop elect since 1850 says: "I learned that *Padre* Santillan obtained a grant of land from Governor Pio Pico. I know of no other instance excepting this, and have heard of no other case in which the grant has been made to a priest personally, and for his own benefit." Berreyesa, when pressed for the reason for the retention of a casual conversation in his memory for so long a period, says: "It was an unusual thing for a mission to be granted to a *Padre* for it was thought that the *Padres* could not hold such property, and it seemed strange to me."

But the grant was made to this necessitous *Padre* upon the primary condition that, "in consideration of this grant, he shall pay the debts of the mission which exist up to this time." It would seem that a grant of land with such a condition, to such a person, was a vain thing. There is no testimony to show what the amount of the debt assumed by Santillan was, to whom it was owing, when and how it was contracted, or what security was required for its payment. Neither Pio Pico nor Covarrubias afford the slightest information of the manner in which the consideration was to be paid.

Until the spring of 1850, none of the large community then building up a city on the land in dispute had any suspicion that this poor man claimed to be owner, in his own right, of ten thousand acres of land, with an outer boundary including three other grants and embracing nearly thirty thousand acres.

He had made some claim for the church as a priest and *administrator of the mis- [*352 sion, and had caused the papers of the mission to be examined by a competent lawyer, and endeavored to repel intruders at his door, by some title which he supposed might exist among the documents of what had been an important missionary establishment. No title was found which vested this property in the church, and superseded the public title; and then this claim was first made known to the public.

There were at that time a thousand settlers on the land claimed, holding their possession and titles by purchases made from a justice of the peace, appointed under the authority of the military government of the United States in California, and who professed to make grants not exceeding fifty *varas* square, but with a reservation of the claims of individuals and that of the United States. Of course, these claimants expected to receive an acknowledgment, or some recognition, of their title by the United States. The *Padre* Santillan seems to have been much excited by his contest with these occupants. In September, 1849, he constituted O'Connor, an attorney at law, and Salmon, a merchant, his attorneys, and authorized them to enter into possession, for the uses and benefits of the mission of Dolores, and of which he was pastor, of lands, tenements and hereditaments, that he had a right to enter into, possess, and enjoy, and the same dispose of by lease, for the benefits and objects of the mission, with all the powers that he possessed by virtue of his pastoral care and tutorship, in his own right, and the rights of others represented by him. "He also empowered them to ask, demand, recover, and secure the sum or sums of money now due or owing for occupancy and use of the lands, houses, tenements and hereditaments, belonging to the parties represented by him, or belonging to him by virtue of his office."

The attorney mentioned in this deed is a leading witness to discredit the genuineness of the grant.

He had no notice or imagination of its existence when this power was accepted. In November, 1849, the *Padre* Santillan, with Dr. Poli, made a journey to Santa Barbara, the place of residence of Covarrubias, and on his return intimated to his *friends "that he had [*353 been to the governor, and that the Americans could not rob the church any longer;" that he had the paper, "in which were all his hopes;" "that he was well off;" and used other exultant expressions, which denote that the acquisition of the deed was newly made, and that a great change was effected by it in his condition and feelings. In the month of March, 1850, he announced to the public of San Francisco that such a grant was in his possession, with other circumstances before detailed, and in the month of April conveyed the land to the claimant.

The testimony does not disclose what was the depository of this grant in Santa Barbara, nor when, nor under what circumstances it was placed there, nor under what circumstances withdrawn. Neither Santillan nor Dr. Poli

have been examined as witnesses: nor was Pio Pico interrogated in reference to the authenticity of the grant.

There is no proof to show that any of the conditions of the grant have been fulfilled. The testimony as to the payment of any portion of the mission debts is vague and unsatisfactory. There was no judicial possession sought or obtained, and no claim made for the land as the grantee thereof, to give the community at large any information concerning it.

Our opinion, consequently, is, that the validity of the grant has not been sustained, and that *the decrees of the Board of Commissioners and the District Court are erroneous and must be reversed, and that the cause be remanded to the District Court, with directions to dismiss the claim.*

EDWARD MINTURN, *Compt. and Appt.*,
v.
JAMES B. LARUE, Carlisle P. Patterson, and John R. Fouratt.

(See S. C. 23 How. 435–438.)

Ferry between Oakland and San Francisco—rule of construction of grants, by legislature to corporations—doubtful words construed more strongly against grantee.

The town of Oakland did not possess the power under its charter to grant an exclusive right of ferries between that place and the city of San Francisco.

It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant.

Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.

A forced interpretation, the court is not at liberty to give.

If the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fall.

Argued Apr. 24, 1860. Decided May 4, 1860.

APPEAL from the Circuit Court of the United States for the Northern District of California.

The bill in this case was filed in the court below, by the appellant, to restrain the defendants from running a ferry between the city of San Francisco and the city of Oakland, claiming an exclusive right of ferries between said cities in himself.

The defendants demurred. The court sustained the demurrer and entered a decree dismissing the bill, whereupon the complainant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **Reverdy Johnson,** for appellant:

The right to keep a ferry in England is an incorporeal hereditament, being a franchise granted by the Crown, or depending on prescription, which presupposes a grant.

5 Com. Dig. 291; 1 Nott & McC. 387.

In respect to the establishment and regulation of ferries, the state government have succeeded to the prerogative and jurisdiction of the Crown.

Gibbons v. *Ogden*, 9 Wheat. 1.

It is no objection to the grant of a ferry privilege, that it is to extend over public navigable waters and arms of the sea.

15 Pick. 253.

There can be no doubt as to the power of the legislature to establish or authorize the running of a ferry between San Francisco and Oakland, and it is well settled that the legislature of a state may confer upon a city or a town, by an act of incorporation, the authority to establish and regulate ferries within certain districts, in as ample manner as they themselves possess it.

Costar v. *Brush*, 25 Wend. 631; *Fanning* v. *Gregoire*, 16 How. 525.

It was said by the circuit court that every grant of power to a corporation was to be construed most strongly against the grantee, and that nothing passes by implication, and that though the words in the charter of the town of Oakland "regulate and keep in repair," were applicable to ferries, yet that the word "make" was not properly applicable, and that, therefore, it was possible that the board of trustees might regulate ferries, provided there were any established, but could not create them. The word "make" signifies to create, to call into being, to construct, to establish.

There is no verb in the English language more comprehensive, and I presume no judicial authority can be found which discards the word "make" as inappropriate to express the idea of establishing a ferry.

See *Stark* v. *McGowen*, 1 Nott & McC. 387; 1 Harg. Law Tracts, ch. 2, page 6.

It is only in cases of doubt that the grant by the sovereign is to be construed favorably to the grantor. Here there is no occasion to resort to any such rule of construction, nor is there any such rule; so that nothing passes in the grant of a charter, or other franchise, by implication.

1 Salk. 142; 14 Vin. tit. *Grants*, Z, 29; Fitz. tit. *Grants*, 41.

The second objection to the right claimed by the appellant was, that if the board of trustees had the power to license or create ferries, they exceeded their power in attempting to make a grant so extensive as this one. That they, at least, had no express power to grant an exclusive right.

Gales v. *Anderson*, 13 Ill. 413, has been cited as sustaining that view. That case, however, depended upon peculiar statutes of Illinois.

In *B. & L. R. Co.* v. *S. & L. R. Co.* 2 Gray, 1, 32, 33, the doctrine that a legislature cannot devest itself of power over a particular subject, so as to prohibit a subsequent legislature from acting on the same subject-matter, was held to have no application to grants of franchises.

In the case of *Costar* v. *Brush*, 25 Wend. 631, it was held, that the legislature of a state may confer upon a city or town by act of incorporation, the authority to establish and regulate ferries, and that a corporation so vested with the power, may, in its discretion, in establishing a ferry, grant exclusive privileges, and the exercise of this power is binding on the corporation and the public.

To open up and maintain this ferry with

NOTE.—*Construction of grants to corporations.*—See notes to 7 L. ed. U. S. 813; 9 L. ed. U. S. 773.

suitable steamboats required a great deal of care, skill, and attention, and a vast outlay of capital. No one could be found willing to invest so much money and to incur the obligations imposed by law, without being protected by the grant of an exclusive right. The establishment of a new ferry so near to an old one as to divert its patronage and diminish its profits, is an invasion of the rights of the latter by the common law.

There is no difference between a franchise by prescription and a recent grant from the Crown, in that respect.

See *Trotter* v. *Harris*, 2 Young & J. 285; *Huzsey* v. *Field*, 2 Cromp. M. & R. 432; Willes, 508; 6 Mees. & W. 234; 3 Bl. Com. 219; 1 Nott & McC. 387; 1 Hayw. 457; 1 Day, 21; 3 Murph. 57.

Counsel then reviewed the statutes of California relating to the subject.

Laws of 1850, p. 97; Laws of 1851, p. 183; Laws of 1853, p. 85; Laws of 1855, p. 183.

The plaintiff holds a ferry franchise, with all the rights and privileges, and all the responsibilities and obligations imposed by law. He is bound to maintain and keep it up, whether there be opposition or not. The defendants are usurping the franchise of a ferry, without grant or prescription. In regard to the power of courts of equity to relieve in such a case, see 1 Nott & McC. 387; 9 Johns. 507; 7 N. H. 35; 2 Gray. 1; *Moor* v. *Veazie*, 32 Me. 343.

Mr. **Edward M. Stanton**, for appellee:

The bay of San Francisco is an arm of the sea. Navigation thereof, by the laws of the United States and the laws of California, is free, and exempt from any private exclusive right.

Acts of California, 14th April, 1853.

2. The act incorporating the town of Oakland conferred on that corporation no exclusive right of property or interest in any ferry, but only a power to regulate ferries over waters within the corporate limits; and the corporation having no such right, could not confer it upon Carpenter and his assigns.

3. The power of the corporation did not extend to ferries across the bay of San Francisco, or beyond the corporate limits.

Mills v. *St. Clair*, 8 How. 569.

4. The power to regulate ferries, conferred by the legislature upon the corporate powers of Oakland, was a public trust to be exercised for the public interest, and the alleged grant of a private, exclusive right for twenty years to Carpenter and his assigns, was a violation of that trust, inoperative and void.

15 Pick. 243.

5. By the grant of power conferred upon the corporate authority of Oakland, the state of California did not surrender its general power to regulate ferries as might be required by the public interest, and the act of 14th April, 1853, prescribing free navigation of the bay of San Francisco, exempt from any ferry laws, regulated and controlled any ordinance, contract or provision of the town of Oakland.

Charles River Bridge Case, 11 Pet. 548; *Mills v. St. Clair*, 8 How. 569; *Fanning* v. *Gregoire*, 16 How. 524; *Thatcher* v. *Dartmouth Bridge Co.* 18 Pick. 501; *Fay, Petitioner, etc.*, 15 Pick. 252.

Counsel also referred to the following cases: *Minturn* v. *LaRue*, 1 McAll. 371; *Regents* v. *Williams*, 9 Gill & J. 401; *State* v. *B. & O. R. Co.* 12 Gill. & J. 446; *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the district of California.

The bill was filed by the complainant in the court below to restrain the defendants from running a ferry between the city of San Francisco and the city of Oakland, on the opposite side of the bay, and which, it is claimed, is in violation of the *exclusive privileges be- [*436 longing to him under the authority of law. The authority, as set forth in the bill, is derived from the charter of the town (now city) of Oakland. The 3d section of the charter (passed May 4, 1852) provided that "the board of trustees shall have power to make such by-laws and ordinances as they may deem proper and necessary;" among other things, "to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries," etc., "wharves, docks, piers, slips," etc.; "and to authorize the construction of the same;" and with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid (that is, of the corporation), between high tide and ship channel, are hereby granted and released to said town.

It is admitted, if the authorities of the town of Oakland possessed the power under the charter to grant an exclusive right of ferries between that place and the city of San Francisco, the complainant has become vested with it. The question in the case, therefore, is whether or not the power was conferred by this 3d section of the charter.

It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities.

Now, looking at the terms of the grant in this case, and giving them their widest meaning, either separately or in the connection in which they are found, or with the object for which the power was conferred, we find, indeed, a power to establish and regulate ferries within the corporate limits of the town, but not an exclusive power. Full effect is given to the words in which the power is granted, when the simple right is conceded to establish and regulate ferries. If the *grant had been [*437 made to an individual in the terms here used, the question would have been too plain for argument. In our judgment, it can have no wider interpretation, though made to a corporation. It must be remembered that this is not the case where the Crown or the legislature

has aliened to a municipal corporation it whole power to establish and regulate ferries within its limits, as may be found in some of the ancient charters of cities in England and in this country. In those cases, the municipal body, in respect to this legislative or public trust, represents the sovereign power, and may make grants of ferry rights in as ample a manner as the sovereign. The error, we think, in the argument for the appellant is, in confounding this grant with these ancient charters, or those of a like character. But on referring to them, it will be seen that the form of the grant is very different, much more particular and comprehensive, leaving no doubt as to the extent of the power. *Costar* v. *Brush*, 25 Wend. 631. So here, if the legislature had intended to confer their whole power upon this corporation to establish and regulate ferries within its limits, or a power to grant exclusive ferry rights therein, a very different form of grant would have been used—one that would have expressed the intent of the law maker to part with the exclusive power over the subject, and vest it in the grantee. In the form used, no such intent appears, or can be reached, except by a very forced interpretation, which we are not at liberty to give, according to well-settled authority. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 422; *Mills* v. *St. Clair Co.* 8 How. 569; *Fanning* v. *Gregoire*, 16 How. 524, 534.

In *Mills* v. *St. Clair Co.* the court, speaking of a ferry grant, said that in a grant like this by the sovereign power, the rule of construction is, that if the meaning of the words be doubtful, they shall be taken most strongly against the grantee and for the government, and, therefore, should not be extended by implication beyond the natural and obvious meaning of the words; and if these do not support the claim, it must fall. And again, in *Fanning* v. *Gregoire*, speaking on the same subject, the court says: The exclusive right set up must be clearly expressed or necessarily inferred, and **438***] the court think *that neither the one nor the other is found in the grant to the plaintiff, nor in the circumstances connected with it.

As the town of Oakland had no power, according to the above construction of the charter, to establish an exclusive right of ferries within its limits, it follows that it did not possess the power to confer upon others an exclusive privilege to establish them.

The power conferred is to make (meaning to establish) and regulate ferries, or to authorize the construction (meaning the establishment) of the same.

We think the court below was right, and that the decree must be affirmed.

SALVADOR CASTRO, *Appt.*,

v.

THOMAS A. HENDRICKS, Commissioner of the General Land Office.

(See S. C. 23 How. 438-443.)

Object of act of 1851 as to California land claims —provisions of —contests between subsequent claimants—decision of Commissioner of Land Office, when upheld.

The primary object of the act "to ascertain and settle the private land claims in the state of California," approved 3d March, 1851, was to distinguish the vacant and public lands from those that were private property.

For this purpose, an inquiry into pre-existing titles became necessary. To accomplish this, every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, was required to present the same to a board of commissioners.

The government has no interest in the contests between persons claiming *ex post facto* the grant; nor is this government charged to decide between such claimants.

The refusal of the Commissioner of the Land Office to issue a patent upon this survey, was an appropriate exercise of the functions of his office.

Argued Apr. 25, 1860. Decided May 4, 1860.

APPEAL from the Circuit Court of the United States for the District of Columbia.

This case arose upon a petition filed in the court below, by the appellant, for a writ of mandamus to be directed to Thomas A. Hendricks, Commissioner of the General Land Office, requiring him to issue a patent to the petitioner for certain lands.

The court below entered a decree refusing the writ, whereupon the petitioner took an appeal to this court. A further statement of the case appears in the opinion of the court.

Messrs. **H. P. Hepburn** and **R. J. Brent** for appellant.

Messrs. **J. S. Black,** *Atty-Gen.*, and **E. M. Stanton** for appellee.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellant petitioned the circuit court for a writ of mandamus, to be directed to the Hon. Thomas A. Hendricks, Commissioner of the Land Office, commanding him to prepare and provide a patent to the appellant for a parcel of land in California, which had been confirmed to him by the decree of the district court for the northern district of California, and is described in a survey approved by the surveyor general of that state.

It appears from the petition and answer, and the papers filed in the circuit court, and forming a part of the record, that in the year 1839 the governor of California granted to Antonio Buelna a tract of land known as San Gregorio, of the extent of four square leagues, a little more or less, as is shown in the sketch attached to the *espediente*. In 1849 the representatives of Buelna (his widow and her husband) sold to the appellant one league of land in the location of San Gregorio; and in 1852 they executed a deed, conveying the same land, by the description of one league of land, in the place known by the name of San Gregorio, on the coast north of Santa Cruz, being part of a tract of land of four leagues, granted by the government to Antonio Buelna, and the same is declared to be situate and bounded as follows, and containing one league, more or less: commencing at a stake marked A, in the Cañada de los Tunis, where the Arroyo de los Tunis comes out of the mountains; thence running southerly with the ridge of the mountains to the stake marked B in the Arroyo *Hondo; thence following said Arroyo [*441 Hondo until it meets the Arroyo de San Gregorio; thence, following the Arroyo de San Gregorio, to a stake marked C on a white rock in the mountain, situate on the west side of said Arroyo; thence northwardly, about two

miles, to a high conical peak of the mountain, on which is a placed stake marked D; thence eastwardly to the place of beginning.

Separate claims were presented by the widow of Buelna and Salvador Castro for their respective portions of the *rancho* San Gregorio, and separate decrees of confirmation were made in the district court. The decree in favor of Madame Buelna is for three square leagues of the land within the boundaries described in the plan attached to the *espediente*, and referred to in the original grant, copies of which are on file in the cause. Salvador Castro was confirmed to the tract of land described in the deed by the metes and bounds before mentioned, with the addition, "being portion of the four leagues granted April 16, 1839, by J. B. Alvarado to Antonio Buelna, and known as San Gregorio, the tract hereby confirmed containing, by estimate, one square league, and being the same land described in the conveyance to the claimant." The two decrees were communicated to the surveyor general of California in 1857, and his returns are filed as testimony in the cause. He has laid off to Madame Buelna the three square leagues confirmed to her, and has surveyed for the appellant a tract within the specific calls of the deed and decree of fifteen thousand seven hundred and 54-100 acres. It is apparent, from this statement, that the surveyor general has entirely disregarded the limits of the *rancho* San Gregorio, and the restrictions as to quantity in the grant of Alvarado, governor of California, of April, 1839. But these, for the object before the court, were the controlling calls in the deed, as well as in the decree. The primary object of the act, "to ascertain and settle the private land claims in the state of California," approved 3d March, 1851 (9 Stat. at L. 631), was to distinguish the vacant and public lands from those that were private property; and for this purpose, an inquiry into pre-existing titles became necessary. To accomplish this, every person claiming 442*] lands *in California, by virtue of any right or title derived from the Spanish or Mexican government, was required to present the same to a board of commissioners. The mesne conveyances were also required, but not for any aim of submitting their operation and validity to the board, but simply to enable the board to determine if there was a bona fide claimant before it under a Mexican grant; and so this court have repeatedly declared that the government had no interest in the contests between persons claiming *ex post facto* the grant. *United States* v. *Sutter*, 21 How. 170.

The authentic evidence of what is private property is to be found in the grants of the government of California, and not in the mesne conveyances. Nor is this government charged to decide between claimants in the condition of those interested in the *rancho* San Gregorio. It was entirely competent for the district court to connect the claims arising under the same grant, and it will be its duty, in superintending the execution of the decrees of that court in such cases, to look to the evidence furnished by the grant itself as overruling in determining questions of boundary and location.

In the case of *The United States* v. *Fossatt*, 21 How. 445, this court had occasion to refer to the limits of the authority of the courts of the United States under the act of the 3d March, 1851 (9 Stat. at L. 631), before cited. We stated in that case, that, if questions of a judicial nature arose in the settlement of the location and boundary of the grants confirmed to individuals the district court was empowered to settle those questions upon a proper case being submitted to it before the issue of the patent; and in such a case, the judgment may properly extend to the confirmation of the survey, and an order for a patent to issue. But it was not the expectation of this court that the surveyor general should make returns to the district court in every case, nor did they imply that the validity of a survey depended on the recognition of that court, or its incorporation into a decree of the court. The surveyor general of California was charged with the duty to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats for the same; and in the location *of the said claims, he was invested with [*443 such power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, in the 6th section of the "Act to Create the Office of Surveyor of the Public Lands for the State of Louisiana," approved 3d March, 1831 (4 Stat. at L. 492). Under this act the surveyor general exercises a quasi-judicial power; and the claimant with an authentic certificate of the decree of confirmation, and a plat or survey of the land, duly certified and approved by the suveyor general, is entitled to a patent. But then, the commissioner of the Land Office, by virtue of enabling acts of Congress, exercises a supervision and control over the acts of the subordinate officers charged with making surveys; and it is his duty to see that the location and survey made by that officer under the decree of the court, and which has not had the final sanction of the judicial tribunals, is in accordance with the decree.

The refusal of the Commissioner of the Land Office to issue a patent upon this survey was an appropriate exercise of the functions of his office, and the decree of the Circuit Court refusing a mandamus is affirmed, with costs.

FREDERICK FREDERICKSON, Agent for Caroline, Widow Plaefflin, *et al.*, *Plffs. in Err.*,

v.

THE STATE OF LOUISIANA.

(See S. C. 23 How. 445-448.)

Louisiana law taxing property of decedent—when not invalid by the treaty with U. S.—construction of such treaty.

By a statute of Louisiana, it is provided that "each and every person, not being domiciliated in this state, and not being a citizen of any other state or territory in the Union, shall pay a tax of ten per cent on all sums actually received from a succession of a deceased person."

The third article of the Convention between the United States and the King of Wurtemberg is, that "the citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, and their legatees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possess-

sion thereof, paying such duties only as the inhabitants of the country, where the said property lies, shall be liable to pay in like cases."

The act of Louisiana does not make any discrimination between citizens of the state and aliens in the same circumstances, and was nothing more than the exercise of the power which every state or sovereignty possesses.

The treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers in reference to property within the country of their origin or citizenship.

The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, is not embraced in this article of the treaty.

Argued Apr. 25, 1860. Decided May 4, 1860.

IN ERROR to the Supreme Court of Louisiana for the Eastern District

This case arose upon opposition made by the state of Louisiana to the account filed in the settlement of the succession of John David Fink, deceased, in the second district court of New Orleans. The state claimed a tax of ten per cent on the amount of certain legacies left by said Fink, one of her citizens, to certain subjects of the King of Wurtemberg.

The levying of the tax was resisted on the ground that the legatees were exempt therefrom by virtue of the third article of the Convention of Wurtemberg of April 10, 1844. The said court entered a judgment allowing the state the tax claimed.

The supreme court of the state of Louisiana having affirmed this judgment, on appeal, the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **Miles Taylor**, for plaintiff in error:

Treaties made under the authority of the United States are the supreme law of the land.

U. S. Const. art. 6.

The Convention between the United States and Wurtemberg (8 Stat. at L. 588) was entered into by the governments of the two countries for the advantage of both. Art. 3 of that Convention was designed by Wurtemberg to secure to her subjects at home the right to receive inheritances falling to them in the United States, in the same manner and on the same terms as if they were citizens of the United States, as well as to obtain for those of her subjects who came into the United States, the right to dispose of their personal property by testament, donation, or otherwise; and the fact that an emigrant from Wurtemberg became naturalized under our laws, can have no effect to deprive the heirs of the one naturalized of the benefit stipulated for in their interest when the treaty was made. This is clear upon the principles which should govern in the construction of treaties.

But this is not all. Under the jurisprudence of the United States with respect to the position of her own citizens who see fit to have themselves naturalized in other countries, the fact of naturalization would not work such a change in the condition of the citizen or subject as would destroy the relations previously existing between him and his native country, when her interest or those of her people required those relations to continue.

4 Am. Law Jour. 461; *Talbot* v. *Janson*, 3 Dall. 133, 152, 158.

Mr. **J. P. Benjamin**, for defendant in error:

1. By the terms of the treaty itself, it does not include the case now before the court. This is not the case of a citizen of the United States disposing of property in Wurtemberg, nor of a subject of Wurtemberg who disposes of property in the United States; but it is the case of one of our own citizens dying at home and disposing of property lying within the state of which he was a citizen and in which he died.

2. If the case were within the treaty, the result would be the same, because the exemption extends only to such duties as are not imposed on the inhabitants of the country where the property lies. Now, by the law of Louisiana, the duty would be levied on the legacies accruing to these parties, even if they were citizens of Louisiana. Our own citizens are compelled to pay this tax, if they reside abroad.

The State v. *Poydras*, 9 La. Ann. 166.

3. The United States had no power by treaty to interfere with or control the right of the state of Louisiana to tax property within its limits, or to control or regulate the descent of property in the state. These powers were not conferred by the states on the general government, and remain vested in the state.

Const. U. S. 9th Amendment; see, also, Federalist, Nos. 32 and 34; Sto. Const. § 1508, and authors there cited.

Mr. Justice **Campbell** delivered the opinion of the court:

The defendant in error made opposition to the account filed in the settlement of the succession of John David Fink, deceased, in the second district court of New Orleans, because the executor did not place on the tableau ten per cent upon the amounts respectively allowed to certain legatees, who are subjects of the King of Wurtemberg. By a statute of Louisiana, it is provided that "each and every person, not being domiciliated in this state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, whether such a person shall have died in this state or elsewhere, shall pay a tax of ten per cent on all sums, or on the value of all property which he may have actually received from said succession, or so much thereof as is situated in this state, after deducting all debts due by the succession." The claim of the state of Louisiana was resisted in the district court, on the ground that it is contrary to the provisions of the third article of the Convention between the United States of America and His Majesty, the King of Wurtemberg, of the 10th April, 1844. That article is, that "the citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise; and "their [*447 heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country,

where the said property lies, shall be liable to pay in like cases." This court, in *Mager* v. *Grima*, 8 How. 490, decided that the act of the legislature of Louisiana was nothing more than the exercise of the power which every state or sovereignty possesses of regulating the manner and terms upon which property, real and personal, within its dominion, may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it. The case before the district court in Louisiana concerned the distribution of the succession of a citizen of that state, and of property situated there. The act of the legislature under review does not make any discrimination between citizens of the state and aliens in the same circumstances. A citizen of Louisiana domiciliated abroad is subject to this tax (*The State* v. *Poydras*, 9 La. Ann. 165); therefore, if this article of the treaty comprised the succession of a citizen of Louisiana, the complaint of the foreign legatees would not be justified. They are subject to "only such duties as are exacted from citizens of Louisiana under the same circumstances." But we concur with the supreme court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the con-contracting powers were or might be subject to onerous taxes upon property possessed by them within the states of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country, where the property lies, pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or 448*] subject of the other, was not in *the contemplation of the contracting powers, and is not embraced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the supreme court of Louisiana. It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the states.

The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration.

The judgment of the Supreme Court of Louisiana is affirmed.

THOMAS BELL, *Plff. in Err.*,

v.

THE MAYOR AND COUNCIL OF THE CITY OF VICKSBURG.

(See S. C. 23 How. 443–445.)

Affidavit to pleading, when waived by demurrer —pleading, when demurrable by state law for want of such affidavit.

Plea of *non est factum* was filed without an affidavit of its truth, which is required by a statute of Mississippi to authorise its reception. Held, that the filing of the plea is only irregular, and a demurrer or replication to it is a waiver of the affidavit, upon the general principles of pleading.

But in courts of states in which this statute exists, a plea of *non est factum*, without the affidavit required by it, is demurrable. Such is the practice in Mississippi.

The circuit court may maintain the rules of pleading prescribed by the statutes of a state, or adopt the usual practice in the state, if not contrary to an act of Congress.

Where the practice in the circuit court conforms to the state practice, it would be a surprise upon the plaintiff, and might work injustice, if we were to sustain the plea under such circumstances.

Argued Mar. 30, 1860. Decided May 4, 1860.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi.

The history and facts of the case sufficiently appear in the opinion of the court.

Mr. **J. P. Benjamin**, for plaintiffs in error:

Defendants in error rely on their plea of *non est factum*, and contend that a demurrer to such plea cannot be maintained. This is undoubtedly true at common law, but the state of Mississippi has, by statute, changed the common law on this subject, and the circuit court of the United States in that circuit has adopted the Mississippi law on the subject of pleading. This fact need not appear on the face of the record, for it is judicially known to the court. Now, the statutes of Mississippi on this subject provide "that no plea in abatement shall be admitted or received, unless the parties offering the same shall prove the truth thereof by oath or affirmation, as the case may require; and no plea of *non est factum* offered by any person charged as obligor, covenantor, or guarantor of a deed, shall be admitted or received, unless the truth thereof shall in like manner be proved by oath or affirmation."

Hutch. Dig. 846.

"Whenever any suit shall be commenced in any of the courts of this state, founded on any writing, whether the same be under seal or not, the court before whom the same is depending shall receive such writing as evidence of the debt, promise, undertaking or duty for which it was given, and it shall not be lawful for the defendant or defendants to deny the execution of any such writing, unless it be by plea supported by affidavit of the truth thereof, to be filed therewith at the time such plea is filed."

See, also, Rev. Code of Miss. 518.

These statutes speak for themselves. The plea in question was filed unlawfully, and was not a legal denial of the execution of the bond sued on, because not supported by "affidavit of the truth thereof, filed therewith."

The transcript contains the whole record as certified, and this court cannot presume, in opposition to the certificate, that the affidavit was filed.

The plaintiff had, it is true, the right to move the court to strike out the plea, but he had also the right to question its sufficiency by demurrer.

The plain meaning of the statute is that the plea of *non est factum*, unless accompanied by affidavit of its truth, shall not be sufficient in law on its face to constitute a denial of the fact of the execution of the deed. In Mississippi, under the statute, the plea would be treated at any stage of the cause as a nullity, being "deficient in one of the substantial requisites of the statute."

Prewitt v. *Bennett*, 7 S. & M. 101; *Templeton* v. *Planters' Bank*, 5 How. Miss. 171.

But the plea was properly demurred to as defective under the law, and the demurrer was the proper and regular mode of disposing of it, under the law of Mississippi.

Smith v. *Bank*, 6 Sm. & M. 314; *Johnston* v. *Beard*, 7 Sm. & M. 214.

The construction put by the state courts on their own statutes is, of course, adopted by this court, under its repeated decisions.

Cathoart v. *Robinson*, 5 Pet. 264; *McCracken* v. *Hayward*, 2 How. 612.

Finally, the judgment of the court below was erroneous, even if the demurrer was properly overruled. Under the Mississippi practice the judgment should not have been final, but *respondeat ouster*.

Randolph v. *Singleton*, 12 Sm. & M. 439.

Messrs. **George E. Badger** and **J. M. Carlisle**, for defendants in error:

As to the plea of *non est factum*, it is supposed that the objection may be, that the plea was not verified by the oath or affirmation of "the party offering the same."

How. & Hutch. Dig. tit. *Pleading and Practice*, 589.

To this it may be answered: 1st. That it does not appear that there was not the required affidavit. It is no part of the plea, and is not necessarily a part of the record. In the court below, so far as appears by the record, no reference was made to the supposed absence of an affidavit, and upon this writ of error it will be presumed that there was an affidavit if necessary, as the plea was received and treated as a plea, and its sufficiency and substance questioned by general demurrer.

2d. It is the office of a demurrer to call in question the sufficiency of a declaration, plea, etc., upon what appears on its face, without reference to any extrinsic matter; but the affidavit is no part of the plea; it may be waived, either expressly or by implication.

1 Ch. Pl. chap. 9; Steph. Pl. 44; *Richmond* v. *Tallmadge*, 16 Johns. 311.

The filing of the plea without an affidavit is an irregularity; but if the plaintiff treats it as a plea pleaded, he has waived the objection.

See *Bray* v. *Haller*, 2 J. B. Moore, 213; *Rex* v. *Cook*, 2 Barn. & C. 618.

And as to the precise question here, it has been expressly ruled by this court on a special demurrer for want of an affidavit, in *Bank* v. *Slocomb*, 14 Pet. 60, a case arising under the same statute of Mississippi. The court said that it could, at most, only have been urged as an objection to the receiving of the plea, but could not be relied on as ground of demurrer.

Mr. Justice **Campbell** delivered the opinion of the court:

The plaintiff instituted this suit upon a sealed instrument, made in the name of the city of Vicksburg, payable to bearer. The defendant pleaded fifteen pleas; to ten of which the plaintiff demurred, and judgment was rendered for the defendant on the demurrer. Some of these pleas involved important questions touching the validity of the instrument, which have, since the decision of the circuit court, been the subject of discussion in the supreme court of Mississippi and in this court. It is conceded that nine of the pleas were insufficient, and that the demurrers should have been sustained to them. The remaining plea is the ordinary *non est factum*. This was filed without an affidavit of its truth, and this is required by a statute of Mississippi to authorize its reception. But the defendant contends that it is the office of a demurrer to call in question the sufficiency of a declaration or other pleadings upon what appears upon its face, without reference to any extrinsic matter; that the affidavit is not a part of the plea; it is only that which is necessary to authorize the plea to be placed on file, and it may be waived either expressly or by implication. The filing of the plea is only irregular, and a demurrer or replication to it is a waiver. Upon the general principles of pleading, we assent to the accuracy of this argument.

Commercial & R. R. Bank of Vicksburg v. *Slocomb*, 14 Pet. 60; *Nicholl* v. *Mason*, 21 Wend. 339.

But in courts of states in which this statute exists, a plea of *non est factum*, without the affidavit required by it, is demurrable. Such is the practice in Mississippi.

Smith v. *Com. Bank of Rodney*, 6 Sm. & M. 83; **Johnston* v. *Beard*, 7 Sm. & M. [*445 214; *Bancroft* v. *Paine*, 15 Ala. 834; 4 Ala. 198.

We do not question the power of the circuit court to maintain the rules of pleading in the manner of applying the statutes of a state, or it may adopt the usual practice in the state, if not contrary to an act of Congress.

We learn that the course of practice in the circuit court conforms to the state practice. We suppose that it would be a surprise upon the plaintiff, and might work injustice, if we were to sustain the plea under such circumstances.

Judgment reversed and cause remanded.

CHARLES E. JENKINS, Moses Kneeland, and Jackson Hadley, *Plffs. in Err.*,
v.
WILLIAM S. BANNING.

(See S. C. 23 How. 455–457.)

When judgment will be affirmed with ten per cent damages—amendments allowed to pleadings, not grounds of error.

Where defendants, on refusing or neglecting to plead, were defaulted and judgment was given for plaintiff, and defendants sued out a writ of error, but failed to appear, and have not assigned error in this court, and it is obvious, from an inspection of the transcript, that there is no error in the proceedings, the judgment affirmed, with ten per cent damages.

Motions to amend mere formal defects in the pleadings are always addressed to the discretion of the court, and their allowance is never the subject of error.

Argued Apr. 30, 1860. Decided May 4, 1860.

IN ERROR to the District Court of the United States for the District of Wisconsin.

The history and facts of the case sufficiently appear in the opinion of the court.

No counsel appeared in this court for plaintiffs in error.

Mr. **R. H. Gillet**, for defendants in error:

First. The practice of an inferior court is not the subject of review upon a writ of error.

Marine Ins. Co. of Alexandria v. *Hodgson*, 6 Cranch, 206; *Simms* v. *Hundley*, 6 How. 1; *Turner* v. *Yates*, 16 How. 14, p. 29.

Second. The amendments permitted to be made to the plaintiff's declaration, were within the discretion of the court below, and cannot be reviewed or reversed on error.

The reasoning and cases cited under the preceding point fully sustain the above position.

Third. The assessment of the damages by the court below on a default, is not the subject of review upon a writ of error.

Fourth. There being no grounds for an arrest of judgment on account of incurable defects in the declaration, there can be no error in the judgment which can be reviewed and corrected by this court.

Not a solitary objection was made to any proceeding in the court below. It follows that there is no error to correct, and the judgment must be affirmed.

Mr. Justice **Clifford** delivered the opinion of the court:

This case comes before the court upon a writ of error to the district court of the United States for the district of Wisconsin. It was an action of debt upon a judgment recovered by the present defendant against the plaintiff in error, in the district court of the United States for the second judicial district of the territory of Minnesota. As originally framed, the declaration did not contain any caption specifying the term of the court when it was filed, or the return day of the process on which it was founded. In point of fact, it was filed on the 30th day of December, 1857, and the process was regularly returnable to the succeeding January term of the district court, to which this writ of error issued. Service of the summons upon the defendants was duly made on the following day, and the record shows that they subsequently appeared and demurred to the declaration, showing for cause the formal defects before mentioned. On the 18th day of January, 1858, the plaintiff, by leave of the court, amended his declaration, obviating the defects shown by the demurrer.

No exceptions were taken to the order of the court granting leave to amend, and, for aught that appears to the contrary, the amendment was made without objection.

After the amendment was allowed, the court overruled the demurrer, and the defendants refusing or neglecting to plead to the merits of the case, they were defaulted. Whereupon the plaintiff moved for judgment, and filed a duly certified copy of the former judgment on which the suit was founded. Reference was then made of the cause to the clerk to compute the interest, and on his report being made in writing, 457*] judgment *was given in favor of the plaintiff for the amount of the former judgment, together with interest on the same.

On this state of the record, the defendants sued out a writ of error, and removed the cause into this court, but have failed to appear and prosecute their writ of error. They did not except to the ruling of the district court, and have not assigned error in this court, and it is obvious, from an inspection of the transcript, that there is no error in the proceeding. Motions to amend mere formal defects in the pleadings are always addressed to the discretion of the court, and are usually granted as a matter of course, and their allowance is never the subject of error. That point has been so frequently decided. that we do not think it necessary to cite authorities in its support.

Under these circumstances, the counsel for the defendant in error moves that the judgment be affirmed, with ten per cent damages. By the twenty-third rule of this court, it is provided that in all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out for delay, damages shall be awarded at the rate of ten per centum per annum on the amount of the judgment, and the said damages shall be calculated from the date of the judgment in the court below, until the money is paid.

That rule is applicable to this case, and the judgment is accordingly affirmed, with costs and ten per cent damages.

THOMAS WHITRIDGE *et al.*, Claimants of the Schooner Fannie Crocker, *Appts.*,

v.

JOSHUA DILL *et al.*

(See S. C. 23 How. 448-455.)

Collision between two schooners—want of lookout—rules of vessel astern passing the vessel ahead.

In case of collision in Chesapeake bay, between two schooners, in the evening, the vessel of the respondents was held in fault because she had no lookout; and the neglect of that precaution contributed to the disaster, and in all probability was the sole cause that produced it.

If the vessel of the respondents was not sufficiently to the windward to have passed the other vessel in safety, then she was also in fault, because she did not seasonably give way and pass to the right, or adopt necessary precautions to pass in safety.

Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close-hauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision.

The vessel ahead, on that state of facts, has the seaway before her, and is entitled to hold her position.

Argued Apr. 27, 1860. Decided May 4, 1860.

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel in this case was filed in the district court of the United States for the district of Maryland by the appellees, to recover damages resulting from a collision. The district court entered a decree in favor of the libellants for the full value of the vessel and cargo. This decree having been affirmed, on appeal, by the circuit court, the respondents took an appeal to this court.

NOTE.—*Collision; measure of damages for*—see notes to 4 L. ed. U. S. 456, and 11 L. ed. U. S. 35. *Rights of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes to 13 L. ed. U. S. 537; 35 L. ed. U. S. 453; 30 C. C. A. 630.

A further statement of the case appears in the opinion of the court.

Messrs. **George W. Brown** and **F. W. Brune, Jr.**, for appellants.

Mr. **John H. B. Latrobe**, for appellees:

The colliding vessel was clearly and alone in fault.

1. Because there was no proper lookout.

2. Because, even after The Smith was seen, there was negligence in not taking the proper means to avoid the collision.

In support of these positions, the following authorities are relied on:

St. John v. *Paine*, 10 How. 585; *Newton* v. *Stebbins*, 10 How. 607; *The Genesee Chief* v. *Fitzhugh*, 12 How. 461; *The New York*, 59 U. S. (18 How.) 225; *Wood* v. *Davis*, 59 U. S. (18 How.) 467; *Chamberlain* v. *Ward*, 62 U. S. (21 How.) 570; *The Catharine* v. *Dickinson*, 58 U. S. (17 How.) 177; *The Europa*, 2 Eng. L. & Eq. 557; *The Netherlands Steamboat Co.* v. *Styles*, 9 J. B. Moore, 286.

Mr. Justice **Clifford** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the district of Maryland. The libel was filed in the district court on the 31st day of March, 1855. It was a proceeding *in rem* against the schooner Fannie Crocker, and was instituted by the libelants as the owners of the schooner Henry R. Smith, to recover damages on account of a collision which took place between those vessels on the 9th day of March, 1855, in the Chesapeake bay, whereby the latter vessel was run down and totally lost. As alleged by the libelants, their vessel sailed the day previous to the collision, from Hampton Roads, in the state of Virginia, laden with a valuable cargo of oysters, and bound on a voyage to New Haven, in the state of Connecticut.

They also allege, that at half past eight o'clock in the evening of the day of the collision, the wind being then from the northwest, and blowing a fresh breeze, and when their schooner was heading one point to the eastward of north, close-hauled on the wind, another schooner was seen on their larboard quarter, about one third of a mile distant; that the strange schooner sailed faster than the vessel of libelants, and soon came up with and abeam of their vessel, when she put her helm up, bore away, and coming down on the vessel of the libelants, head on, struck her abreast the cabin, and so damaged her that she sunk in a few minutes, leaving the master and crew only time to escape on board the colliding vessel.

Many other facts and circumstances are stated in the libel to show that those on board 450*] the vessel of the libelants were *not in fault, and that the collision was occasioned wholly through the unskifulness and negligence of those in charge of the vessel of the claimants. In their answer, the claimants admit the collision, and that the vessel of the libelants was lost, but they deny that the circumstances attending the disaster are truly stated in the libel.

According to their account of the circumstances, it became necessary for The Fannie Crocker, between eight and nine o'clock in the evening of that day, and just before collision, to tack, in order to alter her course. At that time, as they allege, she was heading towards the southern and western shore, but being under a double-reef mainsail, foresail, and jib, and in ballast trim, she failed to go round. Similar attempts, as they allege, were several times repeated, but without success. Finding that the vessel would not go round, the master then gave the order to wear ship, and in executing that order the main peak was lowered to enable the vessel to wear rapidly; but when the main boom passed over the deck, the wind caught the sail and threw it over the main gaff, and tore the sail from the leech-rope, rendering it perfectly useless. While assisting to execute this order, one of the seamen had his leg caught in the fore sheet, and was severely injured, when all hands, except the master, who was at the wheel, went to relieve the seaman. After disengaging the seaman from his dangerous situation, the rest of the hands, as the claimants allege, were called to haul in the mainsail, which was then dragging in the water, and at this juncture another vessel, which subsequently proved to be the schooner of the libelants, was seen on the starboard quarter of the claimants' vessel, some three or four lengths off. In order to prevent the two vessels from coming in contact, the claimants allege that the helm of their vessel was put hard up, with a view to go to the stern of the strange vessel; but the effort was unavailing, and the two vessels came together, and, as the claimants allege, wholly through the carelessness and unskillful management of those in charge of the other vessel, in not altering their course in proper time to avoid a collision.

Some particularity has been observed in stating the defense, *in order that the re- [*451 spondents may have the full benefit of the position they have assumed.

Two witnesses only were examined, on the part of the libelants, in respect to the circumstances of the disaster. In the district court a decree was entered for the libelants, allowing them the full value of their vessel and cargo; and on appeal to the circuit court, that decree was affirmed; whereupon the respondents appealed to this court.

From the pleadings and evidence, it satisfactorily appears that The Henry R. Smith was a schooner of one hundred and thirty-four tons, and that she was laden with oysters, and bound on a voyage to New Haven, in the state of Connecticut. She was a stanch vessel, well manned and equipped, showed a proper light at the time of the collision, and had a sufficient and competent lookout. On the other hand, The Fannie Crocker was a schooner of two hundred and twenty-two tons, sailing in ballast, and was bound on a voyage from Dighton, in the state Massachusetts, to Baltimore, in the state of Maryland. Like the other vessel, she was stanch, and well manned and equipped, but failed to show a light at the time of the collision, and had no sufficient lookout stationed on any part of the vessel. All of the witnesses state that the night was clear, and that there was no difficulty in seeing objects, without lights, at considerable distance. They mention no circumstance tending to authorize the conclusion that the collision can be justified or excused on account of the character of the night or the difficulties of the navigation. Oc-

curring, as it did, inside of the capes, in the open bay, of a clear night, with no difficulties to encounter, except a fresh breeze from the northwest, it is obvious that one or both of the vessels must be in fault. They were both sailing in the same general direction; but the vessel of the respondents, being in ballast, and the larger of the two, was moving through the water at the greater speed. She was astern of the other vessel, and somewhat to the windward, but was sailing on a line converging to the track of the other vessel; and both vessels were close-hauled on the wind.

Terry, the mate of the libelants' vessel, says 452*] when he first *saw the other schooner, she was half a mile distant on the weather quarter. At that time both vessels were on the wind and standing the same way—to the northward and eastward. According to his account, the vessel of the respondents sailed faster than the vessel of the libelants, and ran down until she got abreast of her to the windward, when she was about fifty rods distant. He also states, that when they first saw that she was coming down on them, they put the helm of their vessel up, and tried in every way to keep clear of her, but could not, as she had fallen off from her course, and was then before the wind.

Another witness (a seaman) was also examined by the libelants. His testimony substantially confirms the mate, and clearly shows that the vessel of the libelants was ahead, and that the other vessel was to the windward, and moving through the water much faster than the vessel of the libelants.

Both witnesses testify, in effect, that the approaching vessel, when she was nearly abreast of their vessel, fell off and struck the vessel of the libelants on the larboard quarter, as alleged in the answer. They both affirm that they had a sufficient and competent lookout and proper lights.

Several witnesses were also examined on the part of the respondents. Their account of the circumstances attending the disaster differs in several particulars from that given by the witnesses examined by the libelants. They all agree, however, that the vessel of the libelants was not seen by anyone on board their vessel until she was so near that all efforts on their part, to prevent a collision, were unavailing.

In effect, they also admit that their vessel, at the time of the collision, had no lookout engaged in the performance of that duty. On this latter point, the master says that he had directed the steward, a colored man, to keep a lookout, and adds, that he was somewhere about the main deck. But all hands had been called to haul in the mainsail, and the second mate states that he first saw the vessel of the libelants while he was engaged with the other hands in endeavoring to accomplish that object. When he saw the vessel, he says she was only about three times the length of his vessel off. 453*] *At that time, all the hands, except the steward, were aft the mainsail, where they could not see the other vessel without changing their position. She was first descried by the second mate as he stepped up on to the "lazy board," so called, in order to haul up the damaged sail. He then cried out to the master to put the helm down, but the mate at the same time sung out to put the helm up. In this confusion the master adopted the suggestion of the mate; and he admits that the steward, when the alarm was given, came running aft, and assisted him in changing the helm.

Two other witnesses state that the steward assisted the master in putting up the helm; and one of them says that no particular person was keeping watch, and attempts to justify the neglect upon the ground that it is not customary to have a man forward when all hands are called to take in the sails.

Suffice it to say, without entering more into detail, that the testimony of the respondents shows, conclusively, that their vessel had no sufficient lookout at the time of the collision; and the second mate, who first discerned the vessel of the libelants, testifies, without qualification, that if they had seen her three or four minutes sooner, they could have cleared her and prevented a collision.

From these facts, which are proved beyond doubt, it necessarily follows that the vessel of the respondents was in fault. She had no lookout; and the neglect of that precaution contributed to the disaster, and in all probability was the sole cause that produced it.

2. Assuming that the vessel of the respondents was not sufficiently to the windward to have passed the other vessel in safety, then she was also in fault, because she did not seasonably give way, and pass to the right. Where a vessel astern, in an open sea and in good weather, is sailing faster than the one ahead, and pursuing the same general direction, if both vessels are close-hauled on the wind, the vessel astern, as a general rule, is bound to give way or to adopt the necessary precautions to avoid a collision. That rule rests upon the principle that the vessel ahead, on that state of facts, has the seaway before her, and is entitled to hold her position; *and consequently, the [*454 vessel coming up must keep out of the way.

Speaking of steamers, Judge Betts said, in the case of *The Governor*, Abb's Adm. 110, that the fact that they were running in the same direction, the one astern of the other, imposed upon the rear boat an obligation to precaution and care, which was not chargeable, to the same extent, upon the other. He accordingly held, that a vessel in advance is not bound to give way, or to give facilities to a vessel in her rear, to enable such vessel to pass; but that the vessel ahead is bound to refrain from any maneuvers calculated to embarrass the latter vessel while attempting to accomplish that object. Similar views had previously been announced by the same learned judge, in the case of *The Steamboat Rhode Island*, decided in 1847. In that case, it is said the approaching vessel, when she has command of her movements, takes upon herself the peril of determining whether a safe passage remains for her beside the vessel preceding her, and must bear the consequences of misjudgment in that respect. No immunity is extended by the law to the one possessing the greater speed; and so far from encouraging the exercise of the power to its utmost, the law cautiously warns and checks vessels propelled by steam against an improvident employment of speed, so as to involve danger to others, being stationary or moving with less velocity. Olcott, Adm. 515.

That case was appealed to the circuit court,

where it was affirmed. *The Rhode Island*, 1 Blatchf. 363.

Emerigon says, a ship going out of a port last is to take care to avoid the vessel that has gone out before her, and he mentions the case of a small vessel which went out of the port of Marseilles, and in tacking struck a boat that went out before her, which was also tacking. Claim for damages was made by the boat, and the judges were of opinion that the vessel going out last is to take care to avoid the one before it. Emerigon, chap. 12, § 14, p. 330. Other continental authorities may be cited to the same effect. Whether it be by night or day, says Valin, b. 2, p. 578, the ship that leaves after another, and follows her, should take care to 455*] avoid a collision, *without which she will have to answer in damages. Sibille de Abordage, § 249.

We are not aware that the precise question presented in this case has been ruled by any of the Federal courts. Remarks are certainly to be found in the opinion of the court in the case of *The Clement*, 17 Law Rep. 444, which are inconsistent with the proposition here laid down. That case was appealed to the circuit court, and was there affirmed. But the remarks to which we refer were not necessary to the decision of the cause, and we think they must be received with some qualification. *The Clement*, 2 Curt. C. C. 368, § 1; Pars. Mar. Law, p. 197, note 2.

Without further discussion of the general principle at the present time, it will be sufficient to say, that we are satisfied that the rule assumed in this case is one well calculated to prevent collisions, and that it is one which ought to be constantly observed and enforced in all cases where it is applicable. That exceptionable cases may arise, is not at all improbable; but it will be the proper time to consider them when they are presented for decision. For these reasons, we are of the opinion that the vessel of the respondents was wholly in fault. Objection was made to the damages as excessive, on the ground that the vessel might have been raised from where she was sunk. After a careful examination of the testimony, we think the objection cannot be sustained.

The decree of the Circuit Court is, therefore, affirmed, with costs.

JOHN DOE, *ex dem.*, Curtis Mann and Dolphus Hannah, *Plffs. in Err.*,

v.

WILLIAM WILSON.

(See S. C. 23 How. 457-464.)

Treaty with Pottawatomie Indians—reservations to individuals of the tribe—grant by one, of his lands—when grantee's title perfected.

By the treaty of October 27, 1832, the Pottawatomie Indians ceded to the United States their title and interest in and to their lands in the states of Indiana and Illinois, and the Michigan territory, south of Grand river, and reservations were made in favor of individual Pottawatomies, and to complete their title to the reserved lands, the United States agreed that they would issue patents to the respective owners.

The reservees took by the treaty, directly from the Nation, the Indian title, and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made. The treaty itself converted the reserved sections into individual property.

Although the government alone can purchase lands from an Indian Nation, yet when the rights of the Nation are extinguished, an individual of the Nation who takes as private owner can sell his reserved interest.

When the United States selected the lands reserved to him, and made partition (of which the patent is conclusive evidence) his grantees took the interest he would have taken if living.

Argued May 1, 1860. Decided May 4, 1860.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of ejectment brought in the court below, by the plaintiffs in error, to recover the possession of two sections of land, in Laporte county, Indiana.

The trial below having resulted in a verdict and judgment in favor of the defendant, the plaintiffs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **S. S. Baxter, O. H. Smith,** and **J. A. Liston** for plaintiffs in error:

I. The third article of the treaty of the 27th Oct. 1832, was a mere executory promise of the United States to grant in future and by patent to Pet-chi-co, two sections of land, to be thereafter selected by the President. This promise was to be performed by the political department, and before its performance, could create no inchoate title or estate in Pet-chi-co to any lands.

Longlois v. *Coffin*, 1 Ind. 446; *Verden* v. *Coleman*, 4 Ind. 457; *Haden* v. *Ware*, 15 Ala. 158; *Fipps* v. *McGehee*, 5 Port. 413; *Johnson* v. *McGehee*, 1 Ala. 186.

And this being a mere executory promise to be executed by the political department, was not assignable, and the effort was against public policy, and could convey no estate to the assignee, or give him any right to the land.

Lampet Case, 10 Co. 46 *b*, 48 *a*; 4 Cruize, 174, tit. 32, ch. 6. § 46; *Carleton* v. *Leighton*, 3 Mer. 670; *Doe* v. *Martin*, 8 Barn. & C. 15 Com. Law, 283; 4th § of act of July 22, 1790, 1 S. L. 138; 12th § of act of 1802, 2 S. L. p. 143; opinion of Mr. Taney on treaty of 20th Oct. 1852, 2 Opinions, 588; *Jackson* v. *Wood*, 7 Johns. 294; *Goodell* v. *Jackson*, 20 Johns. 706, 708.

The deed from Pet-chi-co is inoperative.

First. Because no estate in the lands then existed.

Second. Because it conveys no specific land.

The description, whether we look to the subject conveyed or the title, is too vague to convey any property.

Third. It is void as to subsequent purchasers, because not recorded until February 27, 1856.

Rev. Stat. Ind. 1843, ch. 28, § 25, p. 418.

It was not filed in any department of the government, and has never received the sanction of any officer of the government.

U. S. v. *King*, 3 How. 786, 787.

The act of May 20, 1836 (5 Stat. at L. p. 31), vesting the estate of persons who died before patent issued in the heirs or assignees of such person, will not vest the title in Colerick, Coquillard or Wilson, because they are not such assignees as were contemplated by that act.

See *Landes* v. *Brant*, 10 How. 348; *Stoddard* v. *Chambers*, 2 How. 316; *Bissell* v. *Penrose*, 8

How. 317; *French* v. *Spencer*, 62 U. S. (21 How.) 228.

It was not intended to grant the estate of a dead man to an assignee by an instrument not recognized by law, never recorded, never produced to the land office, and on which, if produced, the office could take no action.

II. The patent of January 7, 1837, was the first act severing this land from the public domain, and vesting an estate in it in any individual, and subjecting it to the state laws.

Wilcox v. *Jackson*, 13 Pet. 498.

The heirs of Pet-chi-co took this newly granted estate directly from the United States.

4th Cruise, tit. 32, ch. 20, § 18; *Shaw* v. *Loud*, 12 Mass. 447; *Hall* v. *Leonard*, 1 Pick. 27; 20 Johns. 706; *Hunt* v. *Wickliffe*, 2 Pet. 208.

The supposed deed of Pet-chi-co cannot work an estoppel.

First. Because it was void.

Second. Because the heirs, taking nothing by descent from Pet-chi-co, have no privity with him as to this title.

4 Kent, 248 (221); Co. Litt. 352; *Blight* v. *Rochester*, 7 Wheat. 548.

Messrs. **John B. Niles, R. Breckenridge, and J. U. Petit,** for defendant in error:

The plaintiffs objected that the purchase from Pet-chi-co before the location of the land or issuing of the patents, was void as against the act of congress and public policy.

We have been referred to no act of Congress which forbids such a purchase, and the policy of the state of Indiana rather favors than opposes such sales; hence, the legislature have afforded peculiar facilities for the alienation of lands held by certificates of purchasers before the issuing of the patent, by making such certificates assignable and evidence of the legal title in the original holder or assignee.

Rev. Law, Ind. 31, pp. 93, 94; Session Laws, 1833, p. 112.

A similar policy on the part of the general government is indicated by the act of Congress of May 20, 1836.

5 U. S. Stat. at L. p. 31; *Landes* v. *Brant*, 10 How. 373; *Galloway* v. *Finley*, 12 Pet. 264.

The next objection, that the deed is void for want of sufficient description of the land, is equally untenable.

See Co. Litt. 43; *French* v. *Spencer*, 62 U. S. (21 How.) 228; 7 Stat. at L. 399; *U. S.* v. *Arredondo*, 6 Pet. 739.

But to the last objection to the deeds, that they could only convey an equity, we answer, that it is immaterial what title actually was conveyed at the moment of their execution. It is sufficient that by the subsequent events, and by virtue of the doctrine of relation or estoppel, or by the act of congress of May 20, 1836, they may have become operative so as to work upon the estate, or to estop parties and privies.

The deed under which the defendant claimed title, sets forth that the grantor was entitled to the land, and contained full covenants of warranty and seisin.

After the grantor's death, his right ripened into a perfect legal title by the issuing of the patent. His heirs and privies now claim that the legal title, so acquired, inures to their benefit. This would drive Wilson to his action on the covenant. On the contrary, the doctrine of estoppel applies, and saves the necessity for litigation, and at once secures the ends of justice.

See *French* v. *Spencer*, 62 U. S. (21 How.) 240; *Doe* v. *Oliver*, 2 Sm. Lead. Cas. 583; *Bush* v. *Marshall*, 6 How. 284; *Van Rensselaer* v. *Kearney*, 11 How. 297.

The fourth instruction given by the court was as follows:

"If Pet-chi-co, between the ratification of the treaty and the issuing the patents, sold and conveyed the land in controversy, by a sufficient deed of conveyance, with covenants of warranty to Coquillard and Colerick, and their asigns, then the patents, when issued, as to the assignees, related back to and took effect from the date of the ratification of the treaty."

This instruction announces a well known principle, often affirmed by the Supreme Court, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.

5 Cruise, Dig. 510, 511; *Jackson* v. *Ramsey*, 3 Cow. 75; *Landes* v. *Brant*, 10 How. 348; *Ross* v. *Barland*, 1 Pet. 655; *Lessee of French* v. *Spencer*, 62 U. S. (21 How.) 228.

The doctrine of this instruction is strengthened in its application to this case by the act of Congress of May 20, 1836, above referred to.

The fifth instruction given by the court only asserts the obvious effect of the act of May 20, 1836:

"If, before the issuing of patents to Pet-chi-co, he had by a legal and valid instrument, assigned to Coquillard and Colerick his interest in the lands which were to be granted to him under the treaty of October, 1832, and if Colerick in like manner asigned his interest to Coquillard, and if Coquillard had in like manner asigned to Wilson, then, by virtue of the act of Congress of May 20, 1836, the patents, when issued, inured to the benefit of Wilson, and vested a legal title to the land in him, although Pet-chi-co may have died before its date."

That in case of such a legal and valid assignment as is referred to in this instruction, the patent, when subsequently issued, would, under this act of Congress, has inured to and vest a legal title to the land in the assignee, rather than in the heirs of the patentee, is sufficiently established by the interpretation put upon the act by the Supreme Court in the cases above referred to, in which the act has received a judicial interpretation.

Galloway v. *Finley*, 12 Pet. 264; *Landes* v. *Brant*, 10 How. 348.

Mr. Justice **Catron** delivered the opinion of the court:

By the treaty of October 27, 1832, made by the United States, through commissioners, with the Pottawatomie tribe of Indians of the state of Indiana and Michigan territory, said Nation ceded to the United States their title and interest in and to their lands in the states of Indiana and Illinois, and the Michigan territory, south of Grand river.

Many reservations were made in favor of Indian villagers jointly, and to individual Pottawatomies. The reservations are by sections, amounting probably to a hundred, lying in various parts of the ceded country. As to these, the Indian *title remained as it stood [*462

before the treaty was made; and to complete the title to the reserved lands, the United States agreed that they would issue patents to the respective owners. One of these reservees was the chief, Pet-chi-co, to whom was reserved two sections. The treaty also provides, that "the foregoing reservations shall be selected under the direction of the President of the United States, after the land shall have been surveyed, and the boundaries shall correspond with the public surveys."

In February, 1833, by a deed in fee simple, Pet-chi-co conveyed to Alexis Coquillard and David H. Colerick, of the state of Indiana, "all those two sections of land lying in the state aforesaid, in the region of country or territory ceded by the treaty of 27th October, 1832." The grantor covenants that he is lawful owner of the lands; hath good right and lawful authority to sell and convey the same. And he furthermore warrants the title against himself and his heirs. Under this deed, the defendant holds possession.

The lessors of the plaintiff took a deed from Pet-chi-co's heirs, dated in 1855, on the assumption that their ancestor's deed was void, he having died in 1833, before the lands were surveyed, or the reserved sections selected. And on the trial below, the court was asked to instruct the jury, "that Pet-chi-co held no interest under the treaty in the lands in question, up to the time of his death, that was assignable, he having died before the location of the land, and before the patents issued."

This instruction the court refused to give; but, on the contrary, charged the jury that "the description of the land in the deeds from Pet-chi-co to Coquillard and Colerick, from Colerick to Coquillard, and from Coquillard to Wilson, are sufficient to identify the land thereby intended to be conveyed as the same two sections of land which are in controversy in this suit, and which are described in the patents which have been read in evidence."

It is assumed that the lands embraced by the patents to Pet-chi-co, made in 1837, do not lie within the section of country ceded by the treaty of 27th October, 1832; and, therefore, 463*] *the court was asked to instruct the jury that the defendants cannot claim nor hold the land as assignees of Pet-chi-co, by virtue of the treaty. The demand for such instruction was also refused.

There is no evidence in the record showing where the land granted by the patents lies, except that which is furnished by the patents themselves. They recite the stipulation in the treaty in Pet-chi-co's behalf; that the selections for him, of sections nine and ten, had been made, "as being the sections to which the said Pet-chi-co is entitled" under the treaty. The recitals in the patents conclude all controversy on this point.

The only question presented by the record that we feel ourselves called on to decide is, whether Pet-chi-co's deed of February, 1833, vested his title in Coquillard and Colerick.

The Pottawatomie Nation was the owner of the possessory right of the country ceded, and all the subjects of the Nation were joint owners of it. The reservees took by the treaty, directly from the Nation, the Indian title; and this was the right to occupy, use, and enjoy the lands, in common with the United States, until partition was made, in the manner prescribed. The treaty itself converted the reserved sections into individual property. The Indians, as a nation, reserved no interest in the territory ceded; but as a part of the consideration for the cession, certain individuals of the Nation had conferred on them portions of the land, to which the United States title was either added or promised to be added; and it matters not which, for the purposes of this controversy, for possession.

The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession, in the Indian Nation, with the exclusive power in the government of acquiring the right. *Johnson* v. *McIntosh*, 8 Wheat. 603; *Cornet* v. *Winton*, 2 Yerg. 147.

Although the government alone can purchase lands from an Indian Nation, it does not follow, that when the rights of the Nation are extinguished, an individual of the Nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable, unless the treaty had prohibited *its sale [*464 *Cornet* v. *Winton*, 2 Yerg. 148; *Blair and Johnson* v. *Pathkiller*, 2 Yerg. 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold, and inhabited by a white population, among whom the Indians could not remain.

We hold that Pet-chi-co was a tenant in common with the United States, and could sell his reserved interest; and that when the United States selected the lands reserved to him, and made partition (of which the patent is conclusive evidence), his grantees took the interest he would have taken if living.

We order the judgment to be affirmed.

END OF VOLUME 64.

APPENDIX.

Copy of Affidavit referred to in the closing paragraph of the Opinion of the Court in U. S. v. Gomez, ante, p. 556.

IN the United States district court for the southern district of California (*Vincente P. Gomez* ad. *The United States.*):

Pacificus Ord, late attorney of the United States for the southern district of California, being duly sworn, says: That at the June term, 1857, of the district court of the United States for the southern district of California, held at Monterey, Isaac Hartman represented that he was a member of the law firm of Sloan & Hartman, authorised and retained as counsel for Vincente P. Gomez, in the above titled cause. That he had, as counsel for the said claimant, obtained an order from the district court of the northern district, removing the case to the southern district; and that he was ready and willing to present the same to the court, as soon as the same could be heard. Affiant further says that, shortly thereafter, the court being then in session, the said Hartman, acting as counsel for said claimant, presented the said case to the court by reading the petition for review, and the other papers and transcript in the case to the court, for the appellant. That after so doing, this affiant, acting for the United States, admitted, in open court, that in his opinion the claim was a valid one, and that in accordance with the ruling of the court in previous cases the case should be confirmed. That thereupon the court ordered that the decision of the land commissioners should be reversed, and a decree of confirmation entered therein for claimant. Affiant further says that at the next term of the said district court, held in Los Angeles, in December, the said Hartman, as counsel in said case, presented to affiant a draft of the decree of confirmation of said claim. That upon reading the same, affiant objected to the said draft, on the ground that the same would cover all the land embraced within the limits of the named boundaries, to the extent of eleven leagues. Whereupon the said Hartman made another draft of a decree, restricting the quantity of land to not more than four leagues; which said draft, after being approved by affiant as United States Attorney, was signed by the court. That thereafter affiant drafted an order of appeal to the Supreme Court of the United States in said case, on the part of the United States; and on the last day of the term of said court, Col. Kewen, acting for the United States, at the request of affiant, district attorney as aforesaid, asked for and obtained, as affiant was afterwards informed, the said order in said case. Affiant further says, that at or about the time the said Hartman informed him that he had been retained by the said claimant in said case, affiant informed said Hartman that he had been the attorney for said Gomez before the United States Land Commissioners; and that, for his services therein, the said Gomez had conveyed to him the one undivided half of the tract of land claimed therein. That he had endeavored for a long time to get the Attorney General to appoint some attorney to represent the United States in cases in which he was interested, but without success. That this case had been unacted upon for a long time; and that as the Commissioners had, upon the evidence before them, passed favorably upon the validity of the claim, and though they rejected it, it was only on the ground of want of occupation by the grantee; and as that ground had been overruled by the Supreme Court, there could be no injury to the United States, and no impropriety on his part, as United States Attorney, in appearing and consenting to its confirmation; in all of which views of this affiant, the said Hartman then concurred. Affiant further says, that he wrote to the Attorney General of the United States shortly after assuming the duties of the office of district attorney, about December, 1854, stating that he had been employed as counsel, and was interested in several claims then pending on appeal in his district from the Land Commissioners, and requested that he would cause some attorney to be specially named to represent the United States in such cases. But the Attorney General never made or named any person to act in the matter, as requested. That affiant, being thus left to act in the matter as best he might, did act with the most scrupulous good faith, and to the best of his ability, for the United States, in all such cases. Affiant further says that he has been informed and believes that the parties who are now and have been endeavoring to impede and defeat this claim, since the confirmation by the United States district court, are private persons in possession of a valuable quicksilver mine, believed to be within the limits of said grant, lately opened and worked by them, of which one Daniel Gibb, of San Francisco, is believed to be the principal person interested. Affiant further says that the substantial allegations in certain depositions of said Isaac Hartman and E. W. F. Sloan, dated December, 1859, in said case, are wholly untrue, except as herein admitted.

And further affiant sayeth not.

P. Ord.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

DECEMBER TERM, 1860.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

DECEMBER TERM, 1860.

RUSSELL STURGIS, Claimant of the Steam Tug Hector, her Tackle, etc., impleaded with the Ship Wisconsin, her Tackle, etc., *Appt.*,

v.

HERMAN BOYER, Albert Woodruff, and Jeremiah R. Robinson, owners of the Lighter Republic, *Libts.*,

(See S. C. 24 How. 110-125.)

Collision—tug, when liable for damages done by ship in tow—vessel and owners, when liable.

Where a lighter was capsized by a ship in tow of and lashed to a tug, the tug held liable for the damages.

Whenever a tug, under the charge of her own master and crew, undertakes to transport another vessel, which for the time being, has neither her master nor crew on board, from one point to another, she must be held responsible for the proper navigation of both vessels.

Third persons suffering damage, through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her masters or owners, for recompense.

Whenever a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is liable for the consequences.

No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent, to the owners.

By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents, in performing the service.

The master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation.

Where it clearly appears that those in charge of the steam tug had the exclusive control, direction, and management of both vessels, and there is no proof that the tug was not a suitable vessel to perform the service for which she was employed, or that anyone belonging to the ship in tow participated in the navigation, or was guilty of any negligence, the tug is responsible for damages caused by the ship in tow.

Argued Dec. 19, 1860. Decided Dec. 31, 1860.

NOTE.—*Collision measure of damages for*—see notes to 4 L. ed. U. S. 456, and 11 L. ed. U. S. 35.

Rights of steam and sailing vessels with reference to each other, and in passing and meeting—see notes to 13 L. ed. U. S. 537; 30 C. C. A. 630.

Rules for avoiding collision; steamer meeting steamer—see notes to 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 28 C. C. A. 532; 29 C. C. A. 368.

APPEAL from the Circuit Court of the United States for the Southern District of New York.

The libel in this case was filed in the district court of the United States for the southern district of New York, by Boyer and others, owners of the lighter Republic, against the ship Wisconsin and the steam tug Hector, to recover damages resulting from a collision.

The district court entered a decree in favor of the libelants, against the ship and tug. The circuit court, on appeals by the claimants of the vessels, affirmed the decree of the district court against the tug for damages and costs, and dismissed the libel, with costs as against the ship; whereupon the libelants took an appeal to this court, from the decree of the circuit court, so far as it relates to the ship. And the claimant of the tug took an appeal from the whole of said decree.

A further statement of the case appears in the opinion of the court.

Mr. **E. C. Benedict**, for libelants:

The ship is clearly responsible to the libelants for this collision—they should not be deprived of her responsibility, and compelled to resort to the tug alone.

The enterprise was the enterprise of the ship. She had on board "the mate, helmsman, and a full complement of mariners." There was no wind and an adverse tide. She needed a propelling power, and procured a tug to assist her, not to command her, or her officers, or men. All was the proper business of the ship.

"Third parties receiving an injury by collision can rarely be required to lay the responsibility to any other agency than that which was the proximate cause of it. If a vessel is run upon by another under way, the latter must be answerable for the wrong, unless she can prove the occurrence to have been the result of inevitable accident, or without fault on her side, and no reason is perceived why she is exonerated by having permitted herself to be moved by a steam vessel unskillfully or incautiously managed, more than if the cause of the injury was want of attention or prudence in the appliance or use of her own means of navigation."

The Express, Olcott, 263.

The captain of the tug was on board the ship, and if he was master of the ship *pro hac vice*, he was appointed by the owners. For the pur-

pose of getting under way and moving and mooring at the end, and steering her and keeping a lookout, Captain Ostrom had charge, and the mate had charge as master. The ship must be steered by her own helm, except that, in cases of difficulty, the helm of the tug must be used to assist—it is too small to control. The lookout must be on board the ship, because the ship was ahead. The tug was small, and did not reach the ship's bows within one third of the ship's length. The tug was behind, at one side and below, so that she could not look out.

The tug was on board the ship. She was firmly fastened to her, alongside, and was, for the time being, a part of her, as much as the machinery and side paddle-wheels of the tug were on board, or a part of the tug. They were all fastened on the outside of the hull, to act as motive power.

The ship was the actual cause of the injury. The tug did not touch or injure the lighter—the ship alone struck her. The actual collision was out of sight and out of reach of the tug.

The negligence of the ship and those on board and in charge of her caused the collision; they did not see the lighter, because they had no lookout who was careful or efficient.

At the time of the accident the tug was still. She was shut off at Catharine ferry; her function had ceased. The ship was going on her own momentum. While the tug was propelling her, she went four or five knots an hour; at the time of the collision much less.

When a ship is sent through a public crowded harbor, her owners are bound to provide her with all the necessary means, implements, and agencies of the most skillful, reliable, and trustworthy character, for the safety of other vessels, and if any of them fail, and thereby another is injured, the ship herself is responsible.

The question, which of those subordinate agents was the guilty cause of the accident, is wholly immaterial in this suit. They cannot interplead here. They are not here, plaintiff and defendant, with proper pleadings. Their rights, as against each other, are not in issue, and they can be settled only in another action, to which the lighter cannot be a party. She is not interested in the question whether the tug, for her petty compensation, is an insurer of the ship against her own negligence.

The lighter had no proper course except to proceed against the whole thing, which caused the injury.

The Express, 1 Blatchf. 367.

Mr. **I. T. Williams**, for claimants of the ship Wisconsin:

In no view of the case can the ship be made responsible, or her owners liable, for the damages sustained by the lighter.

Sproul v. *Hemmingway*, 14 Pick. 1; *The Express*, 1 Blatchf. 365.

She was lashed firmly to the side of the tug, and under the exclusive command and direction of the captain and officers of the tug.

To make the owners liable for such a collision, would be to establish an entirely new principle of law.

It would not be an application of the principle *respondeat superior*, for in no sense can the captain and crew of the tug be said to have been the agents or servants of the owners of the ship.

They were in no sense under the control of, or subject to the orders of, the owners of the ship.

But on the other hand, they were the servants and agents—strictly the employés of the owners of the tug, and owed obedience, and were amenable to no one else in the discharge of their duties.

If the owners of the ship could be liable for the misfeasance or malfeasance of the captain or crew of the tug, it would follow that the owners of the ship could have the right to appoint and remove the captain and crew of the tug, and that they were appointed by, and held their respective offices from, the owners of the ship.

Laugher v. *Pointer*, 5 Barn. & C. 553, 554; *Milligan* v. *Wedge*, 12 Adol. & E. 737; *Lucey* v. *Ingram*, 6 Mees. & W. 302; *McIntosh* v. *Slade*, 6 Barn. & C. 657; *Nicholson* v. *Mounsey*, 15 East. 384; *Lane* v. *Cotton*, 1 Salk. 17; 15 Mod. 472; 15 East, 392; Cowp. 754; *Rapson* v. *Cabitt*, 9 Mees. & W. 710; 6 Moor, 47; 2 Dowl. & R. 33; *Quarman* v. *Burnett*, 6 Mees. & W. 509, 510; per Parke, B. 9 Mees. & W. 713; 6 Esp. N. P. 6; 5 Barn. & C. 559, 560; 4 Mees. & S. 29; *Randleson* v. *Murray*, 8 Adol. & E. 109; *Stone* v. *Cartwright*, 6 T. R. 411; 2 Camp. 403; 5 Barn. & C. 554, per Littledale, J; 5 Mees. & W. 414; 8 Adol. & E. 835; *Fletcher* v. *Braddick*, 2 Bos. & P. N. R. 182, recognized 5 Barn. & C. 556; 7 Bing. 190; 4 Mees. & S. 288; 8 Adol. & E. 842, 843; Broom Legal Maxims, 386, 387, 388, 389, and cases there cited; story, Ag. §§ 453, *a*, 453, *b*, 453, *c*, 3.

It is not easy to see why the owners of the ship could be any more liable than the owners of the cargo. The cargo, if heavy, contributes to the force of the blow given by the colliding vessel—which additional force may have occasioned the one vessel to be cut down and sunk, rather than the other.

Take the case of a cargo of timber, a part of which projects over the sides of the vessel, and is the very thing which gives the blow that gives the injury. How could the liability of the owner of such timber be distinguished in principle on the one hand, from the liability of the owners of flour stowed in the hold; or on the other, from the liability of the owner of a ship lashed fast to the side of the colliding vessel?

Sproul v. *Hemmingway*, 14 Pick. 1; *Fletcher* v. *Braddick*, 5 Bos. & P. 182.

Mr. **C. A. Seward**, for claimant of the steam tug Hector:

There is no sufficient evidence to charge the tug.

The lighter might have avoided the collision. She saw the ship long before the collision—long enough to avoid her, and should have done so. But if not, then the ship alone and not the tug, was responsible for the collision.

The ship was under the direction of her owners at the time. Next under them was their regular mate, who was on board and had the general charge of moving the ship. To aid him, they sent on board Captain Ostrom to take charge of the ship, and ten or fifteen men, of whom he had charge, to man the ship, to do the labor, to unmoor the ship and make her fast to the tug, steer her, and then to pull and haul, to

make her fast at her berth at Dover street. The owners sent the tug to do the labor of pulling and hauling in the river, there being a strong floot tide and no wind. The captain of the tug had charge of the ship, so far as transporting her in the river. These were in three classes of servants of the owner co-operating in moving the ship—all of them in charge for certain purposes. Of all of them only one, the tug, is free from blame for negligence; against her there is not an allegation of blame from any quarter.

Actually on board the Wisconsin were the mate, Sinclair, Captains Ostrom, Phillips, and Brower, and ten or fifteen men. None of them belonged to the tug except Brower. He was there, aft, that he might easily communicate with the ship and tug. The mate gave no proper attention; he was forward getting lines out. The most of the men were busy with him. Captain Ostrom was on the quarter deck, giving no proper attention to his duty, though giving orders. The ship's man was at the wheel, but he is not produced as a witness. No one saw the lighter—coming as she was, with sails up, in full sight at high noon, till it was too late.

The engine of the tug was slowed and stopped at the proper place. The wheel had been ported at the proper place to get ship in. The ship's hands had a small boat alongside of the ship, and lines and a man all ready to send the boat and lines ashore, and the ship was sagged in to aid in that movement.

The Wisconsin could not be steered except by her own helm; the helm of the tug could only be used to assist, and it was used to the utmost. Both helms were hard aport. The lookout must be on board the ship, because the ship was ahead. The tug was small, and was back of the ship's bows one third of the ship's length. The tug was on one side toward the stern and far below, so that she could not so well lookout. It was not her duty to keep the lookout of the ship, which had on board, by the admission of the owners in their answer, "her own competent crew and officers."

The tug was not in fault; no negligence or mismanagement is alleged against her by any party or witness in the pleadings or proofs, and there should be no recovery against her for the collision, and her little fee for hauling the ship, does not make her an insurer for the benefit of third parties. If, by reason of her being lashed to the ship, a decree must go against both, then, as they have answered and stipulated separately, the decree should be against the ship and her stipulators, first, and contingently only against the tug and her stipulators.

If there can be a decree against one alone, then the decree of the circuit court should be wholly reversed — The Wisconsin condemned and The Hector discharged.

Mr. Justice **Clifford** delivered the opinion of the court:

This is an appeal in admiralty from a decree of the circuit court of the United States for the southern district of New York, in a cause of collision, civil and maritime. It was a proceeding *in rem* against the ship Wisconsin and steam tug Hector, and was instituted in the district court on the 26th day of October, 1855, by the owners of the lighter Republic. They allege in the libel, that the lighter, on the 15th day of October, 1855, started from pier six in East river in the port of New York, laden with flour, which was *in their possession as [*118 common carriers, to proceed up the river to the foot of Dover street, in the same port; that she had a competent crew on board, but that the wind being light, she was propelled exclusively by oars, and was moving through the water only at the rate of a mile an hour; that when she arrived at a point nearly opposite the place of her destination, she was headed towards the pier or wharf for which she started, and while in that position, that the ship Wisconsin, in tow of the steamboat Hector, and lashed to the star-board side of the tug, came down the river, and was so negligently managed that the flying jib-boom of the ship struck the lighter and capsized her, causing her cargo to roll into the water, and damaging the flour and the lighter to the amount of $2,100. Negligence, want of care, and skill on the part of those in charge of the tow are alleged to have been the cause of the collision; and the libelants also allege that the ship and steam tug were incompetently manned; that they had no proper lookout, and that those in charge of them disregarded the warnings of the lighter, and did not in due time stop and back the engine of the tug, or shear the tow so as to avoid the lighter, as they were bound to have done. Process was issued against the ship and the tug, and the claimants of the respective vessels subsequently appeared, and filed separate answers to the several allegations of the libel. Both answers affirm that the collision was occasioned through the fault of those in charge of the lighter, but in most other respects they are essentially variant. On the part of the steam tug, it is alleged that she was employed by the owners of the ship to tow her from the foot of Water street to the pier at the foot of Dover street; and that the tug was merely the motive power to move the ship to the pier, and that the tug and her crew were subject to, and obeyed the orders of, the master and other officers in charge of the ship. Wherefore, the claimant prays that, in case the libelants recover any sum against the ship and tug, he may have a decree against the ship and her owners for such proportions of the same as he may be made liable to pay. But the claimants of the ship allege that she was in the charge and under the control and management of *the master and crew of the steam tug. [*119 They admit in the answer that her mate, helmsman, and a full complement of mariners, were on board, but aver that they were all under the direction and control of the master and officers of the steam tug to which she was lashed. Testimony was taken on both sides, and after a full hearing in the district court, a decree was entered in favor of the libelants against the ship and the steam tug. From that decree the claimants of each of those vessels appealed to the circuit court, and the cause was there again heard upon the same testimony. After the hearing, the circuit court affirmed the decree of the district court against the tug, but dismissed the libel with costs as against the ship. Whereupon the claimants of the tug appealed to this court, and the libelants also appealed from so much of the decree as pronounced the ship not liable.

At the argument in this court, it was con-

ceded that the flying jib-boom of the ship struck the peak halyards of the lighter, and capsized her, causing the cargo, which consisted of flour in barrels, to roll into the water, and no question was made that the damages had not been correctly estimated. According to the testimony in the case, the lighter was bound up the river, and she was propelled exclusively by oars or sweeps. Her course was on the northern side of the stream, some two hundred yards from the shore. She was moving about a mile an hour, and the collision occurred at midday, and in fair weather. As alleged in the pleadings, the ship was bound down the river, and she was securely lashed, in the usual manner, to the starboard side of the steam tug. Neither the ship nor tug had any proper lookout, and it clearly appears that those in charge of them did not see the lighter until it was too late to adopt the necessary precautions to prevent a collision. Their course down the river was about the same distance from the northern shore as that of the lighter, and both vessels were propelled by the steam power of the tug. They were bound to a point, alongside of another ship, lying at the end of pier twenty-seven, and the lighter was bound to pier twenty-eight, a short distance up the river. None of these facts are disputed, and the testimony clearly 120*] *shows that the lighter first changed her course, and headed towards the pier to which she was bound. When the lighter changed her course and headed for the pier, the ship was so far distant that if she had kept her course, the lighter would have passed to the pier in safety. Nothing appearing in the river to obstruct the view, those in charge of the lighter had a right to assume that she was seen by those navigating the approaching vessels, and that they would hold their course or keep out of the way. Propelled as they were by steam power, those in charge of them could readily govern their course and control their movement. More difficulty, however, would have attended any such effort on the part of the lighter. It was then about slack high water, the current still running up a little out in the stream; but the tide had commenced to ebb close in shore, so that the flour, after it rolled into the water, floated down the river. Until the lighter turned towards the pier, she had been aided in her course by the current; but, when she changed her course, and headed towards the pier, she was rather impeded than benefited by the tide. Those in charge of her saw the ship and tug approaching, and hailed those on board, apprising them of the danger of a collision. There were three men belonging to the lighter; two were forward at the oars, and one was aft, and it does not appear that they omitted anything in their power to do to avoid the disaster. On the other hand, it does appear that the descending vessels were without any lookout, and that those in charge of them did not see the lighter in season to adopt the necessary precautions to prevent the collision. Beyond question, it was the mate of the ship who first saw the lighter, and he admits that she was then heading square into the slip, and was using two oars. He had no charge of the ship, and it does not appear that he, in any manner, interfered with her navigation from the time she left her mooring until she reached her place of destination. When the hail was given from the lighter, he was employed in getting the lines ready to send ashore, as soon as the ship should arrive at the proper place. All of the orders were given by the master of the tug, which had been employed by the owners of the ship to transport her *from [*121 her moorings to pier twenty-seven, for the purpose of discharging what merchandise she had on board, and taking in another cargo. They had also employed a head stevedore to discharge her cargo, and reload her; and, in point of fact, all the men on board, except the mate, were the hands in the employment of the principal stevedore, not one of whom belonged to the crew of the ship. Her master was not on board, and, contrary to the allegation of the answer, the testimony shows that she was without a crew. One of the stevedores was at the wheel of the ship, but both vessels were exclusively under the command and direction of the master of the tug. Prior to the collision, and when the pilot of the tug gave the signal to slow, the master of the tug left his own vessel and went on to the ship, and all the subsequent orders were given by him, while standing on the quarter-deck of the latter vessel. "My attention," says the mate of the ship, "was first called to the lighter by a hail from one of her men." He was the first person on the descending vessels who saw the lighter, and he at once gave notice to the master of the tug. They were then so near, that the mate says he anticipated a collision, and, considering the headway of the ship, he was unable to see how it could be avoided. True it is, the master of the tug testifies that the ship had no headway at the time of the collision, but the weight of the testimony is greatly otherwise. No doubt is entertained that he gave the orders to stop and back before the collision occurred, but the circumstances clearly show that those orders were too late to have the desired effect.

Looking at all the facts and circumstances in the case, we think the libelants are clearly entitled to a decree in their favor; and the only remaining question of any importance is, whether the ship and the steam tug are both liable for the consequences of the collision; or if not, which of the two ought to be held responsible for the damage sustained by the libelants. Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or *crew of both vessels are either defi- [*122 cient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that

they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clear-
123*] ly appears that the tug was a *seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the own-

ers of his own vessel, and they are responsible for his acts in her navigation. *Sproul* v. *Hemmingway*, 14 Pick. 1; 1 Pars. Mar. L. 208; *The Brig James Gray* v. *The John Frazer*, 21 How. 184.

Very nice questions may, and often do arise, says Judge Story, as to the person who, in the sense of the rule, is to be deemed the principal or employer in particular cases. Story, *Ag. § 443, *a*, p. 557. Where the owner [*124 of a carriage hired of a stable-keeper a pair of horses for a day, furnishing his own carriage, and the stable-keeper provided the driver, through whose negligent driving an injury was done to the horses of a third person, the judges of the King's Bench were equally divided upon the question, whether the owner of the carriage or the owner of the horses was liable for the injury. *Laugher* v. *Pointer*, 5 Barn. & C. 547. But the better opinion maintained by the more recent authorities is, that the driver should be regarded as the servant of the stable-keeper, and inasmuch as he could not at the same time be properly deemed the servant of both parties that the stable-keeper and not the temporary hirer, was responsible for his negligence. Upon the like ground, says the same commentator, the hirer of a wherry, to go from one place to another, would not be responsible for the waterman; nor the owner of a ship, chartered for a voyage on the ocean, for the misconduct of the crew employed by the charterer, provided the terms of the charter-party were such as constituted the charterer the owner for the voyage. *Quarman* v. *Burnett*, 6 Mees. & W. 499; *Randleson* v. *Murray*, 8 Ad. & El. 109; *Milligan* v. *Wedge*, 12 Ad. & El. 737; *The Express*, 1 Blatchf. C. C. 365. Whether the party charged ought to be held liable, is made to depend, in all cases of this description, upon his relation to the wrong-doer. If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable; and he is equally so, if it was done by one towards whom he bore the relation of principal; but liability ceases where the relation itself entirely ceases to exist, unless the wrongful act was performed or occasioned by the party charged. It was upon this principle that the ship was held not liable in the case of *James Gray* v. *The John Frazer*, 21 How. 194. In that case, this court said, the mere fact that one vessel strikes and damages another does not, of itself, make her liable for the injury, but the collision must, in some degree, be occasioned by her fault. A vessel properly secured may, by the violence of a storm, be driven from her moorings and forced against another vessel, in spite of her efforts to avoid it, and yet she certainly would *not be liable for damages which it was [*125 not in her power to prevent. So, also, ships at sea, from storms or darkness of the weather, may come in collision with one another without fault on either side, and in that case must each bear its own loss, although one is much more damaged than the other. *Stainback* v. *Rae*, 14 How. 532. Applying these principles to the present case, it is obvious what the result must be. Without repeating the testimony, it will be sufficient to say, that it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction, and management of both vessels, and there is not a

word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that any one belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises.

Counsel on both sides stated, at the argument, that they were prepared to discuss a question of jurisdiction supposed to be involved in the record; but upon its being suggested by the court that the question was not raised either by the evidence, or in the pleadings, the point was abandoned.

In view of the whole case, we think the decision of the Circuit Court was correct, and the decree is accordingly affirmed, with costs.

159*] *JOHN FITCH, *Appt.*,
v.
EDWARD CREIGHTON.

(See S. C. 24 How. 159–164.)

Jurisdiction of circuit courts—equity jurisdiction of United States courts—state laws, as rules of decision—unnecessary party—multifariousness.

The circuit court has jurisdiction of bill to collect assessments on city property levied under a state law.

The equity jurisdiction of the courts of the United States depends upon the principles of general equity, and cannot be affected by any local remedy, unless that remedy has been adopted by the courts of the United States.

The 34th section of the judiciary act of 1789, declaring that the laws of the several states, except where the Constitution, treaties or statutes of the United States shall require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, constitutes a rule of property on which the courts are bound to act.

There was no necessity to make a party in this case, one who made the contract jointly, but before the work was commenced relinquished his right.

Bill to collect assessments on several lots is not multifarious; where the assessments were assessed on the lots by the foot front, and all against the same defendant.

Submitted Dec. 17, 1860. Decided Dec. 31, 1860.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The bill in this case was filed in the court below, by the appellee, to recover certain assessments against lots owned by Fitch.

The defendant demurred to the bill. The court overruled the demurrer, and entered a decree in favor of the complainant; whereupon the defendant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **D. F. Cooke**, for appellant:

On the part of the appellant it is claimed that upon the facts appearing in the bill, the circuit court had no jurisdiction over the subject-matter of the action, and this is the question presented by the demurrer.

1. The right of the complainant to proceed in his own name to enforce the collection of the assessments, is derived entirely from the remedial provisions of the statute. But the equity jurisdiction of the courts of the United States depends upon the principles of general equity jurisprudence. It cannot be affected by any local statute or any local remedy, unless that remedy has been adopted by the courts of the United States.

1 Curt. Com. 25; *Robinson* v. *Campbell*, 3 Wheat. 212; *The Orleans* v. *Phœbus*, 11 Pet. 184.

The inquiry then is whether the complainant by his bill shows himself possessed of a right which can be enforced in his name against this defendant in a court of equity, by any of the known usages and principle which govern that court.

We admit that when the state legislature creates a new right, and at the same time prescribes the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, relief may be had in those courts.

Clark v. *Smith*, 13 Pet. 203.

We also admit that if the state legislature creates a right which cannot be enforced at law, and which properly belongs to a chancery jurisdiction, relief will be granted by the Federal courts.

Lorman v. *Clarke*, 2 McLean, 573.

It will be conceded that the statute does not give to the complainant, directly, any right of action, either at law or in equity, against the defendant. It simply authorizes the city to order and contract for this class of improvements.

NOTE.—*The common-law liability to repair highways*—see note to City of Providence v. Clapp, 15 L. ed. U. S. 72.

Jurisdiction of U. S. circuit courts dependent on parties and residence—see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

Liability to repair highways in United States; safety and convenience of, a mixed question of law and fact.

The obligation to repair the roads never rested upon towns in the United States at common law. It arises, in general, from statute. The corporate powers of towns are defined by statute, and their obligations can only be coextensive with their powers. Morey v. Newfane, 8 Barb. 645; Loker v. Brookline, 13 Pick. 348; Com. v. Springfield, 7 Mass. 13; Chidsey v. Canton, 17 Conn. 475; People v. Comrs. of Highways, 7 Wend. 474; Oliver v. Worcester, 102 Mass. 490; but see Com. v. Hopkinsville, 7 B. Mon. 38; City of Tallahassee v. Fortune, 3 Fla. 19; People v. Albany, 11 Wend. 539; State v. Murfreesboro, 11 Humph. 217.

In New Hampshire, however, by custom, towns have been held liable to keep in repair the highways within their limits. Wheeler v. Troy, 20 N. H. 77; Gilman v. Laconia, 55 N. H. 130; 20 Am. Rep. 175.

Generally, towns or town officers are by state statute bound to repair highways. Stanton v. Springfield, 12 Allen, 566; Providence v. Clapp, 58 U. S. (17 How.) 161; Peck v. Ellsworth, 36 Me. 393; Kitredge v. Milwaukee, 26 Wis. 46; Draper v. Town of Ironton, 42 Wis. 696.

Towns, counties, and other quasi corporations are not liable to private actions for the neglect of their officers in respect to highways, unless such liability be expressly declared by statute and the right of action given. This is the case even where they have power to levy taxes for repair of them. Bartlett v. Crozier, 17 Johns. 439; Eastman v. Meredith, 36 N. H. 284; Chidsey v. Canton, 17 Conn. 475; Mower v. Leicester, 9 Mass. 247; Browning v. Springfield, 17 Ill. 143; Soper v. Henry County, 26 Iowa, 264; Russell v. County of Devon, 2 Term. 671; Bigelow v. Randolph, 14 Gray, 541; Bray v. Wallingford, 20 Conn. 416; Freeholders v. Strader, 3 Harr. 108; Van Eppes v. Comrs. 25 Ala. 460; Treadwell v. Comrs. 11 Ohio St. 190; Pray v. Jersey

to assess the expense upon the property abutting thereon, and prescribes the mode and manner of the collection of such assessment.

There is no promise, express or implied, by the defendant, to pay to the complainant or the city the assessment charged upon his property. His obligation is imposed by the statute, and does not exist at common law. It is a tax—an involuntary contribution—the payment of which is to be enforced by the public authorities. But no suit can be maintained at law or in chancery, to enforce the collection of a tax, unless authorized by statute. No such right of action exists at common law, or according to the principles of general equity jurisprudence.

Andover & Med. Turnpike Co. v. *Gould*, 6 Mass. 44.

Taxes only exist by virtue of the statute authorizing them, and only such remedies can be resorted to for their collection as the statute provides.

Bangor House Prop. v. *Hinckley*, 12 Me. 338.

From these considerations it is claimed—

First. That the complainant does not show himself possessed of any right which he can enforce directly against this defendant or his property; and,

Second. That the liability of the defendant is not such an one as can be enforced against him in a court of equity, without the aid of the statute, which cannot confer jurisdiction upon the courts of the United States.

2. The bill is bad from multifariousness. There is a misjoinder of causes in the suit.

A bill is multifarious if it unites several matters, perfectly distinct and unconnected, against one defendant.

Dan. Ch. Pr. 383; Story, Eq. Pl. § 27; *Bugbee* v. *Sargent*, 23 Me. 271; Adams, Eq. 570, note; 1 Dan. Ch. Pr. 363; *Atty. Gen.* v. *Goldsmith's Co.* 5 Sim. 675.

Jurisdiction cannot be conferred upon the courts of the United States by a joinder, in the same suit, of several causes of action, each distinct in itself.

Each cause of action is to be considered by itself, and if the amount of any one is not sufficient to confer jurisdiction, the whole must be dismissed.

Oliver v. *Alexander*, 6 Pet. 147.

Mr. **N. H. Swayne**, for appellee:

The points made by the counsel for the appellant may be reduced to two, *viz.:*

1. The circuit court had no jurisdiction.
2. The bill was multifarious.

I propose to state briefly the points relied upon to give the circuit court jurisdiction; and incidentally to answer the points made by the appellant.

It seems to be conceded that when the local statutes of a state give rights to an individual, the courts of the United States will enforce those rights, in cases where they have jurisdiction of the parties.

It is not pretended that the states can direct the remedy, by which rights are to be enforced, which the Federal courts are bound to pursue.

But it is claimed, that where the statute of a state creates a right which may be enforced by remedies already existing and resorted to in the latter courts, these courts will enforce the rights by their own known remedies and usages, in cases where they have jurisdiction, although the local statute may direct a special mode of proceeding.

The General Smith, 4 Wheat. 438.

By the statute and the contract with the city, the complainant acquired, by operation of law, rights which courts of equity, by their long established rules and usages, will enforce.

The claims which by this action are sought to be enforced as liens on the lots of the appellant, are not taxes. The supreme court of Ohio has often so decided.

Hill v. *Higdon*, 5 Ohio St. 243; *Ernst* v. *Kunkle*, 5 Ohio St. 520; *Reeves* v. *The Treas. of Wood Co.* 8 Ohio St. 333; and *The Northern Ind. R. Co.* v. *Connelly*, 10 Ohio St. 159, decided at the present term and not yet reported.

This lien upon real estate is such an one as courts of equity, by their long established and well known usages, will enforce; and the complainant being a citizen of Iowa and the defendant a citizen of the state of Ohio, the circuit court, having jurisdiction of the parties, has ample equity powers to take cognizance of the case. It is, in fact, an equitable and not a legal lien—it is a charge on a thing without the right of possession. Such liens are only cognizable in courts of equity.

Story, Eq. Jur. §§ 1215, 1217; Adams, Eq. 127.

City, 32 N. J. Law, 394; Granger v. Pulaski County, 26 Ark. 37; Waltham v. Kemper, 55 Ill. 346; 8 Am. Rep. 652; Russell v. Town of Steuben, 57 Ill. 35.

Chartered cities or ordinary municipal corporations owe a duty to the public to keep their streets in a safe condition, even in the absence of an express statute, and they are liable for special injuries resulting from a neglect of this duty. Browning v. Springfield, 17 Ill. 143; Sterling v. Thomas, 60 Ill. 264; Chicago v. Robbins, 2 Black. 418; Clark v. Lockport, 49 Barb. 480; Erie City v. Schwingle, 22 Penn. St. 384; Blake v. St. Louis, 40 Mo. 569; Meares v. Wilmington, 9 Ired. 73. In general, they are only bound to exercise ordinary care, and negligence must be affirmatively shown. McGinty v. Mayor, etc. of N. Y. 5 Duer, 674; Parker v. Cohoes, 10 Hun, 531.

In grants of franchises, as turnpikes, plank roads, toll bridges, etc. to private individuals, the duty of repairing the road is assumed by them as a condition of the grant. Their obligation is then to furnish a safe road to travelers. Davis v. Lamoille Co. Plank Road Co. 27 Vt. 602; Stanton v. Pro., etc. Haverhill Bridge, 47 Vt. 172; Waterford, etc. T. Co. v. People, 9 Barb. 161; Townsend v. Susq. T. Co. 6 Johns. 90; Parnaby v. Lancaster Can. Co. 11 Ad. & El. 223.

Whether the highway was safe and convenient, which are the essentials of a well maintained highway, is a mixed question of law and fact to be determined by the jury upon the circumstances of each case under instructions from the court. Green v. Danby, 12 Vt. 338; Kelsey v. Glover, 15 Vt. 708; Rice v. Montpelier, 19 Vt. 470; Fitz v. Boston, 4 Cush. 365; Merrill v. Hampden, 26 Me. 234; City of Providence v. Clapp, 58 U. S. (17 How.) 161; Sessions v. Newport, 23 Vt. 9.

Safety and convenience depend on location of road, whether it be in country or city, etc. Hull v. Richmond, 2 Wood. & M. 337; Fitz v. Boston, 4 Cush. 365; Church v. Cherryfield, 33 Me. 460.

The whole width of highway need not be safely passable for wheels. The situation of the road determines this. Kelsey v. Glover, 15 Vt. 708; Green v. Danby, 12 Vt. 338; Cobb v. Standish, 14 Me. 198; Johnson v. Whitefield, 18 Me. 286; Bigelow v. Weston, 3 Pick. 267; Hull v. Richmond, 2 Wood & M. 337; Coggswell v. Lexington, 4 Cush. 307; Snow v. Adams, 1 Cush. 443.

At common law, proprietors of turnpikes, etc., are bound to exercise only ordinary care in the maintenance of their highways. Grigsby v. Chappell, 5 Rich. Law. 443; Bridge Co. v. Williams, 9 Dana, 403.

This court has sustained the jurisdiction of the circuit courts, to enforce the right of beneficiaries even in the name of the trustee, as a formal party, although that trustee were a citizen of the same state with the defendant.

Huff v. *Hutchinson*, 14 How. 587; *McNutt* v. *Bland*, 2 How. 10.

The bill is not multifarious. When the matters are homogeneous in their character, the introduction of them in the same bill will not be multifarious.

1 Dan. Ch. Pr. 395; Story, Eq. Pl. §§ 531–533, and cases there cited.

Mr. Justice **McLean** delivered the opinion of the court:

This is an appeal from the circuit court of the United States for the northern district of Ohio. The bill was filed by Edward Creighton, a citizen of the state of Iowa, against John Fitch, a citizen of the state of Ohio.

By the act of March 11th, 1853, Swan's Statutes Ohio, it is provided "that the city council shall have power to lay off, open, widen, straighten, extend, and establish, to improve, keep in order, and repair, and to light streets, alleys, public grounds, wharves, landing places, and market spaces; to open and construct, and put in order and repair, sewers and drains; to enter upon or take, for such of the above pur-**161*]**poses as may *require it, land and material; and to assess and collect and charge on the owners of any lots or lands, through or by which a street, alley, or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, and repairing said street, alley, or public highway, to be in proportion either to the foot front of the lot or land abutting on such street, alley, or highway, or the value of said lot or land as assessed for taxation under the general law of the state, as such municipal corporation may in each case determine."

Each municipal corporation may, either by a general or special law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands shall be assessed and charged to the owner, which shall be enforced by a proceeding at law or in equity, either in the name of the corporation or of any person to whom it shall be directed to be paid, but the judgment or decree was required to be entered severally; and a charge was required to be enforced for the value of the work or material on such lot or land; and where payment shall have been neglected or refused, when required, the corporation shall be entitled to recover the amount assessed, and five per cent from the time of the assessment. Swan's Stat. 963.

On the 7th of April, 1855, the city of Toledo entered into a contract with Creighton and one Edward Connelly, who bound themselves to do certain work on the streets, for the sums named in the contract; and that so soon as the work was completed, the street commissioner should give them a certificate to the effect, and on the presentation of the same to the council, it would assess the cost and expenses of the improvement on the lots or lands made liable by law to pay the same, and make out and deliver to the contractors a certified copy of said assessments and authorize them or assigns to collect the several amounts due and payable for the work and improvement.

Creighton purchased from Connelly his interest in the contract, and went on and performed the work under it, to the acceptance of the city. On the 14th July, 1856, the council made an assessment on the lots abutting on the improvement in Monroe street, to pay the expenses of that work, and *directed that the owners [*162 of the lots make payment of the assessments to Creighton. Among the rest, lot 640, belonging to John Fitch, was assessed for this work $84.56.

On the 20th May, 1856, the council made an assessment upon the lots abutting on said improvement in Michigan street, to pay for the same, and also directed the owners of these lots to make payment of such assessments to Creighton. Among the lots so assessed were the following, owned by defendant, numbered 547, 538, 539, 544, 1,461; the assessments of the respective lots amounted to the sum of $1,791.76; and subsequently a further assessment was made on the contract of three lots, numbered 686, 751 and 855, which amounted to the sum of $266.47. The above sums were ordered to be paid to the complainant, with five per centum allowed by law.

To this bill the defendant demurred, which, on argument, was overruled. And the court ordered the above sums to be paid in ten days, or in default thereof that the lots be sold, etc.

From this decree an appeal was taken. On the part of the appellant it is claimed, that upon the facts of the case, the circuit court had no jurisdiction; that the equity jurisdiction of the courts of the United States depends upon the principles of general equity, and cannot, therefore, be affected by any local remedy, unless that remedy has been adopted by the courts of the United States.

By the 34th section of the judiciary act of 1789, it is declared "that the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." This section does not relate to the practice of our courts, but it constitutes a rule of property on which the courts are bound to act.

The courts of the United States have jurisdiction at common law and in chancery, and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the state, but from the laws of the United States.

*In *Clark* v. *Smith*, 13 Pet. 203, the [*163 court says: "The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts in the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts."

In the case above cited, the legislature of Kentucky authorized a person who was in possession of land claimed by him, and some one

else had a claim on the same land; the possessor was authorized to file a bill against the claimant to litigate his title and remove the cloud from it.

The statute authorizes a suit at law or in equity, but from the nature of the case it would seem that chancery was the appropriate mode.

There was no necessity to make Connelly a party in this case. He made the contract jointly with Creighton. But before the work was commenced Connelly relinquished his right to Creighton, who performed the whole work, and to whom the city council promised payment. The assessments, too, were made to Creighton, and he was considered the only contractor with the city. No right was held under Connelly. By the statute the city makes an assessment which is to be paid by the owner personally, and it is also made a lien on the property charged. The charge may be collected and the lien enforced by a proceeding at law or in equity, either in the name of the city or its appointee, The complainant is the appointee for this purpose, and his right is too clear to admit of controversy.

This bill is not multifarious; the assessments were assessed on the lots by the foot front, and all against the same defendant.

Lord Cottenham, in *Campbell* v. *Mackay*, 7 Sim. 564, and in Myl. & C. 603, says, to lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is, upon the authorities, ut-
164*] terly impossible. *Every case must be governed by its circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

We think the statute of the state, and the municipal corporation of Toledo, authorize the assessment of the sums on the lots in question, and that the judgment of the Circuit Court must be affirmed.

386*] *HENRY T. BULKLEY, Claimant of the Bark Edwin, *Appt.*,

v.

THE NAUMKEAG STEAM COTTON COMPANY.

(See S. C. 24 How. 386-394.)

Carrier—delivery to lighterman, when is delivery to master of vessel—vessel liable for loss of goods on lighter.

Where the master of a vessel agreed to carry 707 bales of cotton from Mobile to Boston, for certain freight mentioned in the bills of lading: held, that the vessel was bound for the safe shipment of the whole of the 707 bales, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master.

Further held, that the delivery of a hundred bales to a lighterman to deliver on board the vessel was a delivery to the master, and the transportation by the lighter to the vessel was the commencement of the voyage, the same as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter.

Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge, and after the delivery and acceptance at the place of shipment, the shipper had no longer any control over the property.

The ship is liable for the loss on the lighter of the hundred bales, the same as any other portion of the cargo.

No well-founded distinction can be made as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case of the lading of the goods upon the deck of the vessel.

Submitted Dec. 17, 1860. Decided Dec. 31, 1860.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The libel in this case was filed in the district court of the United States for the district of Massachusetts, by the appellee, to recover damages for the nondelivery of a portion of a shipment of cotton from Mobile to Boston.

The district court entered a decree in favor of the libelants, for $7,000, with costs. The circuit court, on appeal, having affirmed this decree, the claimant took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Messrs. **F. C. Loring** and **Charles G. Loring**, for appellant:

1. The libelant cannot hold either the vessel or the owners under the bills of lading, because the goods in question were not on board; and having insisted upon the master's signing such bills, they are prevented thereby from resorting to the original contract of shipment.

It is well settled that neither the vessel nor its owners are made liable for the master's signature to a bill of lading for goods which are never placed on board; that his authority to bind them does not commence till the goods are actually on board.

It is immaterial whether the master is guilty of fraud or mistake, or is imposed upon.

The authorities to this point are conclusive.

Marine Ordinances, Liv. 3, tit. 2; *Walter* v. *Brewer*, 11 Mass. 99; *Rowley* v. *Bigelow*, 12 Pick. 307; *Grant* v. *Norway*, 10 Com. B. 665; 2 Eng. L. & Eq. 337; *Hubbersty* v. *Ward*, 8 Exch. 330; 18 Eng. L. & Eq. 551; *Coleman* v. *Riches*, 16 Com. B. 104; 29 Eng. L. & Eq. 323; *The Freeman*, 59 U. S. (18 How. 191; *The Yankee Blade*, 60 U. S. (19 How.) 89.

2. The owners of the vessels were not common carriers.

Judge Story remarks that it is not everyone who undertakes to carry the goods for hire that is to be deemed a common carrier; that a private person may contract for the carriage of goods, and incur no responsibility beyond that of an ordinary bailee for hire, that is for the exercise of ordinary diligence; that to constitute one a common carrier, he must exercise it as a public employment; must undertake to carry for persons generally; must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*, and must be ready to carry for all who offer goods, so that he is liable to an action if he refuse to carry goods on being offered a reasonable compensation.

Story, Bail. §§ 457, 495, 508; 1 Pars. Maritime Law, ch. 7, § 5; *Dale* v. *Hall*, 1 Wils. 281.

3. The vessel is not liable *in rem*.

In the case of *The Druid*, 1 W. Rob. 399.

Doctor Lushington says: "No suit could ever be maintained against the ship where the owners were not themselves personally liable, or where the personal liability had not been given up as in bottomry bonds;" and the rule as stated by him to this extent is expressly recognized by this court in the case of *The Freeman*, 59 U. S. (18 How.) 189.

If the court should be satisfied that a personal liability does exist on the part of the owners, it does not follow, as of course, that the vessel is liable.

There is not even a presumption that the vessel is liable because the owners are. The liabilities depend upon different grounds, and are not at all reciprocal. In this court, of late years, the tendency has been very strong to limit maritime privileges, and to deny their existence in cases where they had been before recognized. In the case of *The Yankee Blade*, 60 U. S. (19 How.) 82, they are said to be *stricti juris*, and are not encouraged. In *Thomas* v. *Osborn*, 60 U. S. (19 How.) 22, and *Pratt* v. *Reed*, 60 U. S. (19 How.) 350, the liens of materialmen are confined to cases of necessity. A recent rule of the court prohibits the enforcement of domestic liens by the district court. The privilege of the ship owner upon goods for freight is apt to be treated as a mere common-law lien depending upon possession; and in *People's Ferry Co.* v. *Beers*, 61 U. S. (20 How.) 401, it is said that "liens on vessels incumber commerce and are discouraged."

As in all of these cases there would exist a personal liability on the part of the owners, it is very plain that that does not necessarily establish a privilege against the ship.

In respect to the lien on goods for freight, it is well settled that it does not arise upon any part until after that part is actually on board; *i. e.*, only, and so far as the contract in respect to them is executed, and it would seem to follow necessarily that the reciprocal lien of the ship on the goods cannot arise except upon the same state of facts.

Valin, Com. Lib. 1, tit. 14, § 16; 2 Boulay Paty, de Droit Com. 281; *Bailey* v. *Damon*, 3 Gray, 91.

In the recent case of *Morewood* v. *Pollok*, 18 Eng. L. & E. it was held, under facts like the present, that the goods on a lighter were not on board and, therefore, the owners were personally responsible on their contract to carry, "perils of the sea only excepted," when they would not have been liable if the goods had been on board.

In the case of *The Steamer Pocahontas* in the supreme court of Ohio, it was adjudged that, neither by the statute nor the maritime law, was the steamer liable *in rem*, unless the goods were actually on board.

The same principle has been distinctly affirmed by this court in two cases:

The Freeman v. *Buckingham*, 59 U. S. (18 How.) 188; *Vandewater* v. *Mills*, 60 U. S. (19 How.) 90.

Finally, various other grounds of defense might be suggested. But it seems enough to have shown, if that has been done, that, by the principles and rules of the maritime law, the freighter is not entitled to a preference over other creditors, if he is indeed recognized as a creditor at all, when the loss is purely accidental, when the goods have not been on board, and the loss is not occasioned by the fault of the vessel proceeded against, its owners, master or crew.

Mr. **Milton Andros**, for appellee:

I. Between the libelant and the master of the vessel, against which a lien is sought to be enforced in the present case, there was a valid contract of affreightment, which is binding on the claimant and owners thereof.

II. The owners of said vessel are liable as common carriers, and such liability commenced immediately after the master received the libelant's merchandise for transportation.

1. Because their ship was a general ship.

2. Because it appears from the pleadings that they are charged with and assumed responsibilities as such.

Lawes on Charter-parties, 1; Mau. & Pol., 142; Sm. Merc. L. 298; Fland. Ship. 449; 1 Bell's Com. b. 3, p. 1, ch. 5, § 2; 2 Holt on Ship. 57; Chit. & T. Carr. 224; 3 Kent, 202.

In this country, it seems to be well settled that a person who undertakes, though it be only *pro hac vice*, to act as a common carrier, incurs the responsibility of one.

Gordon v. *Hutchinson*, 1 Watts & S. 285; *Powers* v. *Davenport*, 7 Blackf. 497; *Turney* v. *Wilson*, 7 Yerg. 340; *Craig* v. *Childress*, Peck. 270; *McClures* v. *Hammond*, 1 Bay, 99; *Moses* v. *Norris*, 4 N. H. 304.

3. The owners being liable in damages for the nondelivery of the libelant's merchandise which had been by his agent delivered to and received by the master of the said vessel for transportation, the ship in specie is also liable, and this liability arises from the contract of affreightment which has been executed on the part of the libelant.

The contract was an entire one; it was to carry from the cotton press to Boston, and the lighter was employed merely as auxiliary to the purposes of the voyage; this, so far as the libelant's goods were affected, commenced when the lighter left for the ship, and in questions of insurance, boats so employed have been considered a part of the vessel.

Parsons v. *Mass. F. & M. Ins. Co.* 6 Mass. 197, 208; *Snow* v. *Caruth*, 1 Sprague, 325.

Again; as the lien is reciprocal, where the merchandise is bound to the ship, in such case the ship is bound to the merchandise. Now, in the present case the merchandise was bound to the ship. "The lawful possession of the goods being once acquired for the purpose of carriage, the carrier is not obliged to restore them to the owner, even if the carriage be dispensed with, unless upon being paid his due remuneration; for by the delivery he has already incurred certain risk.

Ang. on Carr. 363, § 368.

The owners and masters of general ships and vessels, both on the high seas and on the navigable rivers and canals, are entitled to the same particular lien for the price of the carriage of the goods delivered to them for transportation. And it is so, both by common law and the written maritime code of Europe.

Ang. on Carr. 364, § 369; 4 Domat, 272, 273; *The Nathaniel Hooper*, 3 Sumn. 543; *Jordan* v. *Warren Ins. Co.* 1 Story, 342; *Bork* v. *Norton*, 2 McLean, 422; *Palmer* v. *Lorillard*, 16 Johns.

348; *Tindall* v. *Taylor*, 4 El. & B. 227; *Clarke* v. *Needles*, 25 Pa. 338.

4. The reception and lading of the libelant's merchandise on board of the lighter by the master of the vessel, for the purpose of transporting it to the same, was a sufficient performance of the libelant's part of the contract of affreightment, to enable him to hold the ship in specie as security for the due performance of the master's part of the agreement.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States, sitting in admiralty, for the district of Massachusetts.

The libel in the court below was against the barque Edwin, to recover damages for the non-delivery of a portion of a shipment of cotton from the port of Mobile to Boston. The facts upon which the question in this case depends are found in the record as agreed upon by the proctors, both in the district and circuit courts, and upon which both courts decreed for the libelant.

From this agreed state of facts, it appears that the master of the vessel, which was then lying at the port of Mobile, agreed to carry for the libelant 707 bales of cotton from that port to Boston, for certain freight mentioned in the bills of lading.

The condition of the Bay of Mobile, which is somewhat peculiar, becomes material to a proper understanding of the question in this case.

390*] *Vessels of a large size, and drawing over a given depth of water, cannot pass the bar in the bay, which is situate a considerable distance below the city. Their cargo is brought to them in lighters, from the city over the bar, and then laden on board the vessels. Vessels which, from their light draft, can pass the bar in ballast, go up to the city and take on board as much of their cargoes as is practicable, and, at the same time, allow them to repass it on their return, and are then towed below the bar, and the residue of their load is brought down by lighters and put on board.

In either case, when the vessel is ready to receive cargo below the bar, the master gives notice of the fact to the consignor or broker, through whom the freight is engaged, and provides, at the expense of the ship, a lighter for the conveyance of the goods. The lighterman applies to the consignor or broker, and takes an order for the cargo to be delivered, receives it, and gives his own receipt for the same. On delivering the cargo on board the vessel below the bar, he takes a receipt from the mate or proper officer in charge.

The usual bills of lading are subsequently signed by the master and delivered.

In the present case the barque Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer M. Streck for this purpose, and 100 bales were laden on board of her at the city, to be taken down to complete her load, and for which the master of the lighter gave a receipt; after she had passed the bar and had arrived at the side of the barque, but before any part of the 100 bales was taken out, her boiler exploded, in consequence of which the 100 bales were thrown into the water and the lighter sunk. Fourteen of the bales were picked up by the crew of the vessel, and brought to Boston with the 607 bales on board. Eighty bales were also picked up by other persons, wet and damaged, and were surveyed and sold; four remain in the hands of the ship broker, at Mobile, for account of whom it may concern; two were lost.

The master of the barque signed bills of lading, including *the 100 bales, being advised that he was bound to to do so, and that if he refused, his vessel would be arrested and detained. **[*391** On her arrival at Boston, the master delivered the 607 bales to the consignees, and tendered the fourteen which were refused.

A question has been made on the argument, whether or not the libelant could recover upon the undertaking in the bills of lading, they having been signed under the circumstances stated, or must resort to the original contract of affreightment between the master and the shipper. The articles in the libel place the right to damages upon both grounds. The view the court has taken of the case supersedes the necessity of noticing this distinction.

The court is of opinion that the vessel was bound for the safe shipment of the whole of the 707 bales of cotton, the quantity contracted to be carried, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master, and that the delivery of the hundred bales to the lighterman was a delivery to the master; and the transportation by the lighter to the vessel the commencement of the voyage in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the barque for this portion of the service. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these *termini*, and when delivered by the shipper, and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed—the one entitled to all the privileges secured to the owner of cargo for its safe transportation and delivery; the other, the right to his freight on the completion of the voyage, as recognized by principles and usages of the maritime law.

The true meaning of the contract before us cannot be mistaken, and is in perfect harmony with the acts of the master in furtherance of its execution.

Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge. After the delivery *and acceptance at the place of ship- **[*392** ment, the shipper had no longer any control over the property, except as subject to the stipulated freight.

The contract, as thus explained, being made by the master in the course of the usual employment of the vessel, and in respect to which he is the general agent of the owner, it would seem to follow, upon the settled principles of admiralty law, which binds the vessel to the cargo, and the cargo to the vessel, for the performance of the undertaking, that the ship in the present case is liable for the loss of the hundred bales, the same as any other portion of the cargo.

It is insisted, however, that the vessel is exempt from responsibility, upon the ground that the one hundred bales were never laden on board of her, and we referred to several cases in this court and in England in support of the position. 18 How. 189; 19 How. 90; *Grant* v. *Norway*, 2 Eng. L. & E. 337; 18 Eng. L. & E. 551; 29 Eng. L. & E. 323. But it will be seen, on reference to these cases, the doctrine was applied, or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfilment on the part of the shipper, namely: the delivery of the cargo.

It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel; but as the bill of lading had been signed by the master, in which he admitted that the goods were on board, the question presented was, whether or not the admission was not conclusive against the owner and the vessel, the bill of lading having passed into the hands of a bona fide holder for value.

The court, on looking into the nature and character of the authority of the master, and the limitations annexed to it by the usages and principles of law, and the general practice of shipmasters, held, that the master not only had no general authority to sign the bill of lading, and admit the goods on board when contrary to the fact, but that a third party taking the 393*] *bill was chargeable with notice of the limitation, and took it subject to any infirmity in the contract growing out of it.

The first time the question arose in England, and was determined, was in the case of *Grant* v. *Norway*, 2 Eng. L. & E. 337, in the common pleas (1851), and was in reference to the state of facts existing in this and like cases, and in connection with the principles involved in its determination, that the court say the master had no authority to sign the bill of lading unless the goods had been shipped, cases in which there had been no delivery of the goods to the master, no contract binding upon the owner or the ship, no freight to be carried and, in truth, where the whole transaction rested upon simulated bills of lading, signed by the master in fraud of his owners.

In the present case the cargo was delivered in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.

The argument urged against this lien of the shipper seems to go the length of maintaining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unlading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of *lad- [*394 ing; and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view, we think no well founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf.

The decree of the court below, affirmed.

THE RECTOR, CHURCH-WARDENS, AND VESTRYMEN OF CHRIST CHURCH, in the City of Philadelphia, in trust for Christ Church Hospital, *Plffs. in Err.*,

v.

THE COUNTY OF PHILADELPHIA.

(See S. C. 24 How. 300-303.)

Exemption from taxation not a vested right—repeal of it is not in contravention of U. S. Constitution.

Where an exemption of the property of a corporation from taxes conceded by an act of a state legislature, was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation, it belongs to the class of laws denominated *privilegia favorabilia*.

It is not a necessary implication that the concession is perpetual, or was designed to continue during the corporate existence.

Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of

NOTE.—*Power of states to tax*—see note to 10 L. ed. U. S. 1022.

Power of state legislature to exempt from taxation—see note to 19 L. R. A. 77.

Exemption from taxation; whether a contract or not—see note to 22 L. ed. U. S. 805.

the state, and must be exerted according to the varying conditions of the commonwealth.

It is the nature of such a privilege as the act confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign.

An act of the same legislature partially repealing such exemption is not repugnant to the Constitution of the United States as tending to impair a legislative contract.

Argued Dec. 18, 1860. Decided Jan. 2, 1861.

IN ERROR to the Supreme Court of the State of Pennsylvania for the Eastern District.

This case arose in the court below, upon a case stated in the nature of a special verdict, for the opinion of that court. The court rendered a judgment in favor of the defendant, the county of Philadelphia; whereupon the plaintiffs sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **P. McCall** and **R. Johnson**, for plaintiffs in error:

The question whether the legislature of a state may irrevocably relinquish the power of taxing, is one not open to discussion in this court.

Gordon v. *Appeal Tax*, 3 How. 133; *State Bank* v. *Knoop*, 16 How. 369; *Dodge* v. *Woolsey*, 59 U. S. (18 How.) 331.

The only question, then, is whether the act of 1833 (see opinion of the court) is a contract with the hospital, in the sense of the word "contract" as used in the first article of the Constitution of the United States. The view taken of the act by the court below in 12 Harris, 232, is as follows: "But no duty is imposed upon the institution as the consideration of the grant. It is required to do nothing. It is left to pursue its own course as freely as before. There is therefore nothing in the statute of exemption which savors of contract."

It is submitted that this view is erroneous. If we take the elementary definition of a contract, an agreement on sufficient consideration to do or not to do a particular thing, this statutory exemption has all the features of a contract. It is an agreement by the state, on a sufficient consideration if that were necessary, to wit: the relief by the hospital of persons who would otherwise be chargeable on the public, that the property of the hospital shall not be taxed. Just as a grant, which is a contract executed, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.

Fletcher v. *Peck*, 6 Cranch, 137.

It is not less a contract because it does not in terms stipulate for any mutual return of service on the part of the corporation, as the consideration of the grant. No one doubts, after *Fletcher* v. *Peck*, *Terret* v. *Taylor*, and *Dartmouth College* v. *Woodward*, that a grant by the legislature is a contract executed, which cannot be repealed by a subsequent legislature. A legislative grant always imports a consideration from the deliberate character of the act, and a valuable consideration is not essential.

Mayor v. *B. & O. R. Co.* 6 Gill. 288; *Derby Turnpike Co.* v. *Parks*, 10 Conn. 522.

There is a distinction between legislative acts which are of a public nature, adopted for the benefit of the whole community, to be varied or discontinued as the public good may require, and statutes which confer private rights of property. The former class is illustrated by *Butler* v. *Pennsylvania*, 10 How. 402; *East Hartford* v. *Hartford Bridge Co.* 10 How. 511.

The latter class is illustrated by the cases of *Fletcher* v. *Peck*, 6 Cranch, 89; *Terrett* v. *Taylor*, 9 Cranch, 43; *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

We submit that the act exempting the property of Christ Church Hospital from taxation falls within the latter class. The party on whom the immunity from taxation is conferred, is a private eleemosynary corporation. The statute is not a public and general law. It does not affect the whole community, but confers on the hospital a special private right of property.

See *New Jersey* v. *Wilson*, 7 Cranch, 164; *Gordon* v. *Appeal Tax Court*, 3 How. 133; *Dodge* v. *Woolsey*, 59 U. S. (18 How.) 330; *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Hardy* v. *Walton*, 7 Pick. 108; *Mathene* v. *Golden*, 5 Ohio St. 361; *Atwater* v. *Woodbridge*, 6 Conn. 223; *Osborne* v. *Humphreys*, 7 Conn. 335; *Landon* v. *Litchfield*, 11 Conn. 251.

It seems to be well established by authority of decided cases, that an exemption from taxation annexed by the legislature to a grant of land, or contained in an act of incorporation, or in a general law under which an incorporation is created, is a contract which cannot be impaired by subsequent legislation.

The question then is, does it make any real difference in point of principle, that the immunity from taxation is not contained in the act of incorporation, but in a subsequent legislative act? Is it the less a contract in the latter case than in the former? Why is not a surrender to existing corporations of the right to tax, as much a contract as a gift of land or other property to such a corporation? No one can doubt that a legislative grant of money to a hospital or university already in existence, is a contract which could not be revoked by a subsequent act of the legislature. It is a principle perfectly well settled, that the legislature can no more revoke its grants than a donor his gifts when delivered. A surrender of the right to tax seems to stand on the same footing as a grant of money or other property. So far as the question of legislative contract is concerned, the material inquiry seems to be, not whether the grant was cotemporaneous with the charter, but whether it confers private rights upon a private corporation. If it does, it is a contract within the protection of the Constitution.

See *The Derby Turnpike Co.* v. *Parks*, 10 Conn. 522.

Mr. **Henry T. King**, for the defendant in error:

The powers of the co-ordinate branches of the government of Pennsylvania, are designated by the Constitution of that state. That is the paramount law, and in the judgment of the supreme court of that state in 1858, the legislature had no power to alienate any of the rights of sovereignty, such as that of taxation, so as to bind future legislatures, and any contract to that effect is void.

Mott v. *Railroad*, 30 Pa. 27.

It is assumed to be settled doctrine here, that that decision is conclusive upon this court, and will be implicitly followed.

See *Groen* v. *Neal*, 6 Pet. 291.

The decisions which show that the passage of

a state law impairing the obligation of contracts is in violation of the 10th section of Article 1 of the Constitution of the United States, appear to be unnecessary. The law on that point has been so often and so authoritatively announced, that there is little danger of its ever being shaken. See the decision of the supreme court of Pennsylvania in *Hospital* v. *Phil. Co.* 24 Pa. 232.

It is not pretended that if the act of 1833 is in its nature a contract within the power of the legislature, a subsequent act could impair it; but it is submitted that no case can be found where a law has been held against the Federal Constitution, which did not operate to defeat vested rights. What rights have been vested, or been created, by reason of the act of 1833? The cases cited by the other side prevented a devestiture of rights, but where no right has vested against the state or the public, the law has been held constitutional.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 420.

Mr. Justice **Campbell** delivered the opinion of the court:

This cause comes before this court upon a writ of error to the supreme court of Pennsylvania, under the 25th section of the act of Congress of the 24th September, 1789 (1 Stat. at L. 73). In the year 1833 the legislature of Pennsylvania passed an act which recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge; and it being represented that, in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed, and its usefulness limited," they enacted, "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

In the year 1851 the same authority enacted "that all property, real and personal, belonging 302*] to any association or *incorporated company which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be, and the same is hereby repealed." It was decided in the supreme court of Pennsylvania, that the exemption conferred upon these plaintiffs by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of their real property under the act of 1851 was not repugnant to the Constitution of the United States, as tending to impair a legislative contract they alleged to be contained in the act of assembly of 1833 aforesaid.

The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence.

Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the state, and must be exerted according to the varying conditions of the commonwealth. The act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says "that all laws may be said to be framed with a view to perpetuity; but perpetual is not synonymous to irrevocable; and the principle on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity—a perpetuity defeasible *by an alteration of the circum- [*303 stances and reasons on which the law is founded." The inducements that moved the legislature to concede the favor contained in the act of 1833 are special, and were probably temporary in their operation. The usefulness of the corporation had been curtailed in consequence of the decay of their buildings and the burden of taxes.

It may be supposed that in eighteen years the buildings would be renovated, and that the corporation would be able afterwards to sustain some share of the taxation of the state. The act of 1851 embodies the sense of the legislature to this effect.

It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum* and may be revoked at the pleasure of the sovereign.

Such was the conclusion of the courts in *Commonwealth* v. *Bird*, 12 Mass. 443; *Dale* v. *Governor*, 3 Stew. (Ala.) 387; *Alexander* v. *Duke of Wellington*, 2 Russ. & M. 35; 24 Pa. (12 Har.) 232; Lindley, Jurisp. § 42.

It is the opinion of the court that there is no error in the judgment of the Supreme Court, within the scope of the writ to that court, and its judgment is affirmed.

BRADDOCK JONES, *Plff. in Err.*,
v.
JAMES G. SOULARD.

(See S. C. 24 How. 41-65.)

When riparian owner owns to center of fresh-water river—size of river does not alter the rule—city of St. Louis—school land.

All grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions.

The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary

NOTE.—*Title to land under water*—see note to 42 L. R. A. 161.

The law of accretion to shore lands—see note to 58 L. R. A. 193.

high-water mark, has no application in such case; nor does the size of the river alter the rule.

The city charter of St. Louis of 1809 extends to the eastern boundary of the state of Missouri, in the middle of the river Mississippi.

The entry set up in defense in the court below is void, as held in Kissell v. The St. Louis Schools, 59 U. S. (18 How.).

The school corporation held the land in dispute, with power to sell and convey the same in fee to the defendant in error, in execution of their trust.

Submitted Dec. 12, 1860. Decided Jan. 7, 1860.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This was an action of ejectment brought in the court below, by the defendant in error, Soulard, to recover possession of a part of S. 404 of the series of St. Louis school lands.

The title of Soulard was deduced from the corporation of the St. Louis public schools. It was admitted that all the title of this corporation was vested in the said Soulard. The defendant held under the city of St. Louis, whose claim was derived through a statute of the state of Missouri.

The trial below resulted in a verdict and judgment in favor of the plaintiff, whereupon the defendant sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **M. Blair and P. B. Gareschè**, for plaintiff in error:

The plaintiff in error submits:

1st. That the town of St. Louis, as the same stood incorporated on the 13th June, 1812, did not extend to the middle of the main channel of the Mississippi river as its eastern boundary, but only to high-water mark on its right bank.

2d. Even if it did so extend, yet at most the land in controversy was but reserved for the support of schools, not actually granted for that purpose, and, upon the admission of the state of Missouri, in 1820, it became the property of the state.

3d. That the first direct grant of this land by the state was made by the act of 3d March, 1851, under which plaintiff in error claims.

The general proposition first laid down depends on the correctness of the following argument, *viz.*, the limit of private ownership in water courses when these are navigable in law, or arms of the sea, is high-water mark; and such rivers as the Ohio and Mississippi are of the same nature and dignity at law above tide water, as ordinary rivers below the flow of the tide. It will not be denied that when land is bounded by a tide-water river, the limit of private property is the mark to which high tide ascends.

The second branch of this first general proposition is more debatable. Above the ebb and flow of the tide, no river of England is navigable at all. In inquiring into the definition of navigable streams in that country, therefore, it was found that they were correctly described to be those in which the tide ebbed and flowed. But navigability is the principal thing; the flowing of the tide is a mere incident. When, therefore, we find that there are navigable waters in America or elsewhere not flowed by the tide, we seek other definitions of navigable water, the flowing of the tide being no longer a test. Whatever be the new definition, we attach to navigable waters here the same consequences, properties, and incidents that the jurists of England attach to navigable waters in that country. In other words, we treat our western inland rivers in the same manner, and claim for them, and the land bordering on them the same legal consequences that are predicable of arms of the sea, properly so called in England.

That no rivers in England are navigable above tide water is well settled.

Genesee Chief v. *Fitzhugh*, 12 How. 454.

In the same decision it was declared in the most solemn and emphatic manner that such a definition was inapplicable to the rivers and lakes of America, and that these were public navigable waters (p. 454).

This being settled, it is difficult to resist the conclusion that they have all the properties of public navigable waters, such as the sea and its arms which are flowed by the sea; which last is declared to be an immaterial circumstance, and by no means an essential feature of navigability.

If this be conceded, the case of the defendant in error is at an end; for one of the properties of arms of the sea is not to be the subject of private ownership below high-water mark.

Naglee v. *Ingersoll*, 7 Pa.; 1 Pa. 105; *Carson* v. *Blazer*, 2 Binn. 475; 14 Serg. & R. 71–74; 8 Watts, 434; 9 Watts, 228; 2 Devereaux, 30–36; *Elder* v. *Burrus*, 6 Humph. 358; *McManus* v. *Carmichael*, 3 Ia. 1; *Haight* v. *City of Keokuk*, 4 Ia. 199; 1 Walker, Ch. 155; *Bullock* v. *Wilson*, 2 Port, 436.

But the plaintiff in error is free to confess that in some of the other states of the Union, perhaps in a majority of them, a contrary doctrine has been laid down, and that the decisions of the state of Missouri and of the Supreme Court of the United States may be cited in opposition to the views which it is the duty of the plaintiff in error to enforce.

It is imagined that peculiar stress will be laid upon those cases to be found in the Missouri Reports, which conflict with the doctrine contended for by the plaintiff in error. But it is believed that but little weight is due to these Missouri decisions; for in all of them, the matter seems to have passed without serious dispute or discussion. There is no evidence that the matter was argued at the hearing, and it is almost certain that the points now made were not presented to the court on those occasions. If they were, they received no attention. Under these circumstances, it is submitted that this court should consider itself free to consider the case as of the first impression, so far as the decisions of the supreme court of Missouri are concerned.

As to the decision of this court in the case of *Howard* v. *Ingersoll*, 13 How. 416 to 422, the point covered by this *dictum* was not necessarily decided, and so what fell from the court on that occasion was *obiter dictum*.

On the second point plaintiff in error submits, that up to the act of January 27, 1831, the United States did not grant, absolutely, to the schools or to the state for the use of schools, any of the land reserved for the support of schools by the 2d section of the act of 13th June, 1812. Up to the passage of this act there was only a reservation of certain lands, but no

grant of them. This was decided expressly in the case of *Hammond* v. *The Schools*, 8 Mo. 65.

It follows that there was no final disposition of the land in controversy by the United States prior to the admission of Missouri as a state, which occurred in 1820; and the point taken by the plaintiff in error is, that this land being covered by the waters of the Mississippi river at that time, was a part of the bed of the stream, and that according to the doctrine of *Pollard's Lessee* v. *Hagan*, 3 How. 212, it passed by the admission of Missouri to the state. The subsequent grant of it, therefore, by the United States was of no validity.

Navigability is the test of sovereignty. If the water be navigable, the bed of the stream over which it flows belongs, as an incident of sovereignty, to the state in which it is found; and whether it is flowed by the tide or not can make no difference, as was declared by the court in the case of *The Genesee Chief* v. *Fitzhugh*.

The land in controversy never was included within the town of St. Louis as it stood incorporated in 1812, and so was not reserved for the support of schools. Further, that not being so reserved, but being an incident of sovereignty, Missouri had the entire ownership of it on her admission into the Union; and as in 1833 the state of Missouri only granted to the school corporation so much of the lands as had been reserved for school purposes, the land in controversy was not within the description of the 9th section of that act.

The first act which embraces this land in terms, was passed in 1851, and by it this land was given to the city of St. Louis, under whom the plaintiff in error claims.

If these views be correct, the judgment of the court below must be reversed.

Messrs. **Thomas T. Gantt** and **Thomas C. Reynolds**, for defendant in error:

The defendant in error submits the following propositions:

1. The documents read in evidence by the plaintiff below are conclusive in favor of plaintiff against anyone not having a better title under the United States to the premises in controversy.

2. The land, within the assignment and survey 404 is, as a proposition of fact, admitted to be in T. 45 R. 7 E. in St. Louis county, and to be within the reservation for the schools by the 2d section of the act of 13th June, 1812; provided that the eastern boundary of the town of St. Louis, as then incorporated, was the middle of the main channel of the Mississippi river. But the middle of this channel is that eastern boundary as a proposition of law.

3. If it was within this reservation, the title passed to the school corporation by the several acts and documents read in evidence by plaintiff, whether, upon the admission of Missouri as a state, the proprietary right to the premises in controversy was continued in the United States, or transferred to the state of Missouri.

Upon the first proposition, it is not intended to do more than to refer to the case of *Kissell* v. *The Schools*, 59 U. S. (18 How.) 19, where this matter was carefully considered, and where the very pre-emption of Duncan, which is set up as one of the defenses in this action, was pronounced to be a nullity. The examination of the second proposition brings up the inquiry whether the eastern boundary of the town of St. Louis, as it stood incorporated at the date of the act of 13th June, 1812, was the middle of the main channel of the Mississippi river, and whether the out-boundary run by the surveyor general in 1840 had for its eastern boundary the middle of the main channel of the Mississippi river.

The words used in each case are substantially the same.

Coming to the description of the town as it stood incorporated in 1812, we find that the calls are: "Thence due east to the Mississippi; from thence by the Mississippi to the place first mentioned."

This is the description of an incorporated town, which is bounded on the east by the Mississippi river. That this description is, in every legal sense, equivalent to a call for the middle of the main channel of the stream, is one of those propositions which, to use the language of Judge Cowen in his learned note to *Ex parte Jennings*, 6 Cow. 518–543, "no lawyer will hazard his reputation by controverting." In the same note he remarks, that "the only question which can generally arise between the citizen and the state as to the ownership of rivers above the tide, is whether the former be the owner of the soil adjacent, within the meaning of Hale (p. 543)."

In the case at bar, there can be no question of this kind; for [see 59 U. S. (18 How.) p. 19] the schools are the owners of all the unappropriated lands within the survey of which—whether we adopt the description of the town of St. Louis as it stood incorporated in June, 1812, or of the out-boundary of the town "run so as to include the out lots, common lots and commons"—we find the Mississippi river designated as the eastern boundary. The only inquiry is: does this boundary carry us to the middle of the stream?

The propositions urged by the plaintiff in error assert that in the United States a public river, navigable in fact, though above the tide, was *ipso facto* subject to all the legal incidents of what are properly called "arms of the sea," or creeks and rivers flowed by the tide.

The defendant in error maintains that the doctrine of Sir Matthew Hale, on this subject, has been adopted in all its integrity by the judicial mind of America.

As the land in question lies in Missouri, we naturally look, in the first instance, to the decisions in that state, to ascertain the rule by which controversies respecting land titles are to be determined.

The first decision bearing on this point occurs in *O'Fallon* v. *Dagget*, 4 Mo. 343. It was followed by the case of *Shelton* v. *Maupin*, 16 Mo. 124. Then came the case of *Smith* v. *City of St. Louis*, 21 Mo. 36; and the case of *Smith* v. *Kelly*, not yet reported, decided at the March Term, 1860.

In all these cases, the common-law rule laid down by Hale and referred to by Cowen, was quietly adopted by the court and, indeed, does not seem to have been gravely questioned by the bar. When this question has come up incidentally or directly before this court, it has been treated as a settled matter.

See 13 How. in the case of *Howard* v. *Ingersoll*

soll, p. 416, Judge Wayne's opinion, and p. 422, Judge Nelson's opinion; see, also, *Jones* v. *Johnson*, 59 U. S. (18 How.) p. 150.

These are the latest opinions in which a reference to this principle is to be found. It has been repeatedly spoken of, in like manner, in earlier cases.

After referring to the decisions of the courts of Missouri and of the United States, it would seem unnecessary, in respect of the title to land in Missouri, to speak of the decisions of other states. Nevertheless, a brief citation of cases decided in the different states, all agreeing with the doctrine of Sir Matthew Hale, may not be inappropriate.

Brown v. *Chadbourne*, 31 Me. 9; *Storer* v. *Freeman*, 6 Mass. 439; *King* v. *King*, 7 Mass. 496; *Lunt* v. *Holland*, 14 Mass. 149; *Hatch* v. *Dwight*, 17 Mass. 289; *Claremont* v. *Carleton*, 2 N. H. 369; *Greenleaf* v. *Kilton*, 11 N. H. 531; *Adams* v. *Pease*, 2 Conn. 483; *Warner* v. *Southworth*, 6 Conn. 471; *Palmer* v. *Mulligan*, 3 Cai. 307; *People* v. *Platt*, 17 Johns. 195; *Hooker* v. *Cummings*, 20 Johns. 90; *Ex parte Jennings*, 6 Cow. 518. More than a dozen cases were decided afterwards in New York, in which this principle was recognized; but all refer to this case and to Judge Cowen's valuable note.

See 5 Paige, 137, 547; 5 Wend. 447; 13 Wend. 358; 17 Wend. 571; 20 Wend. 111; 22 Wend. 425; 26 Wend. 404, etc.; *Arnold* v. *Mundy*, 1 Halst. 1; 3 Zab. 624; *Brown* v. *Kennedy*, 5 Har. & J. 195; *Haye's Exrs.* v. *Bowman*, 1 Rand. 417; *Harramond* v. *McGaughon*, Taylor, 84, 136; *Hagan* v. *Campbell*, 8 Port. 9; *Harrison* v. *Young*, 9 Ga. 359; *Jones* v. *Water Lot Co.* 18 Ga. 539; *Morgan* v. *Reading*, 3 Sm. & M. 366; *Morgan* v. *Livingston*, 6 Mart. 216; *Municipality No. 2* v. *Orleans Cotton Press Co.* 18 La. 122, 278; *Stuart* v. *Clark's Lessee*, 2 Swan. 9, Overruling *Elder* v. *Burruws*, 6 Humph. 358; *Middleton* v. *Pritchard*, 3 Scam. 510; *Lorman* v. *Benson*, 8 Mich. 18; *Jones* v. *Pettibone*, 2 Wis. 308; *Young* v. *McEntire*, 3 Ohio, 495; 11 Ohio, 138; 16 Ohio, 540.

All these authorities establish, without any variation, that the bed of a fresh water stream or of a river above high water belongs to the owner of the adjacent soil, and that this holds good whether the portion of the bed which is in question be navigable in fact, or not; the only consequence of the stream admitting of navigation above tide water being that the proprietary right of the owner of the adjacent soil is subject to the public easement, or servitude, as it is called by Sir Matthew Hale. At the trial in the circuit court, the defendant (now plaintiff in error) cited, among other authorities, to support his views, cases from the supreme courts of Tennessee, Alabama, and Michigan, being 6 Humph. 358; 2 Port. 436; and 1 Walk. Ch. 155, respectively.

The case in 6 Humph. is overruled by that in 2 Swan. 9; and although the cases cited from Alabama and Michigan cannot be so distinctly said to have been overruled by the later cases of 8 Porter, and *Lorman* v. *Benson* (which will be found in 8 Michigan, 18), it is only because the previous decisions of those states were not as supposed by plaintiff in error; no previous decision needed to be overruled in those states.

It is far from being true that all the waters of England are unfit for navigation above tide water, and are not public rivers above that point. On the contrary, the citations presently to be made from Hale's Treatise, "*de jure maris et brachiorum ejusden*," show that the distinction between rivers navigable in fact above tide water, and rivers navigable in the proper legal sense as being arms of the sea, was just as familiar to Hale as to the American jurists. And that it was in full view of the truth that rivers might be and were used by the public as common highways above tide water, that the doctrines which, as Judge Cowen says, in his note to 6 Cowen, 543, "at this day no lawyer will hazard his reputation by controverting," were laid down in the first instance by English courts, and have since then been adopted with so much uniformity by the bench and bar of America. In the second place, it is a complete missing, not only of the spirit, but of the letter of the two decisions quoted from 3 How. and 12 How., respectively, to suppose that they give any countenance to the conclusions announced and contended for by plaintiff in error.

By reference to the decisions of the Supreme Court of the United States since *Pollard* v. *Hagan*, it will be seen that while the doctrine of that case has been repeatedly reaffirmed, scrupulous care has been used to restate that doctrine as it was in the first place laid down, and to limit the decision by the circumstances under which it was made, *viz.*: that land flowed by the sea at ordinary high tide, if not previously disposed of by the United States, became the property of the state on its admission to the Union. This careful reference to tide water [9 How. 471; 59 U. S. (18 How.) 71-74], and the distinction taken as lately as 13 How. 416, 422, between fresh-water streams and the arms of the sea, properly so called, are abundantly sufficient to show, if illustration were needed, the accuracy with which the doctrine declared in *Pollard's Lessee* v. *Hagan*, was adapted to the particular facts of that case, and how little it was the purpose of this court to leave anyone at liberty, first to misconstrue and then misapply the decision in that cause.

The same policy which forbids the acquisition of exclusive individual rights over the shore of the sea, forbids the establishment of such rights over such places as are flowed by its tide; for, in truth, as far as the tide flows in any river bed, that bed would be filled by the sea, if the fresh river water were entirely to fail. Let us suppose all sources supplying fresh water throughout the world to fail, the beds of rivers remaining as now. In this case, twice in twenty-four hours, for most of these, they would be filled with water from the ocean. This would be the true limit of the dominion of the sea. No one would be at any loss then to recognize the extent of "the sea and its arms." Upon these, then, there is to be no encroachment by any private individual. This limit is fixed by nature and adopted by the law. If by the supply of the necessary water the river beds above these limits become navigable, they become subject to the "servitude of public interest." But while the rights of the public or the interests of the public have been so far consulted in respect of rivers which are thus navigable as to secure to the community the

free use of such streams as common highways, yet subject to this easement, which is from its nature merely accidental and temporary, the bed of the stream, *usque ad filum aquæ*, belongs to the owner of the adjacent land. These principles were as clearly recognized and these distinctions as clearly taken in England as in America.

See Matthew Hale's Treatise, to be found at large in the volume entitled "Hargrave's Law Tracts," and the first four chapters of which are reproduced in the notes to 6 Cow. 540, already cited.

Public navigable rivers above tide water have been familiar to the English jurists from the time of Sir Matthew Hale to the present day, though then, as now, and in England as well as in America, the physical and legal distinction between "arms of the sea," or waters flowed by the tide, and consequently navigable uniformly and constantly, and those rivers above tide water, which were, by the customary supply of rain, kept at such a height as to be generally navigable, was clearly recognized, and that while in respect of all lands adjacent to the first class of waters the rights of the proprietor extended only to high-water mark, in respect of lands adjacent to public rivers above the tide, the proprietary right extended *usque ad filum aquæ*.

The decision of this court that the admiralty jurisdiction of the United States extends to inland waters navigable in fact, has no effect upon the title of proprietors of land adjacent to such waters.

5 How. 441.

Improvements in the structure of boats and in the mode of propelling them may render streams, now wholly incapable of serving any commercial purpose, available for the carrying on of a most valuable trade by water. Let this marine commerce spring up, and the protection which the admiralty jurisdiction of the United States can give must accompany it. But shall the title to land adjacent to our streams which may thus become navigable, in fact, be affected by the discovery of improved methods of navigation? The consequences which the plaintiff in error attempts to deduce from the two decisions in 3 How. 212, and 12 How. 454, are completely negatived by the more recent decision of the same court in 13 How. 381.

The defendant in error denies that any such change in the ownership of the land in question occurred upon the admission of Missouri in 1820, as is claimed by the plaintiff in error. But if by that act the premises in controversy became the property of the state, the school corporation have the elder title thereto under the state, namely, by virtue of the act of February 13, 1833. If, therefore, the premises in controversy were within the reservation for the use of schools made by Congress on June 13, 1812, though this reservation did not prevent the subsequent disposition of the land by Congress (8 Mo. 65), and though it may have passed to the state of Missouri in 1820, yet the state took it subject to a trust which it recognized and fulfilled by the act of February 13, 1833, and so the titles, both of the state and the United States, unite in the school corporation.

But it is conceived that the title to the land in controversy did not become vested in the state by the admission of Missouri.

In the case of a territory just about to become a state, the United States, as proprietor of the land on the sea or its arms, owns everything down to high-water mark. As to what is beyond high-water mark, the right is either in the United States as sovereign, or in the territory, or in abeyance. As to land bounded by a fresh-water stream or a river above tide water, the United States as proprietor owns everything to the middle of the main channel. The change of sovereignty to the state, or the acquisition of sovereignty by the state, will have no effect upon any proprietary rights.

Mr. Justice **Catron** delivered the opinion of the court:

Soulard sued Jones to recover the northern part of a United *States survey of land [*64 laid off for the St. Louis schools. The part sued for fronts the Mississippi, and includes a sand bar, formerly covered with water when the channel of the river was filled to a navigable stage. The land included in the survey approved June 15, 1843, designating the school lands; and the controversy would be governed beyond dispute by the principles declared in the case of *Kissell* v. *St. Louis Public Schools*, 18 How. 19, had this been fast land in 1812, when the grant to the schools was made. But it is insisted that the title to this accretion within the Mississippi river did not pass by the act of 1812 (2 Stat. at L. 748), and remained in the United States till the state of Missouri became one of the states of the Union, in 1820, when the title vested in the state as a sovereign right to land lying below ordinary high-water mark. And furthermore, that if the state did not take by force of her sovereign right, she acquired a good title to the land known as Duncan's island by the act of Congress to reclaim swamp lands. These claims the state conveyed by a statute to the city of St. Louis, and that corporation conveyed them to Jones, the plaintiff in error.

Soulard claims under the corporation of the St. Louis schools. The school survey No. 404 contains 78, 96/100 acres, including the land in controversy.

The town of St. Louis was incorporated in 1809 by the common pleas court of St. Louis county, in conformity to an act of the territorial legislature passed in 1808, and the only contested question in the cause is, whether the eastern line of the corporation extends to the middle thread of the Mississippi river, or is limited to the bank of the channel. The calls for boundary in the charter are, "beginning at Antoine Roy's mill on the bank of the Mississippi; thence running sixty arpents west; thence south on said line of sixty arpents in the rear, until the same comes to the Barrieu Donoyer; thence due south until it comes to the Sugarloaf; thence due east to the Mississippi; from thence by the Mississippi, to place first mentioned."

The expression used in the designating boundary on the closing line in the charter is as apt to confer riparian rights on the *proprietor of the tract of seventy-nine acres as the call could well be, unless the last call had been for the middle of the river. [*65

Many authorities resting on adjudged cases

have been adduced to us in the printed argument presented by the counsel of the defendant in error, to show that from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions.

We think this, as a general rule, too well settled, as part of the American and English law of real property, to be open to discussion; and the inquiry here is, whether the rule applies to so great and public a water course as the Mississippi is, at the city of St. Louis. The land grant, to which the accretion attached, has nothing peculiar in it to form an exemption from the rule; it is an irregular piece of land, of seventy-nine acres, found vacant by the surveyor-general, and surveyed by him as a school lot, in conformity to the act of 1812.

The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case; nor does the size of the river alter the rule. To hold that it did would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as a matter of fact, rather than proceeding on established principles of law.

1. We are of the opinion that the city charter of St. Louis of 1809 extends to the eastern boundary of the state of Missouri, in the middle of the river Mississippi. *Dovaston* v. *Payne*, 2 Smith's Lead. Cas. 225.

2. That Duncan's entry set up in defense in the court below is void, as this court held in the case of *Kissell* v. *The St. Louis Schools*, 18 How. 19.

3. That the school corporation held the land in dispute, with power to sell and convey the same in fee to the defendant in error, Soulard, in execution of their trust.

It is ordered that the judgment of the Circuit Court be affirmed.

JOSEPH C. PALMER, Chas. W. Cook, Bethuel Phelps, and Dexter R. Wright, *Appts.*,

v.

THE UNITED STATES.

(See S.C. 24 How. 125-131.)

Mexican land case—fabricated claim.

In a Mexican land case where the only document found among public records, shows that the petitioner asked for land, that the governor did not accede to the request, and it is evident that the grant was fabricated, the claim was rejected.

Argued Dec. 26, 1860. Decided Jan. 7, 1861.

APPEAL from the District Court of the United States for the Northern District of California.

The history of the case, and a statement of the facts, appear in the opinion of the court.

Messrs. **J. P. Benjamin** and **E. L. Goold**, for appellant:

The proof that the titles are genuine and authentic is overwhelming, and the circumstances relied on in support of the adverse pretensions of the government are trivial in the extreme. The proof of all the papers that preceded the final grant is found in the government's own records and archives, and need not be enlarged on.

The signatures are proved by the men who wrote them, Pio Pico, and J. M. Moreno, and by the grantee, who was a public officer and familiar with them.

The cases of *Cambuston* and *Fuentes*, cited by the Attorney General, are in no sense authorities in the cause now before the court; they are totally inapplicable. In this case, unlike them, there is record evidence of all the preliminary proceedings, and proof of the loss of the book in which the concession is certified to have been recorded.

Mr. **J. S. Black**, *Atty. Gen.*, for appellees:

The judge of the court below, who knew the witnesses, has declared upon record his opinion that they are not entitled to credit, and that conclusively establishes their status in this court. Where a court of original jurisdiction expressly bases its decision upon a fact within its knowledge and sufficient to justify its decision, an appellate tribunal cannot reverse it on the ground that the fact is otherwise, unless there be something else upon the record which shows very clearly that the inferior court was mistaken. This is peculiarly true of cases in which the decision turns upon the credibility of witnesses. For these reasons, the opinions expressed upon the characters of the witnesses directly or indirectly, expressly or impliedly, by auditors, masters in chancery, or assessors of any class, are always regarded as conclusive upon the courts which review their decision—as conclusive as the verdict of a jury would be upon the same matter. There is certainly nothing in this case to create a doubt that the judge of the court below did entire justice to Diaz and Moreno.

We insist that all the evidence, introduced by the claimant for the purpose of showing that the grant existed before the contract, is illegal; and besides, when it comes to be examined, it will be found not to prove any such fact.

We insist, also, that this grant is void for uncertainty with which the land is described in the title papers. It is void beside, because there is no record of it, for the case comes precisely within the principle decided in the case of *Cambuston*, repeated in the case of *Fuentes* as well as in many other cases determined by this court within the last three years.

Even if this grant had been regularly made according to the form of the laws, customs, and usage of Mexico, it would still have been void, for the reason that the lands claimed under it were not vacant lands within the meaning of the colonization laws. A part of it had been appropriated, and was at the time occupied and used, under a decree of the Supreme Congress, for military purposes. Another part was devoted by law to the use of the church and the payment of the debt contracted by the Mission Dolores. The balance was within the limits of

the *pueblo*, as claimed by the city of San Francisco, and conceded by the United States.

Mr. Justice **Grier** delivered the opinion of the court:

The appellants claim the land in dispute as assignees of Benito Diaz. This claim was rejected by the board of land commissioners, and also by the district court.

The documentary evidence, upon which the case rests is as follows:

1. A petition of Benito Diaz, dated April 3, 1845, in which he asks for a grant of land which he calls "a vacant place within the jurisdiction of San Francisco, known by the name of 'Punta de Lobos,' bounded on the north by the sea, which flows to the port of San Francisco; on the south with the Cerro, in the rear of the mission known by the name of the 'Cerro de Laguna Honda;' on the east with the 'Loma Alta;' and on the west by 'la Punta de Lobos;' which will comprehend two leagues." The petition adds that the *presidio* and castle are within the tract, but the petitioner does not ask for them unless the government is willing; but if that be done, he promises to erect a house of certain dimensions in the port of San Francisco for the military command.

2. An order of reference, bearing date May 24, 1845, and signed Pico, ordering the petition to pass for information to the respective judge, and await the report of the military commander upon the matter.

3. A report from Jose de la Cruz Sanches, who seems to have been *alcalde* at the *pueblo* of San Francisco, dated August 16, 1845, in which he declares that the land is vacant, and the petitioner has the necessary requisites according to law, but declining to give any information about the military lands.

4. A report by Francisco Sanches, the military commander, dated at the military command of San Francisco, October 18, 1845, setting forth that the land the petitioner solicits **127*]** is vacant and *may be conceded to him, "not comprehending in the grant the two military points of the castle and *presidio* that are included in the petition."

These documents are all written on the same paper. The governor's order of reference is on the margin, and the reports indorsed. But there is no concession or order that a definitive title should issue to the petitioner, as is always found when the governor accedes to the prayer of the petition. See *Arguello* v. *United States*, 18 How. 543.

The petition is not accompanied by a *diseño* or map of the land, as required by the regulations of 1828. This is all the document found among the archives or public records, and shows this fact only: That the petitioner asked for land; that the *informé* did not satisfy the governor, who did not accede to the request, and, therefore, the petitioner took nothing by his application. That the governor had good reasons for refusing the prayer of this petition is apparent from the fact, not only of the public fortifications of the harbor being erected thereon, but because on the 4th of November, 1834, Governor Figueroa, in his decree establishing the *pueblo* of San Francisco, had included a large portion of the land now claimed, and the remainder was claimed as the land of the Mission Dolores, which the departmental assembly afterwards (15th April, 1846) ordered to be sold at auction, and suspended the further alienation of the same as vacant.

This is all the record evidence, on which alone the court can rely as speaking the truth. It does not show even an inchoate equity in Benito Diaz; nor does the fact that he carried off some of the materials of the dilapidated fort to build him a house in San Francisco, add to it.

The next fact which we can admit as sufficiently proved is the sale by Benito Diaz of the land claimed to Thomas O. Larkin, in September, 1846, reciting a grant or patent to Diaz, dated 25th June, 1846. This instrument purports to be a patent or definitive title to Benito Diaz, for all the land included in the boundaries mentioned in the petition. The public fortifications which protect the harbor of San Francisco are not excepted. The value of such a grant might easily be *anticipated, [*128 when the occupation of the country by the United States had taken place. Pio Pico, after his deposition from the government, could afford to be more liberal in 1846 than in 1845, when he very properly refused to make it. There is no trace of this grant to be found on record, or in the public archives. It purports to be signed by Pio Pico, and attested by his secretary, Moreno; and each of them has been called to attest the genuineness of the signatures. We have decided in the case of *Luco* v. *United States*, 23 How. 543, "that, owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers of the Mexican government in California cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives." In compliance with this rule, we might dismiss this case without further argument; for if the testimony of the officers of the government cannot be relied on, much less can that of more obscure individuals, especially as we have seen in the *Luco Case*, and some others, that it is easy to obtain any number of witnesses to depose to any fact necessary to establish a fraudulent grant.

The testimony brought in this case to support this private deed, and give it the force and effect of a public record, grant or patent, and to prove that it was executed as such before the 7th of July, 1846, when the official functions of the late officers ceased entirely, tends only to confirm the suspicions in which it is involved, and demonstrates the necessity of the rule of decision which we have adopted.

Pio Pico was called as a witness. He swears "that he believes the signatures to be genuine," and that is all. He does not state where it was signed, or when it was signed, whether before or after his expulsion from the government. If executed where it purports to be, *viz.*, at Los Angeles, where the public records were kept, he knew it could be proved he had left Los Angeles a week before its date (25th June), and was residing at Santa Barbara, where he remained till the approach of Frémont to Monterey. He knew it could be proved that his secretary, who attested the paper, was in Los Angeles, *seventy miles distant. He could prob- [*129 ably give no better reason for his willingness

to sell the public forts, which he had refused to do a year before, than the fact that the Americans had taken possession of them. His silence on these points in expressive. There is no doubt that his testimony, so far as it goes, is true, and given with his habitual caution. He might excuse himself for not stating whether or not this grant was one of the large number said to have been executed by him on the 8th of August, on the eve of his departure to Mexico, for the reason that no question was asked him as to that fact.

Moreno, the secretary, is not so cautious and therefore has involved himself in more difficulties, which are unexplained, and perhaps inexplicable.

He testifies as follows:

"I recollect this document. I saw it on the 25th June, 1846, when I signed it. This is my signature as secretary *ad interim*, and also my signature to the certificate of registry; and I saw Pio Pico sign it as governor. This is his genuine signature. I think Benito Diaz wrote the body of the grant himself. After the grant was completed, I delivered it to the agent of Benito Diaz, on the road from Los Angeles to Santa Barbara. The agent to whom I delivered it, according to my recollection, was Eulogio Celiz."

Now, this document states that it was "given in the city of Los Angeles, on the 25th of June, 1846," and Moreno swears he saw Pio Pico sign it, who was on that day seventy miles distant in Santa Barbara. His certificate, that he has recorded it in the proper book, he does not prove to be true; or if he was at Santa Barbara, with Pico, on the 25th, how he could record it in Los Angeles, where alone the records were kept. If he executed and recorded it in Los Angeles, he does not explain why it is in the handwriting of Benito Diaz, and not drawn up by the clerks of the department as other grants; and how it came to pass that the date of the paper, and his certificate, are in the handwriting of Benito Diaz, who was at San Francisco, some five hundred and twenty miles distant; nor how it came to pass, that when he had signed and recorded this important document, 130*] he put it in his pocket, and started *for Santa Barbara, and met Celiz on the road; nor does he explain how Celiz, who left San Francisco on the 21st of June, with this paper drawn up by Diaz, for the purpose of taking it to Los Angeles to have it executed, could have taken it all the way to Los Angeles, five hundred and twenty miles, before it was executed; and then, that Moreno should meet him on the road between Santa Barbara and Los Angeles, after it was executed. There were no railroads in California at that time by which to account for such swift traveling.

Diaz testifies that the document is in his handwriting; "that he wrote it in San Francisco, on the 20th or 21st of June, in consequence of a letter which he received from Bandini, whom he calls secretary of the government," but who was not secretary. "That the country was in such a critical state, that it was necessary to send it immediately; which he did, by special courier. That from information of his courier. Celiz, he understood that the grant was signed on the road, either at Santa Buena Ventura, or Santa Barbara." The critical state of the country, as the Americans were in possession of the greater part of it, will no doubt account for the fast riding of the courier and in some measure for the execution of the deed on the highway, and the false certificate of record of a document which, without such recording, was but a private deed.

If Celiz met Pico where he states, he required but five days to ride five hundred miles, while it required eight days for Pico to travel less than seventy miles.

There is no necessity to rely upon the testimony of witnesses Crane and Watson, that Diaz declared, "that after the American Revolution, he made out the grant in his own handwriting; and that, in order to make it valid, he dated it back to the month of June."

The face of the paper, and the testimony brought to support it, sufficiently demonstrate this to be the fact.

It is evident, that when this grant was fabricated, it was not known that conclusive evidence could be produced of the absence of Governor Pico from Los Angeles on the day of its *date. Hence the necessity of chang- [*131 ing the venue to that of the highway, when it was too late to alter or erase the certificate of record to suit it. And hence the absurd contradictions exhibited in the testimony of Moreno, who appears to be emulating the example of his predecessor.

The judgment of the District Court is, therefore, affirmed, with costs.

THE UNITED STATES, *Appt.*,
v.
CLAUDE CHANA, Wm. Martin, Thos. P. Turner, and Albert Rowe.

(See S. C. 24 How. 131, 132.)

Mexican land claim rejected.

Where the testimony to sustain a Mexican claim is similar to that offered in the cases of United States v. Nye, 62 U. S. and The United States v. Rose, 64 U. S. in which cases it was determined that the testimony was not sufficient to support the claims, the claim rejected.

Submitted Dec. 17, 1860. Decided Jan. 7, 1861.

APPEAL from the District Court of the United States for the Northern District of California.

This case arose upon a petition filed before the board of land commissioners, in California, by Claude Chana, and supplemental petitions filed by the other appellees, before said board for the confirmation to them of a claim to certain lands in California.

The board of land commissioners entered a decree confirming the claim. The district court, on appeal, affirmed this decree; whereupon the United States took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **J. Black**, Atty-Gen., for appellants:

This claim is based entirely upon Sutter's general title, and like all of its class it is, of course, worthless.

Mr. **Crittenden** for appellees.

Mr. Justice Campbell delivered the opinion of the court:

The appellees presented their claim, before the board of commissioners for the settlement of land claims in California, for a tract of land consisting of four leagues, on the south side of Bear creek, in Yuba county, under a grant to Theodore Sicard by Micheltorena, governor of the department of California.

The testimony to sustain the claim is similar to that offered in the cases of *United States* v. *Nye*, 21 How. 408, and *United States* v. *Rose*, 23 How. 262. In these cases it was determined that the testimony was not sufficient to support **132***] the *claims. This case must follow the same course that was assumed in those.

Judgment of the District Court reversed, and petition dismissed.

ANGELINA R. EBERLY and Peyton Lytle, by his Next Friend, A. B. Eberly, *Plffs. in Err.*, *v.*

LEWIS MOORE and Charles Raybon.

(See S. C. 24 How. 147-158.)

Plea to jurisdiction, what sufficient—false averment of jurisdiction.

The district court may permit the withdrawal of pleas in bar for the purpose of pleading to the jurisdiction.

Where an attempt was made, according to the affidavit on which the motion was founded, to confer upon the district court, by a false and fraudulent averment, a jurisdiction to which it was not entitled under the Constitution, this was a gross contempt of court.

A plea in abatement is not a nullity, if, although not precise or formal, it denies the averment of citizenship of plaintiffs, as they affirmed it to be.

Argued Dec. 17, 1860. Decided Jan. 7, 1861.

IN ERROR to the District Court of the United States for the Western District of Texas.

The history of the case and a sufficient statement of the facts appear in the opinion of the court.

Mr. **W. G. Hale**, for the plaintiffs in error:

1. The district court was not authorized to permit the defendants, Moore and Raybon, to withdraw their answers and to file pleas to the jurisdiction. It will be observed that suit was commenced November 4, 1855; that service was made on these defendants, on September 27 and October 23, 1856; that on November 25, 1856, and some days after pleas to the jurisdiction had been made by other defendants, Moore and Raybon voluntarily filed their answers containing the general issue and pleas in bar; that an order for a survey was made at the same term, and that it was not until June 8, 1857, at a new term, that they thought proper to swear that they had been deceived by a false allegation in the plaintiff's petition, and had since ascertained its incorrectness.

Ordinary questions of amendment are intrusted to the discretion of the inferior courts and are not revisable here; but in a case of this character, the courts of law have no discretion. The 32d section of the act of 1789 (1 Stat. at L. 91) applies in its first clause to the correction of formal defects or errors by a reference to other parts of the record, and in its last and more general clause, to an amendment of "any defect in the process or pleadings." It is obvious that this statute grants only the power of correcting an error occurring in the body of a pleading, and is not to be understood as authorizing the cancelation or withdrawal of the pleading itself. In the latter case there would be "no defect" to be supplied, as there would be nothing left in which to supply it. The power, then, to allow the withdrawal of an entire plea and the substitution of another, must be derived, if at all, from the common law or the general and necessary authority of a court *in ordinationem litis*. But this general authority cannot extend to the case of amendments, because then there would have been no need of the enabling statutes. And at common law the courts had at first no power of admitting the amendments after the term.

Bac. Abr. Amendment, A; *Blackmore's Case*, 6 Co. 157; Com. Dig. Prerogative, D. 85; *Nelson* v. *Barker*, 3 McLean, 379.

Afterwards their power was considered to continue as long as the cause was "in paper."

Tidd, Pr. 97; *Bondfield* v. *Milner*, 2 Burr. 1099.

The expression "in paper" appears to be expressly applied to the condition of a cause before the impaneling of a jury; but the decisions are conflicting as to the power of granting amendments in material point, except to correct a variance, after issue is taken. It is clear that an omission cannot, in the English courts, be supplied after that time.

Bye v. *Bower*, Carr. & M. 262; *John* v. *Currie*, 6 Carr. & P. 618; *Brashier* v. *Jackson*, 6 Mees. & W. 549; *Webb* v. *Hill*, Moody & M. 253.

There is no precedent for the withdrawal of a plea in bar, to admit either a demurrer or a plea in abatement. On the contrary, it is well settled that a plea, introduced by amendment, must be to the merits of the case.

Law v. *Law*, Str. 960; *Perkins* v. *Burbank*, 2 Mass. 73; *Eaton* v. *Whittaker*, 6 Pick. 465; *Beach* v. *Fulton Bank*, 3 Wend. 573, 576; *Waples* v. *McGee*, 2 Harr. 444; see, also, *D'Wolf* v. *Rabaud*, 1 Pet. 476; *Ripley* v. *Warren*, 2 Pick. 592, 594–596; *Palmer* v. *Evertson*, 2 Cow. 417; *Engle* v. *Nelson*, 1 Pa. 442.

Judicial discretion can only be exercised where neither party has a legal right. When rights begin, discretion ends, and any decision becomes the subject of appellate revision. In the present case the defendants in error, by pleading in bar at a former term, had admitted the jurisdiction of the court and waived any objection to it.

Co. Litt. 303; Com. Dig. Abatement, D. 9, 5; *Mostyn* v. *Fabrigas*, Cowp. 161; *Bailey* v. *Dozier*, 6 How. 23, 30; *Sheppard* v. *Graves*, 14 How. 505, 509; *Whyte* v. *Gibbes*, 61 U. S. (20 How.) 541; *Martin* v. *Com.* 1 Mass. 347; *Ripley* v. *Warren*, 2 Pick. 592, 594; *Coffin* v. *Jones*, 5 Pick. 61; *Ludlow* v. *Simond*, 2 Cai. Ca. 1; *Wood* v. *Mann*, 1 Sumn. 578; *Hinckley* v. *Smith*, 4 Watts. 433; *Chamberlin* v. *Hite*, 5 Watts, 373.

And it is so expressly decided in Texas.

Hart. Dig. 688, 691; *Drake* v. *Brander*, 8 Tex. 351; *Cook* v. *Southwick*, 9 Tex. 615; *Ryan* v. *Jackson*, 11 Tex. 391, 400; *Wilson* v. *Adams*, 15 Tex. 323.

This waiver on the part of the defendants

NOTE.—*Pleading to the merits, waives plea in abatement*—see note to Sheppard v. Graves, 14 L. ed. U. S. 518.

inures to the plaintiffs, and when acted on by them in the further prosecution of the suit, gives them a right to insist on it as conclusive.

Iveson v. *Harris*, 7 Ves. 254; *Chichester* v. *Donegal*, 6 Madd. 375; *Smith* v. *Elder*, 3 Johns. 113.

Cases are not wanting, also, in which the power of a court to permit a plea to the jurisdiction, after such a constructive admission, has been expressly denied.

Martin v. *Com.* 1 Mass. 353; Anonymous, 3 Cai. 102.

So permission to plead in abatement will be refused, after imparlance, though the prayer for imparlance was by mistake or through ignorance.

2 Rol. 244; Com. Dig. Abatement, D, 9, 2.

The subject is elaborately discussed in *Wood* v. *Mann*, 1 Sumn. 578. And the principle is substantially affirmed by the supreme court of Texas, in *Coles* v. *Perry*, 7 Tex. 109, 14.

II. The district court should have directed a judgment by default to have been entered against the defendants, Moore and Raybon, on the application of the plaintiffs. The answer having been voluntarily withdrawn, these defendants stood without a plea, for the plaintiffs had a right to regard the plea to the jurisdiction as a nullity; first, as being filed too late after an appearance; and second, on account of its intrinsic defects and irregularities.

1. As to the first cause there can be no question that, if a plea in abatement be filed too late, the plaintiff may sign judgment treating it as a nullity.

Tidd. Pr. 463; *Brandon* v. *Payne*, 1 T. R. 689; *Doughty* v. *Lascelles*, 4 T. R. 520; *Lockhart* v. *Mackreth*, 5 T. R. 661, 663; *Blackmore* v. *Flemyng*, note, 7 T. R. 447; and so in the Texas practice, *Taylor* v. *Hall*, 20 Tex. 215.

2. As to the second cause; if the plea in question was defective in some necessary formality, or incomplete in substance, the plaintiffs could equally consider it as a nullity. The general rules of construction are unfavorable to such pleas: they cannot be amended; the greatest precision is required and the least slip, fatal. Thus, if a plea to the jurisdiction is made by attorney (Com. Dig. Abatement, D, *i*, *a*, 2; 2 Saund. 309, *b*; *Teasdale* v. *The Rambler*, Bee, 9); if it is filed without an affidavit to its truth (2 Saund. 210, note; *Richards* v. *Setree*, 3 Price, 197; *Lovell* v. *Walker*, 9 Mees. & W. 299; *Rapp* v. *Elliott*, 2 Dall. 184; *Richmond* v. *Tallmadge*, 16 Johns. 307); or if it be no plea at all, but a mere pretense not applicable to the action, the plaintiff may take judgment.

Mr. **W. P. Ballinger**, for the defendants in error:

1. There is no final judgment to which a writ of error can be prosecuted, and this court has not jurisdiction of the case.

U. S. v. *Girault*, 11 How. 22.

2. The court below had the right to permit the answer to the merits to be withdrawn and abandoned, and a plea to the jurisdiction filed, and this court will not revise the discretion which was exercised.

The general rule requiring a plea to the jurisdiction to precede a plea to the merits, or otherwise waiving the former, is, of course, familiar.

2 Sumn. 585; 1 Phil. 393; 14 How. 509.

But the question is whether, if the party once pleads to the merits, he forever forfeits all right to ask, and the court itself lose all power to permit, upon any ground whatever, such plea to be withdrawn, and an issue presented to the jurisdiction of the court. If courts could not, in case of accident or necessity, with a view to reach the truth, give relief or indulgence on making the other party indemnity for the delay, our rules would be worse than any principles of law in common cases, which are often relieved against in equity, and sometimes at law, in the event of accident and mistake.

See *Wallace* v. *Clark*, 3 Wood. & M. 359, a case standing on very analogous ground.

The Constitution of the United States provides that "the judicial power shall extend to all cases in law and equity, arising," etc. By "cases in law" was meant suits in which legal rights are to be determined in contradistinction to rights cognizable in equity or admiralty.

Parsons v. *Bedford*, 3 Pet. 44; *Bennett* v. *Butterworth*, 11 How. 669.

There is no common law of the United States regulating principles of pleading and practice at law; or upon any other subject (*Wheaton* v. *Peters*, 8 Pet. 658); nor do the laws of a state have any effect *proprio vigore*.

9 Pet. 329; 2 Curt. C. C. 94.

The Supreme Court of the United States has the power to prescribe rules of pleading and practice in suits at common law for the district and circuit courts (act August 23, 1842, § 6; 5 Stat. 517); but it is a power which has never been exercised. The district court in Texas has also the power to regulate its practice "as shall be fit and necessary for the advancement of justice," etc. (act March 2, 1793, § 7, 1 Stat. 335), and in the entire want of all other rules, it adopted its own rules of pleading and practice, conforming them to the practice of the state courts so far as consistent with the laws of Congress and the distinctive organization of a court of law. One of the few provisions of act of Congress, touching the pleadings in the courts of the United States, is that those courts may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall, in their discretion and by their rule prescribe.

Sec. 32, judiciary act, 1789, 1 Stat. 91.

By the law governing the state practice, "the pleadings in all suits may be amended under the direction of the court, upon such terms as it may prescribe, at any time before the parties announce themselves ready for trial, and not thereafter." O. & W. Dig. art. 434.

These express provisions of law intrust the amplest discretion to allow amendments of "the pleadings," and the largest measure of such discretion and control also results from the organization of the court. The exercise of that discretion cannot, upon well-settled principles, be revised by this court. In *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, the defendant having filed six special pleas, was refused leave to file two others.

The allowance or disallowance of amendments is not matter for which a writ of error lies.

Chirac v. *Reinicker*, 11 Wheat. 280; and see *Walden* v. *Craig*, 9 Wheat. 578; Wright v. *Hollingsworth*, 1 Pet. 167; *U. S.* v. *Buford*, 3 Pet. 31; *Clapp* v. *Balch*, 3 Me. 219; *Morgan* v. *Lucr*,

10 Johns. 163; *Northum* v. *Kellogg*, 15 Conn. 574; *Tobey* v. *Claflin*, 3 Sumn. 380; *Calloway* v. *Dobson*, 1 Brock. 119.

The precise question of permitting a plea to the jurisdiction after general answer to the merits, was decided by Judge Story in *Dodge* v. *Perkins*, 4 Mason, 435.

"In this case, I should feel it my duty to give the defendant a right to withdraw his answer and put in a plea, if the posture hereafter should render that course desirable to me."

P. 437; and see 1 Sumn. 579; see, also, *Riddle* v. *Stevens*, 2 Serg. & R. 544.

Almost all pleas in abatement to courts of general jurisdiction are merely dilatory and technical; and therefore have been regarded with disfavor, and tried by the most stringent rules. But the jurisdiction of the Federal courts being limited by the Constitution, dependent in this class of cases on the citizenship of the parties in the different states; involving, to say no more, greatly increased expense and inconvenience to the defendant—a jurisdiction created only to reserve rights to citizens of other states, more important than the admitted injury to defendants, it is a question of substance of the greatest importance to the individual defendant, and of delicacy and solicitude to the court.

Cook, 482.

There can be no fair ground on which the Federal court should regard pleas to their jurisdiction, made in good faith. with disfavor. 3 Wood. & M. 360.

On the contrary, they should guard themselves, in a substantial and effective and even jealous manner, against fraudulent attempts to impose upon their jurisdiction; and to retain, or, more properly, to imply and assume jurisdiction upon harsh, illiberal, merely technical grounds, is not in accordance with the Constitution or spirit of the Federal judiciary.

3 Sumn. 380; 2 Pet. 329; 60 U. S. (20 How.) 525.

Mr. **Justice Campbell** delivered the opinion of the court:

The plaintiffs, as citizens of Kentucky, commenced a suit by petition against the defendants, as citizens of Texas, for the recovery of a parcel of land in their possession. At the return of the process the defendants pleaded to the petition the general issue, and the statute of limitations, in bar of the suit.

At the next succeeding term they moved the court, upon an affidavit charging that the allegation in the petition, "that the plaintiffs were citizens of Kentucky, was untrue, and fraudulently made to induce the court to take cognizance of the cause," and that they were citizens of Texas, for leave to withdraw their pleas, and to plead this matter in abatement of the suit. This motion was allowed, and pleas in abatement were filed. One of these avers that the allegation of citizenship in said plaintiffs' petition is not true; that said plaintiffs are not citizens of Kentucky, but are respectively citizens of Texas; wherefore he prays the dismissal of the cause for want of jurisdiction. The plaintiffs, thereupon, moved the court for judgment for the want of a plea. This motion was not allowed, and thereupon the plaintiffs refused to reply to the pleas in abatement, and the court then proceeded to impanel a jury, and directed them to ascertain whether, from the proof before them, the plaintiffs, or either of them, were citizens of the states of Kentucky or Texas at the date of the writ. The jury returned as their verdict, that the domicil or residence of the plaintiffs never had been changed from the state of Texas, and that their domicil or residence was in the state of Texas at the commencement of this suit. The court dismissed their petition.

*The plaintiffs object to the authority [*158 of the district court to permit the withdrawal of pleas in bar, for the purpose of pleading to the jurisdiction; that a plea in bar admits the jurisdiction of the court, and the capacity of the plaintiffs to sue, and that they cannot be deprived of the benefit of that admission. The equitable jurisdiction of the courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried. Such a jurisdiction is essential to and is inherent in the organization of courts of justice. *Bartholomew* v. *Carter*, 3 M. & G. 125.

But this jurisdiction has been conferred upon the courts of the United States in a plenary form by acts of Congress. 1 Stat. at L. p. 83, § 17; p. 335, § 7; p. 91, § 32.

It has been uniformly held in this court that a circuit court could not be controlled in the exercise of the discretion thus conceded to it. *Spencer* v. *Lapsley*, 20 How. 264. In the present instance the jurisdiction was properly exercised. An attempt was made, according to the affidavit on which the motion was founded, to confer upon the district court, by a false and fraudulent averment, a jurisdiction to which it was not entitled under the Constitution. If true, this was a gross contempt of the court, for which all persons connected with it might have been subject to its penal jurisdiction.

The plaintiffs contend that the plea is a nullity, and that they were entitled to sign judgment. It is not a precise, distinct, or a formal plea, but it denies the truth of the averment of the citizenship of the plaintiffs, as they had affirmed it to be in the petition. We may say as Lord Denman said, in *Horner* v. *Keppel*, 10 Ad. & E. 17: "Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside; but the plea here is not quite bad enough to warrant that remedy."

Judgment affirmed.

HENRY AMEY, *Plff. in Err.*,
v.
THE MAYOR, ALDERMEN, AND CITIZENS OF ALLEGHENY CITY.

(See S. C. 24 How. 364-376.)

Certificates of indebtedness, or bonds, of city not null and void because in excess of charter limit of indebtedness—irregularities in issue of municipal securities, no defense against bona fide holders.

Certificates of loan, with certificates for interest

attached, are called bonds, with coupons for interest: but neither the instrument or coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt.

Where an act of the state legislature authorized a city to subscribe to the capital stock of a railroad company to be paid for by the corporate credit of the city by the issue of "certificates of loan," and the railroad company took, from the city, certificates of loan in payment of the subscriptions, and sold them, and with the money built the road, such contemporaneous action by all the parties interested, proves that the authority given to the city to make the subscriptions to the railroad company, had been carried out just as it was meant to have been.

The several acts of the assembly of Pennsylvania stated in the case, conferred authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise bonds with coupons, as was done, to pay for its subscriptions to the capital stock of the Ohio & Pennsylvania Railroad Company.

The bonds or certificates of loan which were issued and are not null and void, because the debt of the city had reached a limit mentioned in its charter prior to the second subscription, nor because the ordinance of the city directing the issue for the payment of the second subscription had not been recorded within thirty days.

When they are in the hands of bona fide transferees, it would be inequitable, if the city could repudiate them at all, and more especially, if that were allowed to be done upon the ground of any fault in the corporation in their issue.

They are not null and void for any irregularity connected with that issue, by the city of Allegheny.

Submitted Dec. 12, 1860. Decided Jan. 7, 1861.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Western District of Pennsylvania.

The history of the case and a statement of the facts appear in the opinion of the court.

Mr. **J. Knox**, for the plaintiff:

The legislature itself had power, under the Constitution of Pennsylvania, to grant the power to issue these bonds to the city of Allegheny.

See *Oebricke* v. *Pittsburgh*, 7 Am. Law Reg. 726; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. 147; *Commonwealth* v. *Commiss. of Allegheny Co.* 32 Pa. 218; *Commonwealth* v. *Pittsburgh*, Pittsburgh Leg. Jour. No. 35, page, 277.

The acts of the assembly in question conferred authority on the corporation of Allegheny to issue bonds with coupons, as has been done.

The act of 5th of April, 1849, in its second section, authorizes the cities of Pittsburgh and Allegheny to subscribe to the capital stock $200,000, or in other words to promise in writing to pay $200,000 at a future day for so much stock. The power to subscribe is a power to contract a debt. Such is the literal meaning of the term. It is a term different in its signification from to purchase or to buy. Such also is the legal signification of the term.

Commonwealth v. *M'Williams*, 11 Pa. 62.

The power to subscribe carries with it the power to contract a debt, and to perform the usual and necessary acts to provide money to pay the debt, or to give an evidence of debt. A bond is only an evidence of debt under seal, and is the usual mode of giving evidence of a debt by a corporation.

See *Carr* v. *Le Fevre*, 27 Pa. 414; *McMasters* v. *Reeds*, 1 Grant, Cas. 36; *Hamilton* v. *Pittsburgh*, Pittsburgh Leg. Jour. No. 35, pp. 274, 276; March 12, 1860.

Allegheny city has solemnly asserted in the bonds that they were issued in pursuance of an act of the legislature, passed April 5, 1849. The rules of law and equity require that she shall be held to the interpretation placed upon this act by herself. The 1st and 2d sections of the act are to be construed together. The first speaks of "a certificate" alone, and while there is no affirmative delegation of power in this section, unless the 2d section contains this delegation of power, the 1st section is utterly meaningless. "Certificates" alone and bonds have the same signification. The evident purpose of this act was to enable the city of Allegheny to contribute by the use of her credit to the making of this road, and the only way in which this purpose could be effected was, by enabling her to make a form of security that was usual for corporations to give in making the subscriptions, and which would pass in the market and bring the best price.

See *Wilkinson* v. *Leland*, 2 Pet. 661; *The Emily* and *Caroline*, 9 Wheat. 388.

The legislature of Pennsylvania by a subsequent act, May 8, 1850, recognized the subscription as a debt.

See *U. S.* v. *Freeman*, 3 How. 556.

The remarks made in regard to the above act apply also to the act of 1852, under which the second issue of bonds was made.

There are two irregularities named by the counsel for the defendants.

1. The debt of the city of Allegheny had reached the limit of $500,000 prior to the second subscription.

2. That if otherwise valid, the ordinance authorizing the second subscription became null and void, by reason of not being recorded within 30 days.

The allegation that the act limiting the debt of the city invalidates the second subscription and the bonds, authorized under an act passed subsequently to the act of limitation, is but a mode of asserting that a subsequent legislature cannot repeal the act of a former one.

The second objection can avail the defendant nothing.

1. She cannot take advantage of her own wrong.

2. She alleged in the bonds that they were issued in pursuance of the resolution of 19th June, 1852. Of course it was thereby implied that it was a valid resolution.

3. The charter was merely directory on this point.

See 7 Casey, 517.

4. The bonds were signed by the mayor and treasurer, and the seal was properly attached.

They were properly delivered to the railroad company, and having been acknowledged by the city corporation for 8 to 10 years, she cannot now repudiate them, because one of her officers neglected his duty.

NOTE.—*Jurisdiction of United States Supreme Court to declare state law void, as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws; power of state courts to construe their own statutes*—see note to Jackson v. Lamphire, 7 L. ed. U. S. 679.

It is for state courts to construe their own statutes. Supreme Court will not review their decisions, except when specially authorised thereto by statute—see note to Commercial Bank v. Buckingham, 12 L.ed. U. S. 169.

Mr. **A. W. Loomis,** for the defendants:

The certificate of division of opinion in the present case limits and restricts discussion and decision to the propositions therein enumerated.

See 8 How. 611; 7 How. 694; 5 How. 208; 9 Pet. 267; 12 Pet. 239; 6 How. 41.

These propositions are:

First: Whether the several acts of assembly mentioned in the case stated, conferred any authority on the corporation of the city of Allegheny to give bonds with coupons, as stated in the cause.

Second. Whether such coupons are null and void by reason of such want of authority.

Third. Whether they are null and void for any other irregularity connected with their issue.

These propositions embrace the whole case open for discussion here.

The act giving the corporation authority to subscribe to the stock of the railroad company, did not empower the corporation to issue bonds.

Wilcock, Corp. 36; *Kirk* v. *Nowill,* 1 T. R. 124; Ang. & Ames, Corp. §§ 336, 343; *Beaty* v. *Knowler,* 4 Pet. 168; *People* v. *Utica Ins. Co.* 15 Johns. 383; 2 Cow. 664, 675, 678; 3 Wend. 485, 574; 6 Pick. 32; 2 Cranch, 127; 4 Wheat. 636.

The fact that the debt of the city of Allegheny had reached the limit of $500,000 prior to the second subscription, rendered the subscription void.

If otherwise valid, the ordinance authorizing the issuance of the bonds for the second subscription became null and void, by reason of not being recorded within 30 days.

See act of May 8, 1850, § 4; § 8 of charter of the city.

Mr. Justice **Wayne** delivered the opinion of the court:

This case has been sent to this court on a certificate of division of opinion between the judges of the circuit court for the western district of Pennsylvania.

The plaintiff has sued the mayor and aldermen and citizens of Allegheny city, in actions of debt, upon several coupons of bonds which were issued by that corporation, and made payable to the Ohio & Pennsylvania Railroad Company, in payment for two subscriptions, of $200,000 each, to the stock of the latter.

It was agreed by the parties upon the trial of the cause, to submit it for the opinion of the court upon a statement, in the nature of a special verdict, and that verdicts upon the coupons should be entered accordingly.

The judges, however, in their consideration of the case, differed in opinion on the following points: "Whether the several acts of assembly recited in the case stated conferred any 368²] *authority on the corporation of the city of Allegheny to issue bonds with coupons, as had been done, or whether the same are altogether null and void, by reason of such want of authority, or for any other irregularity connected with their issue."

It is admitted that the bonds were issued and delivered in payment for subscriptions of stock to the Ohio & Pennsylvania Railroad Company; that they were made payable to that company or its order; that the company had negotiated them to raise funds to construct the road, and that the road had been completed in conformity with the conditions of the subscriptions of the defendants.

The parties agree that the subscriptions had been made by the authority of acts of the legislature of the state of Pennsylvania, in conformity with the charter of the railroad company, and were intended to be in pursuance of resolutions and ordinances of the select and common councils of the city of Allegheny.

The mayor was first instructed to subscribe for four thousand shares of the capital stock of the Ohio & Pennsylvania Railroad Company, to be paid for in bonds, with coupons attached for interest, payable semi-annually, the bonds having twenty-five years to run. The railroad agreed to pay the interest upon the bonds until the completion of the road, or so much of it as may be adequate to pay the interest, and that the proceeds of the bonds were to be applied to the construction of the road from the city of Allegheny to the mouth of the Big Beaver river, about twenty-five miles. And to secure the city and the bondholders, it was stipulated, in addition to the legal obligations incurred in making the subscription, that the stock, with the interest, earnings and dividends of the road, should be pledged to pay the interest, and finally to redeem the bonds. Accordingly two hundred bonds of $1,000 were prepared, and were delivered to the railroad company, on the 1st of January, 1850, and the city at the same time received a certificate of four thousand shares. The coupons now sued upon were a part of those which were attached to those bonds.

*The second subscription was made in [*369 virtue of another act of the assembly of Pennsylvania, and in compliance with a resolution of the city, dated June 19th, 1852. That act authorized the city to increase its subscription to the capital stock of the railroad company, to any amount not exceeding its first subscription, upon the laws and conditions which had been prescribed for the first; but it restrained the city from making an issue of bonds of a less denomination than $100. The act also exempts the stock from the payment of any tax in consequence of the payment of any interest to stockholders, until the net earnings of the company shall realize six per cent per annum on the capital stock. The city authorities passed an ordinance for this additional subscription, but it was not published in compliance with the charter of the city, nor was it recorded in the manner which it is said the charter requires the city ordinances to be. For those neglects, it is said the ordinance was null and void, and that the city had not the power to make the second subscription under the act of the legislature. But the city bonds were issued, and the subscription was made. It is also objected that the ordinance was indorsed upon the bonds, without any proviso requiring the railroad company to pay the interest upon them according to its stipulation. But it is admitted that the road was built first from the city to the Big Beaver river, and afterwards completed to its termination on the western border of Ohio, and thence to Chicago.

The city continues to hold its stock in the railroad company. It has received five divi-

dends from the company—one of $14,000, another of $16,000, another of $12,000—which were retained by the company by the consent of the city, and had been appropriated to the payment of the coupons for interest; and that $4,000 of those dividends had been paid in cash, and others in stock. Prior to the city's second subscription, it appears that the debt of the city had become $500,000, the limit prescribed by an act of the legislature. That act is "that it should not be lawful for the councils of the city, either directly or indirectly, by bonds or certificates of loan of indebtedness, or by virtue of any contract, or by any means or device what-
370*] soever, *to increase its indebtedness to a sum which, added to the existing debt, shall exceed $500,000, exclusive of the subscription of $200,000 to the Ohio & Pennsylvania Railroad Company.

It is admitted, also, that the stock of the city in the railroad company had been voted at all elections of it by order of the city, except in a single instance, when the city refused to vote. The city was incorporated on the 11th of April, 1840, with all the powers and authorities then vested by law in the select and common councils of the city of Philadelphia.

We have given the agreed case of the parties, in every particular, in any way bearing upon the points about which the judges in the court below were divided in opinion, and will now consider them.

The subscriptions of the defendants were made under the acts of the 5th April, 1849, and that of the 14th April, 1859. The first permitted a subscription of $200,000 to be paid for by "certificates of loan." The second permitted the increase of it, to an amount not exceeding the first, without, however, having altered the manner in which the corporate credit of the city was to be used for the payment of the second subscription. We infer from the words of the act, and do not see how it can be otherwise, that it was to be paid for by the same certificates of indebtedness which the legislature had directed to be issued and used for the payment of the first subscription. The act is "that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the said Ohio & Pennsylvania Railroad Company to any amount not exceeding the subscription heretofore made by the said city, upon the terms and conditions prescribed in regard to said previous subscription; provided no bond for the payment of the subscription shall be issued of a less denomination than one hundred dollars." This proviso is merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than $100; and the words "no bond for the payment of the subscription shall be issued," when considered in connection with the act of authorizing the second subscription, that it should be made "upon
371*] the same terms and conditions *of the first," cannot be interpreted into a permission or direction of the legislature, that the city might use in payment for the stock any other legal or commercial instrument than "certificates of loan." Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money, in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as "certificates of loan," with certificates for interest attached, payable to the bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be presented for payment. But now, in their use, they are called bonds, with coupons for interest—a coupon bond—coupon being the interest payable separable from the certificate of loan, for the purpose of receiving it. But neither the instrument nor coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt.

Such certificates of loan have been resorted to for many years in the United States to raise money for internal improvements. They were as well known and used in Pennsylvania as elsewhere, and were permitted to be issued in that state, by just such enactments as those which authorized the city of Allegheny to subscribe to the capital stock of the Ohio & Pennsylvania Railroad Company. Such an issue was applicable to the subject-matter of legislation. The city solicited the state to be allowed to make the subscriptions. It was the policy of the state to grant the application. The subscriptions were made under the act of the 5th April, 1849, and that of the 14th April, 1859. The first permits a subscription of $200,000 which was to be paid for by certificates of loan. The act of the 14th April, 1859, allowed the increase of the subscription to an amount not exceeding the first, upon the same terms and conditions. It was the understanding of the legislature, of the city, and of the railroad company, that the subscriptions were to be paid for by the corporate credit of the city by the issue of "certificates of loan." That appears *from [*372 the act of 1849, authorizing it, before the subscription was, in fact, made. That act provides, in anticipation of its being done, that the certificates of loan which shall hereafter be issued by the city of Allegheny in payment of any subscription to the Ohio & Pennsylvania Railroad Company were to be exempt from all taxation, except for state purposes. The railroad company took from the city certificates of loan in payment of the subscriptions sold them as such, and with the money built the road. Such a concurrence of contemporaneous action by all the parties interested in the subject-matter of legislation, proves that it was the intention of the legislature that the authority given to the city to make the subscriptions to the railroad company, had been carried out just as it was meant to have been.

We answer, therefore, that the several acts of assembly stated in the agreed case did confer authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise bonds with coupons, as was done, to pay for its first and second subscriptions to the capital stock of the Ohio & Pennsylvania Railroad Company.

We will now inquire whether the bonds or certificates of loan which were issued are null and void "for any irregularity connected with their issue."

It is said there were two irregularities which made them so. The first is, that the debt of the city had reached its limit of $500,000 prior to the second subscription. The second is, that the city ordinance, authorizing the issue for the payment of the subscriptions, was null and void, from not having been published in conformity with the charter of the city.

The first objection depends upon the proper construction of the act of 8th May, 1850, § 4, in connection with the act of the 14th April, 1852, which authorized the second subscription. The first declares that the indebtedness of the city should not be made to exceed $500,000, exclusive of the subscription of $200,000 to the railroad company; and it is urged, that the act of 14th April, 1852, though it authorizes the city to make a second subscription of $200,000 373*] does not permit *the city to increase its debt to a larger sum than $700,000, to which it was limited by the first act of 1850. The objection has arisen from a misconception of the 4th section of the act of 1850. It provides that it shall not be lawful for the councils of the city of Allegheny, either directly or indirectly, or by bonds, certificates, or loans, or of indebtedness, or by virtue of any contract, or by any other means or device whatsoever, to increase the indebtedness of the said city, in a sum which, added to the existing debt, shall, taken together, exceed $500,000. exclusive of the subscription of $200,000 to the Pennsylvania Railroad Company; meaning, obviously, that no increase of debt should be made by the councils beyond the sum of $500,000, but not intending that the legislature might not authorize an increase of it beyond that amount, as it had previously done by authorizing the first subscription to the railroad company. The same political power which allowed the first subscription could, at a succeeding session of the legislature, give authority to the city to make a second. Such authority was given by the act of the 14th April, 1852. The city councils could not, under its charter, have made either the first or second subscription without authority from the legislature, but by its charter it could contract debts for the purposes of its incorporation to a larger amount than $500,000. When, then, the legislature was called upon to authorize the city to make the first subscription, increasing its indebtedness $200,000 beyond what the city might have owed then for other purposes, it was thought prudent, as well for the protection of the citizens of Allegheny as for those who might purchase these certificates of stock with coupons, to declare that the councils of the city should not thereafter, by virtue of their charter authority to contract debts, by any device whatever, increase its amount to more than $500,000. And as it has turned out, judging from the attitude of the mayor, aldermen, and citizens of Allegheny in this suit, it must be admitted to have been upon the part of the legislature of Pennsylvania a very commendable precautionary act of legislation.

374*] *Having thus disposed of the first irregularity imputed to the councils of Allegheny, in making their issue for the payment of the second subscription, we proceed to the second.

It is that the ordinance of the city directing the issue for the payment of the second subscription had not been recorded within thirty days. It is admitted in the stated case that it had not been.

By the 8th section of the charter of the city of Allegheny, it is provided, that in order that a knowledge of the laws, ordinances, regulations, and constitutions of the city, authorized by the 7th section of the charter, may at all times be had and obtained, and the publications thereof at all times be known and ascertained, such and so many of them as shall not be published in one or more of the public newspapers published in the city, or in such other way as the select and common councils may direct, within fifteen days after these laws severally passed, etc., etc., and also recorded in the office for the recording of deeds, etc., etc., etc., within thirty days after these laws passed, etc., etc., shall be null and void.

Now, it does not require a very careful examination of the section to determine that it can have no bearing upon the ordinance directing the issue for the payment of the second subscription of the city to the Ohio & Pennsylvania Railroad Company, for, in terms, it is only applicable to ordinances, etc., authorized by the 7th section of the charter, and that did not permit such a subscription to be made, and paid for by the city stock, as the ordinance for that purpose was intended. It could only be made by the authority of the legislature. In other words, the legislature enlarges the powers of the councils of Allegheny, to do what it could not do by charter. Besides, if the section was not limited to such ordinances, etc., etc., as are authorized by the 7th section of the charter, and those words were not in it, it could have no application to an ordinance of the city passed for a special purpose to carry out an act of the legislature outside of the charter as was the case here. We have determined that the acts of the legislature have been carried out by the city in the way they should have been done. Neither the ordinance, nor the stock issued by *the city, are deficient in any [*375 substantial particular. The latter has every formality of the corporation to give them currency. They were circulated for ten years, and were constantly acknowledged by the city, as its bonds, for the purposes for which they were issued. They are now in the hands of bona fide transferees, to whom they must be paid according to their terms. It would be inequitable, if the city could repudiate them at all, and more especially, if that were allowed to be done upon the ground of any fault in the corporation in their issue. But we will not enlarge further upon the case. The points of objection of which we have treated have already been before this court in several cases, and they are worthy of perusal. See the cases of *The Commissioners of Knox Co. Indiana*, v. *Wallace*, 21 How. 546, *Zabriskie* v. *Cleve. Col. & Cin. R. Co.* 23 How. 381.

We have not, in our treatment of this certified division of opinion, discussed that position of the learned counsel who argued it for the defendant, that the acts of the legislature of Pennsylvania, authorizing the issue of the certificates of loan were unconstitutional.

Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved, we cannot,

with the respect which we have for the judiciary of his state, discuss the imputed unconstitutionality of the acts upon which the subscriptions were made to the Ohio & Pennsylvania Railroad Company; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its supreme court, that acts for the same purposes, as those are which we have been considering, were constitutional.

We shall order it to be certified, that the issue of bonds with coupons, in the case stated, are not null and void, but that it was done under the authority of constitutional acts of the state of Pennsylvania, in the case stated; and further, that they are not null and void for any irregularity connected with that issue by the city of Allegheny.

376*] *ORDER.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Pennsylvania, and on the point or question upon which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court, that the issue of bonds with coupons, in the case stated, are not null and void, but that it was done under the authority of constitutional acts of the state of Pennsylvania, in the case stated; and further, that they are not null and void for any irregularity connected with that issue by the city of Allegheny.

Whereupon it is now here ordered and adjudged that it be so certified to the said Circuit Court.

MIGUEL DAVILA, *Plff. in Err.*,
v.
DAVID MUMFORD and Jesse Mumford.

(See S. C. 24 How. 214–224.)

Texas act of limitations—constructive notice—commissioner's authority.

Construction of act of limitations of Texas which provides "that every suit to be instituted to recover real estate shall be instituted within three years next after the cause of action shall have accrued, and not afterwards."

That the elder title was on record, was not constructive or actual notice of the elder title.

Defense held complete under that statute of three years' limitation.

An objection that the commissioner had no authority to act; held, cured by the act of the republic of Texas in 1841.

Argued Dec. 19, 1860. Decided Jan. 14, 1861.

IN ERROR to the District Court of the United States for the Western District of Texas.

This case arose upon a petition filed in the court below, by the plaintiff in error, to recover the possession of eleven leagues of land in the state of Texas.

By agreement of parties, David and Jesse Mumford were permitted to sever from the other defendants in their defense and trial. The trial as to them resulted in a verdict and judgment in their favor; whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **W. G. Hale**, for the plaintiffs in error:

In the present case, we are to seek for a construction of the terms, title or color of title, as used in the 15th section of the act of limitations of February 5, 1841, and to define the extent to which such title or color of title is to be subject to the requirement of "intrinsic fairness and honesty." The supreme court of Texas has said that by "title or color of title" is meant a consecutive chain of transfer from the sovereignty by written conveyance.

Castro v. *Wurzbach*, 13 Tex. 131; *Williamson* v. *Simpson*, 16 Tex. 444.

But no case has arisen in which the manner of the expression "intrinsic fairness and honesty," has been called in question. We are left, therefore, on this point, to the literal signification of these words, or to the principles of those systems of law from which Texas derived the basis of her legislation. It is unnecessary to say that, in theis literal sense, "intrinsic fairness and honesty" is not consistent with an adverse claim to land known to belong to another, while it is perfectly consistent with a possession held under an ignorance of the better title. The Roman law required good faith at the time of the acquisition of the colorable title, and also at the commencement of the possession.

Cod. VII. 33, Const. 1, 2, 5, 6, 10; Dig. XLI. 4, Fr. 7. § 4; XLI. 43, Fr. 15, § 2; Inst. II. 6 Fr.

And the good faith thus made necessary consisted in a reasonable belief that the true title was in the possessor, and in ignorance of the title of the sole owner.

D. XVIII. 1, Fr. 27; L. 16, Fr. 109; XLVIII. 15, Fr. 3.

No one, it is said, can prescribe, who, at any part of the time has a knowledge that he is holding the property of another.

Dec. Greg. II. 26, cap. 5, 17, 20.

This more extended application of the rule was adopted by the Spanish jurisprudence, departing in that respect from the literal sense of the laws, which seem only to require good faith at the commencement of the possession.

Part. III. 29, 12; Nov. Rec. XI. 8, 2; Greg. Lopez, *gloss. ubi. cit. covarr. op. omn.* 437, No. 4; Esriche, *dico. ver. Prescripcion;* see, also, Cast. VII. cap. 26, No. 3, No. 30.

The doctrine is succinctly stated in the Treatise of Mago. Bellena, Inst. II. 89.

See, also, Troplong, Prescription, arts. 914, 931.

This was the state of the law when the republic of Texas obtained its political existence, and it continued to be the rule of construction until the adoption of the common law as a system in 1840. The 39th section of the act of December 20, 1836 (Hart. Dig. 2375), was merely a partial innovation, and is to be construed in reference to the still existing rule.

Hart. Dig. 2396.

The introduction of the common law by the act of January 20, 1840, did not introduce the English statutes, and the former law, as to prescription, remained unchanged up to the passage of the act of February 5, 1841.

Gautier v. *Franklin*, 1 Tex. 746.

This act, thus passed under the combined influence of the common and the civil law, as coexisting systems, derived its provisions in some measure from both; and while the 14th section is a rude attempt to adopt the doctrine of disseisin, the 15th and 16th sections follow distinctions known only to the Spanish jurisprudence, and to the legislation of our western states. Title or color of title—the *titulo justo* and *colorado* of the Spanish jurists—are not required in the English law to work disseisin, nor do they confer a right to a shorter period of prescription. They only extend the effect of the actual disseisin to the boundaries claimed by the deed under which the entry is made, and no reference is had, therefore, to the derivation of the title or the mode of its acquisition. But in the peculiar land law of the western states, which contributed most to the settlement of Texas, a possession held under a connected title was sometimes made to confer greater privileges, and to be sufficient for prescription in a shorter term.

So in Tennessee, act of 1797, ch. 43; in Louisiana Code Civ. arts. 3445, 3414, 3415; Illinois, act of 1839, "to quiet possessions, etc."

Under this new rule of limitation, it was no longer indifferent to inquire into the character of the title of the possessor, or the mode by which he obtained it. For both the character and the mode qualified the possession. The courts of Tennessee, Louisiana, and Illinois, while this rule continued in force, have therefore held that the occupant, claiming the benefit of the short period of limitation, must show that he had held with a just confidence in his title and an honest belief in its superiority.

Wilson v. *Kilcannon*, 4 Hayw. 185; *Hampton* v. *McGinnis*, 1 Tenn. 291; *Patton's Lessee* v. *Easton*, 1 Wheat. 476; see, also, *Gregg* v. *Sayre*, 8 Pet. 254, and *Andrews* v. *Mulford*, 1 Hayw. N. C. 320.

The supreme court of Louisiana has often said, in accordance indeed with the direct provisions of the Civil Code, that a title acquired in bad faith or with a knowledge of a better title, will not sustain prescription.

Reeves v. *Towles*, 10 La. 283–286; *Devall* v. *Choppin*, 15 La. 578; *Sandoz* v. *Gary*, 11 Rob. 531; *Hughey* v. *Barrow*, 4 La. Ann. 252.

And upon this point a reference may be made to the nice distinctions of the French jurists.

Tropl., Prescription, arts. 918–933; 21 Duranton, No. 386; Merlin, Repertoire, tit. *Prescription*, 1, 5, 4; and compare Code Nap. art. 550.

In none of the western states however, except in Louisiana and Illinois, is there any expression in the statutes of limitation which seems to indicate that good faith is necessary in the shorter periods of possession, and the courts of the other states have, therefore, been compelled to decline to introduce by construction an exemption not contained in the law. The difference in this respect of the act of limitation of Texas gives a greater weight to our position, since it shows an intention to require an additional requisite in the definition of "color of title," and to look for a rule rather to the principles of the civil than the common law.

This view is, if not confirmed, at least supported by the intimations derived from the course of judicial decision in Texas.

Charle v. *Safford*, 13 Tex. 94, 112; *Marsh* v. *Weir*, 21 Tex. 97; see, also, *Wright* v. *Mattison*, 59 U. S. (18 How.) 56; *Smith* v. *Power*, 23 Tex. 29.

It is useless, therefore, to advert to the decisions of the courts of the common law states which have given other attributes to a colorable title, or to the cases which have been decided in this court, upon the common law theories of adverse possession and disseisin. The act of limitations of Texas is based upon a different view, and requires the application of other analogies.

The evidence in this case justifies the instructions requested by the plaintiffs. The titles set up by the defendants were obtained in 1835, under the same government which granted the land to the plaintiff in 1833. The defendants, being bound to know the previous appropriation of the land by reference to the public archives, are charged with actual knowledge of it.

Byrne v. *Fagan*, 16 Tex. 398.

In addition to this, the defendants must have known that their own titles were defective.

The defense made under the 16th section of the act of limitations was necessarily based upon a possession held under deeds duly registered.

Hart. Dig. 2392.

And the question arose on the trial, whether the *testimonios* given in evidence by the defendants as the original of their title, were duly registered. The district court overruled the objection of the plaintiffs to the registration, and refused to instruct the jury that these instruments were not duly registered.

Upon this branch of the case the counsel cited:

Hart. Dig. arts. 2752, 2776, 2791; *Deen* v. *Wills*, 21 Tex. 645; *Craddock* v. *Merrill*, 2 Tex. 496; *Edwards* v. *James*, 7 Tex. 373; *Butler* v. *Dunagan*, 19 Tex. 559; *Secrest* v. *Jones*, 21 Tex. 122.

Mr. **N. P. Ballinger**, for defendants in error:

The general character of the limitation laws of Texas is readily apparent. The periods for suits are short for motives of policy, addressing themselves strongly to the law making power.

Horton v. *Crawford*, 10 Tex. 382.

The precise construction of the terms of the 15th section of the act in question is not susceptible of doubt. It limits the time for bringing suit against those in possession under title or color of title. It defines title to mean "a regular chain of transfer from or under the sovereignty of the soil." That completes the definition. The remainder of the section is explanatory of color of title. The title, then, must be "regular." Does this mean that it shall be paramount and, therefore, perfect? That the best title from the government requires three years' possession to defend it? This is simply absurd. The limitation was intended solely to protect the junior title; but not the junior title without notice or the means of notice of the senior title, because such cases are very rare and exceptional, only happening from the irregularities attending some of the early colonial records; and it is well settled in Texas that the

junior title, without notice of the senior title, actual or constructive, from its being found in the General Land Office, or recorded or mapped in the county, is the best title and entitled to recover in ejectment.

Guilbeau v. *Mays*, 15 Tex. 410; *Byrne* v. *Fagan*, 16 Tex. 391; *Wilson* v. *Williams*, 26 Tex. 54.

To ascertain what is meant by "color of title," Mr. Hale refers to the civil law; but the act itself is its complete expositor. Our supreme court says: "The statute having defined the meaning of the terms employed, we are not at liberty in construing this section to resort to other sources for their definition and meaning."

21 Tex. 109.

It is a direct arraignment of title from the government, not strictly "regular," one which purports to transfer the right, but does not in a perfect and formal manner. A patent would be title. That did not need to be expressed. But the statute, in application to it, explains color of title as from the government. The location of a headright certificate, land warrant or scrip, is declared color of title. It leaves the fee in the government, but is a character of right to maintain ejectment (section 1, same act Lim. Hart. Dig. 3230), and is a vested right of property.

Howard v. *Perry*, 7 Tex. 266; *Hamilton* v. *Avery*, 20 Tex. 635.

So if the mesne conveyances are not "regular," which is at once illustrated: "as if" not registered or only in writing, without a seal (13 Tex. 131), "or such like defect," etc., the plain intent being to embrace any instrument purporting and intended to be a conveyance, and equitably conveying the right of the grantor, although defective in strict law. A bond is not color of title, because it does not purport to be a transfer.

13 Tex. 128.

"Color of title" had its fixed signification in the statutes of Texas with reference to the character of the conveyance, *ex facie*, and not to its operation from extrinsic causes, or to any good faith in its holder. The 37th section (act Organizing Inferior Courts, etc., December 20, 1836) provides that any person who owns or claims land of any description by deed, lien, or any other color of title, shall have the same recorded, etc. The 38th section specifies the proof to be made in order to record "all titles, liens, mortgages, or other color of titles."

Hart. D. 2754, 2755.

The 39th section is the first limitation law of Texas.

The only decision that I call to mind upon this act of limitation is *Jones* v. *Menard*, 1 Tex. 171, in which a possession of five years after record of the junior grant was held a bar. It is true there is no discussion of the point whether the junior grant is color of title, for the simple reason that no one thought to doubt it. In *Marsh* v. *Weir*, 21 Tex. 97, the construction of the 15th section, act 1841, is discussed. In *Smith* v. *Power*, 23 Tex. 33, the matter is settled with the utmost precision. The Chief Justice says: "To constitute such title or color of title, there must be a chain of transfer from or under the sovereignty of the soil." This necessarily presupposes a grant from the government, as the basis of such transfer. And the grant must be effectual to convey to the grantee whatever right or title the government had in the land at the time of making the grant. It need not necessarily carry with it the paramount title; but it must be title as against the government, valid in itself when tested by itself and not tried by the title of others. It must have intrinsic validity as between the parties to it, though it may be relatively void as respects the rights of third persons.

The case of *Scott* v. *Rhea*, 5 Tex. 258, again before the court, 21 Tex. 708, shows clearly that want of notice of the prior title is not an element of "title or color of title" under the statute.

And to same effect, see *Wheeler* v. *Moody*, 9 Tex. 372; *Horton* v. *Crawford*, 10 Tex. 382; *Castro* v. *Wurzbach*, 13 Tex. 128; *Mason* v. *McLaughlin*, 16 Tex. 24; *Williamson* v. *Simpson*, 16 Tex. 444.

The case of *Christy* v. *Alford*, 58 U. S. (17 How.) 601, shows that such a construction was unheard of then in the court below and in this court. There has never been a plea of three years' limitation in Texas, which did not involve this question. Should it not be considered settled that it has never even been mooted?

The grants being "title or color of title," to sustain the plea of three years' possession, the ruling of the court that they were also "deeds duly registered," to sustain a possession of five years under the 16th section of the act of limitations, is wholly immaterial. If an error, it was one committed against the defendants, the possible effect of which was that it might have misled the jury to their prejudice, but could not have injured the plaintiff.

See 5 Pet. 135; 5 How. 228; 13 How. 233; 8 Watts & S. 391; 3 Sm. & M. 447; 16 Pet. 455; 3 Tex. 280.

The grants to the defendants were duly registered more than five years before suit brought.

*Mr. Justice **Nelson** delivered the [*221 opinion of the court:

This is a writ of error to the district court of the United States for the western district of Texas.

The suit was brought against the defendants and others to recover the possession of eleven square leagues of land, situate in what was formerly known as the county of Milam, on the right bank of the river San Andres, otherwise called Little river, where Buffalo creek and Donaho's creek enter said river, with specified boundaries.

The plaintiff gave in evidence a grant from the government of Coahuila and Texas, within the limits of the colony of the *empresarios*, Austin and Williams, dated 18th October, 1833, and rested.

The defendants gave in evidence grants from the same government of a league each, situate within the boundaries of the eleven leagues, the one to David Mumford, dated 20th March, 1835, the other to Jesse Mumford, dated 25th February, the same year; the former went into possession in the spring of 1844, and continued in the possession and cultivation of the tract down to the time of trial; the latter took possession in the year 1850, and continued the cultivation and improvement down to the trial.

The defense relied on is the statute of limitations.

The court charged that the plaintiff and defendants both claimed under titles emanating from the sovereignty of the soil; that the plaintiff's was the elder in point of date, and must be regarded as paramount, unless the defendants were protected by the statute of limitations set up in defense. That if the jury believed from the evidence the defendants had held actual adverse and peaceable possession, in their own right, for more than three years next before the commencement of the suit, under color of title, and that the plaintiff's cause of action accrued more than three years prior to the suit, the jury should find for the defendants.

The court further charged, that if the jury believed from the evidence that the defendants had held actual adverse and peaceable possession in their own right, cultivating, using, and enjoying the lands, and paying taxes thereon, 222*] and claiming *under a deed or deeds duly recorded, for more than five years next before the commencement of the suit, they should find for the defendants.

The 15th section of the act of limitations of Texas provides "that every suit to be instituted to recover real estate as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards;" and provides that, "by the term 'title,' as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfers down to him, her, or them, in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty."

The principal ground taken against the operation and effect of the three years' limitation in the present cause is, that the elder title being on record, the defendants had constructive notice of the same at the time of the grants to them, and hence that the title is subject to the charge of the "want of intrinsic fairness and honesty" within the meaning of the statute, which it is claimed removes the bar of three years' adverse possession.

It is admitted that this clause of the statute has not yet received a construction by the courts of Texas, and there is certainly some difficulty in ascertaining the precise meaning intended by the legislature from the phraseology used. The better opinion, we think, is, that the want of intrinsic fairness and honesty, in the connection in which the words are found, relates to some infirmity in the muniments of title, or deduction of title, of the defendant, indicating a want of good faith in obtaining it.

The statute, in defining what is intended by possession, "under title, and color of title," in order to operate as a bar within the three years, declares, that by the term "title" "is meant a regular chain of transfer from or under the sovereignty of the soil," which, as is apparent, is 223*] the case before us, *the title of the defendants being directly from the government; and "color of title" is declared to be "a consecutive chain of such transfer down to him, her, or them, in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty;" clearly referring, as we think again, to the muniments of the title, and defects therein.

To refer these words to a constructive or actual notice of an elder title would, in the practical effect of the limitation, be a virtual repeal of the statute, especially in all cases in which the elder title is of record.

A statute of limitations is founded upon the idea of an elder and better title outstanding, and prescribes a period of possession and cultivation of the land, under the junior or inferior title, as a bar to the elder, for the repose of society; thereby settling the title by lapse of time, and preventing litigation.

As it respects the five years' limitation, the objection is, that the grants were not duly registered, and hence the possession not within the 16th section of the act. The grant to David Mumford was registered on the 21st July, 1838, and that to Jesse on the 4th October of the same year.

It is insisted, however, that the registries were a nullity, on the ground that the execution of the grants had not been properly proved or acknowledged, in order to be admitted of record.

In the case of the grant to David, the recorder certifies that the deed was presented to him, proven, and duly recorded in his office the day above mentioned; and in that of Jesse, that the deed was proved for record by J. B. Chance, who made oath that he was familiar with the handwriting of the commissioner, W. H. Steele, and also of the assisting witnesses, and that he believed the several signatures to be genuine.

There is some difficulty in determining, from the various decisions of the courts of Texas upon the registry act of 1836, whether or not the certificates of proof of the grants in the present case were sufficient to admit them to registry at the *time they were filed for [*224 record. It is claimed for the defendants that the recording of the grants was confirmed by the act of 1839, which provides that "copies of all deeds, etc., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the county where such land lies." This act relates to the colonists' titles delivered to the grantee, the originals remaining as public archives. The deeds in the present case are copies of the originals remaining in the archives, and are certified by Steele, the commissioner, that they agree with the original titles which exist in the archives, from which they are taken for the parties interested, the day of their date, in the form provided by the law. In addition to this certificate, the copies, which it seems are executed by the commissioner, and are second originals, were proved before the recorder at the time they were admitted to registry. But be this as it may, we are not disposed to look very critically into the question of the registry, though we cannot say the court was in error in respect to it, inasmuch as the

defense was complete under the statute of three years' limitation, as already explained.

An objection has been taken that the grants of the defendants are a nullity, upon the ground that Steele, the commissioner, had no authority to act in that capacity in the colony of Nashville, or Robertson, at their date. But this defect was cured by the act of the republic of Texas in 1841, as has been repeatedly held by the courts of Texas. 2 Tex. 1, 37; 9 Tex. 348, 372; 23 Tex. 113, 234; 22 Tex. 161; 21 Tex. 722; 20 How. 270.

The judgment of the court below affirmed.

CHRISTOPHER G. PEARCE *et al.*, Incorporated and Acting under the Name of The Niles Works, *Appts.*,

v.

JESSE W. PAGE *et al.*, Claimants of the Steamboat Doctor Robertson.

(See S. C. 24 How. 228-233.)

Collision—rules applicable to.

Collision between a flat boat and a steamboat. The flat boat was heavily laden, in a somewhat rapid current, and the only means of removing it out of the direction of the steamboat was by working the end oars across the current.

When a floating boat follows the course of the current, a steamer must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use. This is the established rule of navigation.

The steamer held in fault in not avoiding the flat boat.

Argued Dec. 20, 1860. Decided Jan. 15, 1861.

APPEAL from the Circuit Court of the United States for the District of Kentucky.

The libel in this case was filed in the district court of the United States for the district of Kentucky, by the appellants, to recover damages resulting from a collision.

The district court entered a decree dismissing the libel, with costs.

The circuit court, on appeal, having affirmed this decree, the libelants took an appeal to this court.

A further statement of the case appears in the opinion of the court.

Mr. **T. D. Lincoln**, for appellants:

The very statement of the admitted facts of the case shows clearly that there is fault somewhere; gross fault. It was not in the night. The boats had not come into view of each other on a sudden, as though they were emerging from a fog, or were coming around a short point; nor was there any want of power in those on the steamer to avoid the collision. They had their steam on, and all the officers of the steamer were at their posts. It was a clear day, they had a clear view, and a river sufficiently wide and deep for all practical purposes of navigation. The presumption of carelessness, want of foresight, and skill somewhere, is therefore very strong.

The question whether there be such negligence or want of foresight, and where the same lies, under those principles and rules applicable to such cases, is a matter of proof to some extent, and to some extent a matter of law.

The first point which I desire to make is, that the presumption of negligence is too strong to be rebutted by any "uncertain evidence," such as is usual in cases of this kind.

The second point is that this presumption, both in law and in fact, is against the steamer; and that it requires "clear proof" on her part to rebut such presumption and show that the collision was the result of accident merely, or the result of fault on the part of the flat boat alone. The following cases are in point and tend to establish this second position.

Fretz v. *Bull*, 12 How. 471, 472; *St. John* v. *Paine*, 10 How. 582; *The N. Y. & Liv. U. S. Mail Steamship Co.* v. *Rumball*, 62 U. S. (21 How.) 385; *The Oregon* v. *Rocca*, 59 U. S. (18 How.) 572; *Culbertson* v. *Shaw*, 59 U. S. (18 How.) 587; *The Genesee Chief* v. *Fitzhugh*, 12 How. 461; *Newton* v. *Stebbins*, 10 How. 586; Pars. Marit. L. 201-202 and n. 8.

The third point is that there is no such evidence. On the contrary, the evidence clearly shows that the steamer was in fault, had ample means of avoiding this loss, and might have done it without the exercise of any unusual skill or foresight.

Those on the flat boat relied upon the well-settled rule, and expected the steamer to stop. If they misjudged in this respect, the steamer was in greater fault in placing herself there, and in bringing about the emergency, and must bear the consequence.

N. Y. & Liv. U. S. Mail Steamship Co. v. *Rumball*, 62 U. S. (21 How.) 384; *The Rhode Island*, 1 Blatchf. 364.

But I insist that as Captain Douglass pursued the usual course, it was not fault in a legal sense on his part, even if he did misjudge; that he relied upon the rule of the river, was not, under the circumstances, a fault which ought to prevent the libelants from recovering full damages.

Mere error in judgment is not always regarded as a fault. There are many cases where a plaintiff had committed an error in judgment, which entered somewhat into the disaster, but has still recovered his full damages.

Reeves v. *The Constitution*, Gilp. 587; *Chaplin* v. *Hawes*, 14 Eng. C. L. 446; *Bridge* v. *The Grand Junc. Railw. Co.* 3 Mees. & W. 244; *Walters* v. *Pfeil*, 22 Eng. C. L. 544; *Ingalls* v. *Bills*, 9 Met. 1.

In such cases, the whole blame is put upon the party committing the first fault, and whose duty it was to guard against any such emergency.

N. Y. & Liv. U. S. Mail Steamship Co. v. *Rumball*, 62 U. S. (21 How.) 385; *Fretz* v. *Bull*, 12 How. 471, 472.

Messrs. **P. Phillips** and **A. O. P. Nicholson**, for appellees:

The argument for the appellees was confined to the evidence.

Mr. Justice **McLean** delivered the opinion of the court:

This is a libel filed by Christopher G. Pearce

NOTE.—*Collision; right of steam and sailing vessels with reference to each other, and in passing and meeting*—see notes to 13 L. ed. U. S. 537; 30 C. C. A. 630.

Rules for avoiding—steamer meeting steamer—see notes to 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 28 C. C. A. 532; 29 C. C. A. 368.

et al., incorporated and acting under the name of "Niles Works," and by virtue of the statute of the state of Ohio, passed May 1, 1852, entitled "An Act to Provide for the Creation and Regulation of Incorporated Companies, in the State of Ohio," against the steamboat Doctor Robertson, her tackle, apparel, engine, and furniture, and all persons intervening for their interest in the same, in a cause of collision, civil and maritime.

The libelants were the owners of a large amount of iron castings, made for and intended as sugar-mill machinery, which was at the time of the said collision in a flat boat, well manned and equipped, and which was being navigated on the Ohio river, and in the usual mode of navigating such craft, and near the Illinois shore, and along the side of the Cincinnati tow head, about twenty-five feet therefrom, and had crossed over from the Kentucky side, and was at the time in full view of the Doctor Robertson and her pilot.

The libel states that on the 8th day of August, 1856, at about 8 o'clock in the forenoon of that day, and while the said flat boat was being navigated as aforesaid, the said steamboat, Doctor Robertson, approached her, coming up the river, and having a lighter in tow, with full 230*] speed; and although the flat *boat was in full view of her pilot, and there was ample room for the said steamboat to pass to the left of and between her and the Cincinnati bar, which lay between the flat boat and the Illinois shore, yet the said steamboat endeavored to run between the said flat boat and the said tow head, and ran herself and the said lighter, with great force, directly into and upon the said flat boat, and broke in the sides thereof, and caused the flat boat immediately to sink in about twenty feet of water, and so injured it as to render it entirely useless.

It happens in this case, as in all other cases of collision, that the witnesses on the respective boats are somewhat contradictory in their statements. It is admitted, that in ascending the Ohio river, some fifty or sixty miles below Cincinnati, the steamboat Doctor Robertson, a stern-wheel boat, of fifty tons burden, in passing up the river, near the place called the Cincinnati tow head, while running close to the Kentucky shore, being from one to two miles below, in full view of the libelants' flat boat, which was freighted with sugar-mills and other machinery, for the Western trade; and that the flat boat, being put in the course of the current, floated down the river, her stern and front oars not in use, but laid on the boat, without any effort by the hands of the flat boat, continued to float with the current, until it came into collision with the ascending steamboat. That this boat, to avoid a snag that projected some distance into the river, changed her course, by which means she came into collision with the flat boat, which was immediately sunk in water near fifteen feet deep.

There seems to have been little or no effort made to avoid this collision by those who had the command of the flat boat. There were two other flat boats lashed together, which followed the first boat at a distance of some two or three hundred yards; and they, perceiving that a collision was likely to occur, used their oars, so as to avoid the ascending steamboat. Under this state of facts, the question of fault arises.

The libelants' flat boat was ninety-six feet in length, and some ——— feet in breadth, with an oar or sweep in the front and rear parts of the boat, so that some direction might be given to it. But this movement cannot be relied on when *the colliding boats are near to each [*231 other. The flat boat was heavily laden, and occupied near a hundred feet in a somewhat rapid current, and the only means of removing it out of the direction of the steamboat, was by working the end oars across the current. This could not be done successfully, unless the boats were so far apart, as by a diagonal movement to secure the aid of the current in escaping a collision.

But what is the law of the river on this subject, in regard to floating flat boats and steam vessels? The self-moving power must take the responsible action. This cannot always be done, even with a fair wind, by a sailing vessel, as it may suddenly change, or be subject to accident. But steam is, generally, under the control of the will of the engineer, and he is responsible for a proper use of it.

Schuyler C. Barnet says he was passenger on the Doctor Robertson, and that five or six miles below Shawneetown she came in collision with a flat boat, loaded with sugar-mill machinery, at about nine or ten o'clock of a clear morning; the flat boat had come over the reef, and had straightened down the river, and was about one hundred feet from the tow head, the witness sitting half an hour on the boiler deck of the steamer before the collision, the steamer running about fifty feet from the Kentucky shore, on the larboard side; she had a lighter in tow and when she approached very near the flat boat she turned out a little from the shore to avoid a snag just above her, but kept on until the lighter struck the flat boat; when the bow of the steamer was some fifty or sixty feet below the tow head, the lighter struck the flat boat and ran half way over it, which caused the flat boat to sink.

And the witness says, that on the part of the flat boat nothing could have been done, as she was lying in the best possible position. Since 1824, the witness states, he has been boating on the river, and that the general custom has been, and now is, "for steamboats to give the way for flat boats to pass."

Alexander Ford has been on the river ten or twelve years, and a pilot for three years. The flat boat was lying nearly straight with the tow head, about one hundred and fifty yards, *more or less, above the foot of it, and [*232 about twenty-five or thirty yards from the Kentucky shore. The Doctor Robertson aimed to go on the starboard side of the flat boat, when the barge which the Robertson had in tow struck the flat boat, and sunk her. He thinks the Robertson had stopped her engine, which, if it had been done in time, the boats would not have come together. He says there was plenty of room to pass outside of the flat boat. The witness says "that he supposed the Robertson could pass on either side of the flat boat. The flat boat was not easily turned out of line. The boats in approaching each other were in full view a mile and a half. It is customary for a

steamboat to give way to a flat boat. The steamboat takes either side of the descending flat boat, so as to avoid it. Ford's boat was from seventy-five to one hundred and twenty-five yards above the machinery boat when he perceived that the steamboat would run into the flat boat."

The witnesses generally concurred in saying that the steamboat could have run to the Kentucky shore until the flat boat had passed, or could have run on the Illinois side of the flat boat. In the language of John Walker, a witness, "the steamboat could have either gone to the shore or run closer to the shore, or she might have gone entirely outside of the flat boat;" and he does not think those persons on the flat boat could have done anything to have prevented the collision. Witness thinks there was one hundred to one hundred and fifty yards of river on the Illinois side.

William P. Lameth, for the last fifteen years, has acted as steamboat captain, and he says: "It is the usual custom for steamboats to examine the position of the flat boats, and to take the best possible course to avoid them, on either side that seems best. If danger is apprehended, it is usual to ring a slow bell, and run easy. If danger be apparent, the boat should land or stop entirely, and let the flat boat pass."

John F. Farrell says: "It is the duty of a flat boat to straighten itself in the river, ease its oars, and pursue the course with the current, and the steamboat must avoid her." The snag in the river, Douglass says, was one hundred feet above the bow of the steamer when the 233*] boats struck. The *two other flat boats were, when the steamer struck the flat boat, one hundred and fifty yards above the colliding boats, and the witness, Douglass, thinks the steamboat could have passed, if all the flat boats had kept their places. The stern of the flat boat was sixteen feet under water.

Several witnesses called by the steamer seem to think that the flat boat was bound to avoid the steamer; but such a rule would be unreasonable, and would increase the risk of navigation. When a floating boat follows the course of the current, the steamer must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use. Any attempt to give a direction to the floating mass on the river would be likely to embarrass the steamer, and subject it to greater hazards. A few strokes of an engine will be sufficient to avoid any float upon the river which is moved only by the current; and this, I understand, is the established rule of navigation.

We think the steamer was in fault in not avoiding the flat boat; on which ground the judgment of the Circuit Court is reversed.

THOMAS RICHARDSON, *Plff. in Err.*,
v.
THE CITY OF BOSTON.

(See S. C. 24 How. 188–195.)

Indictment, when evidence — former verdict of little weight as evidence, if founded on erroneous instructions.

Lecraw v. Boston, 58 U. S. affirmed.

Bills of indictment, which constituted part of the history of the case, and were referred to in the testimony of the plaintiff, are admissible as testimony.

Former verdict and judgment, though admitted in evidence, should have little or no weight on the decision of the case, when it was founded on erroneous instructions on the law.

Former decision in this case, 60 U. S., clearly stated and explained.

Argued Jan. 7, 1861. Decided Jan. 21, 1861.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island.

The history of the case and a sufficient statement of the facts, appear in the opinion of the court.

See, also, statement by the counsel for the defendant in error, and previous reports of the case there cited.

Messrs. **B. R. Curtis, S. Bartlett, George E. Badger,** and **J. M. Carlisle,** for plaintiff in error:

1. The court below erred in allowing the defendant to give in evidence certain indictments which purport to have been found against the defendant in the years 1848 and 1849, for certain alleged nuisances described in the said indictments respectively.

2. The court erred in refusing the instructions prayed by the plaintiff, and in the instructions given.

(*a*) There was evidence "tending to show that the boundary of the highway now called Summer street, next to the sea, was and is low-water mark." But the court refused so to instruct the jury, and instructed them to the contrary.

This is the same evidence upon which this case was remanded (60 U. S. in b. 15, p. 639), and additional evidence of like tendency.

A portion of the documentary evidence offerred by the defendant, it is conceived, had a like tendency.

(*b*) The court erred in the instruction given with respect to the former verdict and judgment offered in evidence by the plaintiff, in this, that the said instruction was upon the weight and effect of the evidence, which was a question for the jury exclusively. And therefore, though the court might give its opinion to the jury, it should have been so guarded as to leave the jury free in the exercise of their own judgments." They should have been made distinctly to understand that the instruction was not given as a point of law, by which they were to be governed, but as a mere opinion as to the facts, and to which they should give no more weight than it was entitled to.

Tracy v. *Swartwout*, 10 Pet. 96; see, also, *Greenleaf* v. *Birth*, 9 Pet. 299; *Ches. & O. Canal Co.* v. *Knapp*, 9 Pet. 567, and particularly *Games* v. *Stiles*, 14 Pet. 322.

Whereas the court instructed the jury upon this point in the same form and as absolutely as upon the matters of law, omitting any discrimination or caution.

Messrs. **C. Cushing** and **P. W. Chandler,** for defendant in error:

This action is for the continuance of an alleged nuisance from September 13, 1850, to April 15, 1852.

It was originally tried at the June term, 1853, of the circuit court for the district of Rhode Island.

At that same term the plaintiff obtained the

judgment alluded to in this case, for the original erection and continuance of the same alleged nuisance up to September 13, 1850.

Both the declaration in the action on which that judgment was recovered, and the one in this case, contained six counts; one for each of plaintiff's wharves, alleging a right of way in the dock in question, for the plaintiff, his servants and vessels appertaining to his said wharves; one for each of said wharves, alleging a public dock, slip, or way between them, by which plaintiff was entitled to a passage from the channel to his wharves, and *vice versa;* one for the reversion of both wharves relying on the way appurtenant to them, and one (the 6th) for the reversion of both wharves, counting on the public easement; the injury in all cases being the same with averments of special injury to the plaintiff, in the counts where the public nuisance was counted on. The structure constituting the alleged nuisance was the same as in the case of *City of Boston* v. *Lecraw*, 58 U. S. (17 How.) 426.

In both cases verdicts were given for the plaintiff on his 6th count.

The judgment in the first case was satisfied, the amount being too small for a writ of error, but in the present case a motion was made for a new trial, pending which motion this court decided the case of *Lecraw* v. *The City of Boston*, in which the views of the law upon which the verdicts and judgment above mentioned had been obtained were pronounced erroneous.

58 U. S. (17 How.) 426.

The motion for a new trial in the present action was accordingly decided in the defendant's favor, and the case came on for trial at the June term, 1855.

The plaintiff then filed the 7th count of his declaration, upon which alone he now relies, and to which alone the instructions of the court at the last trial apply.

The count alleges that the *locus in quo* was "a highway, town way, or public way, to the sea, sometimes known as the town dock, extending from the corner of Summer street and Sea street to the channel," and that the way aforesaid was "a public highway or town way or public way to the sea or low water, duly laid out and established pursuant to law; and by reason thereof the plaintiff had, ought to have had, and still ought to have, free ingress and egress with boats and vessels of every description, upon, over, and through said way, to and from the wharves, so by him possessed as aforesaid, from and to the channel of the sea.

At the trial in 1855, the court below, thinking itself bound by the judgment of this court in *Lecraw's Case*, and seeing no substantial difference between the two, instructed the jury that there was not sufficient evidence in the case to authorize a verdict for the plaintiff.

Richardson v. *Boston*, 60 U.S. (19 How.) 263.

The jury having found for the defendant, the plaintiff sued out a writ of error, which was heard in this court, and a new trial was ordered, on three grounds:

1. That the judgment in the former case, although rendered under an erroneous view of the law, was still evidence which should have been submitted to the jury with proper instructions from the court.

Richardson v. *Boston*, 60 U.S. (19 How.) 263.

2. That the record disclosed some evidence proper for the consideration of a jury, that Summer street was originally laid out to low-water mark, in which case the court seem to imply that the right, to use it as a highway on land, would accrue to the abuttors, and the superficial drain which the plaintiff complains of might be a nuisance.

3. That there was some evidence of injury to the plaintiff by deposit of matter from the drain at the end of his wharves, for which he might recover, as his declaration then stood.

The case was tried again at the June term, 1858, and resulted in a verdict for the defendants, under instructions from the court, which are expected to on this record.

The position of the plaintiff is somewhat modified since the case was last before this court.

1. The claim for damages by accretions has been stricken out of his declaration, under an arrangement of counsel.

2. It is no longer controverted that the fee of the *locus* is in the defendants.

3. It is expressly admitted that it is not for any obstruction to a way for travel on land, but only to the access to the plaintiff's wharves by vessels, that damages are claimed.

4. The exceptions to the charge of the judge are only to his refusal to give the ruling requested by the plaintiffs, and to the instructions actually given respecting the said highway.

5. Every point upon which the plaintiff originally rested his right to recover, has been explicitly decided against him, and the same is true of all the points on which he now bases his claim, except that of a public way for boats and vessels, and this point, the defendants contend, has been substantially and by implication decided in their favor, leaving only the question of accretions at the end of the plaintiff's wharves as a ground of claim for damages; and this point is not before the court.

There was no evidence before the jury which would have authorized them to find that the supposed way or dock between the plaintiff's wharves, from high to low-water mark for the passage of boats and vessels, as alleged in the 7th count of his declaration, was ever dedicated by the defendants to the public use, or was ever laid out according to law, by the town of Boston, or the authorities thereof, as a highway for the passage of boats and vessels from high-water mark to the channel.

They had no power to lay out ways below high-water mark.

Kean v. *Stetson*, 5 Pick. 492.

And if they undertook to lay out ways to low-water mark, the laying out would be valid as far as high-water mark, and void below that point.

Commonwealth v. *Wicher*, 5 Met. 448; *State* v. *Wilson*, 42 Me. 9, 21.

This court has already decided that there is no evidence of a dedication to the public in *Lecraw's Case*, in which the evidence was, substantially, the same as in this.

58 U. S. (17 How.) 426.

The powers of selectmen are conferred by statute, and are limited to those so conferred.

Rev. Stat. ch. 14, § 66, *et seq.; Bethum* v. *Turner*, 1 Me. 111.

The power of laying out ways involving the taking of private property for public uses, is

especially to be strictly limited to that expressly granted. And the selectmen have no more authority to lay out ways over the town's land than over that of others.

Mr. Justice **Grier** delivered the opinion of the court:

This is the third time in which this claim to have damages from the city of Boston, for erecting drains and sewers on their own land for the preservation of the health of the city, has come before us.

The plaintiff is the owner of two wharves, called Bull's wharf and Price's wharf, running from high-water to low-water mark. The space between these two wharves belongs to the city of Boston, being situated at the foot of Summer street; and as it was but thirty feet wide, it became, by the mere accident of its position, a very convenient dock, or slip, for plaintiff, so long as the city did not see fit to reclaim their land. Formerly, the drains and sewers which ran under Summer street discharged at the end of that street at high-water mark; but, as the city increased, this discharge of drainage **192*]** *became pestilential, and a nuisance to the neighborhood. To remedy this evil, the city was compelled to extend its drains out to low-water mark, and this is the nuisance complained of in this and the other suits.

The case of *Boston* v. *Lecraw*, 17 How. 426, first introduced this controversy to this court. Lecraw was tenant of Richardson, and his title consequently the same. It was claimed that the city of Boston, by not wharfing out their land at the end of Summer street, had dedicated it to the public, or rather to the private use of Richardson, to whose wharves it afforded a most convenient dock or slip. This claim was declared by this court to be wholly without foundation; and that "whether it was called 'town dock' or 'public dock,' it would furnish no ground to presume that the city had parted with their right to govern and use it in the manner most beneficial to the citizens."

It is not our purpose to again discuss this question, or again repeat the arguments and principles on which our judgment was founded. The correctness of that decision has not been impugned or denied, and it needs no interpretation.

During the pendency of this suit of Lecraw, the tenant, and before its decision in this court, Richardson had brought a suit for damage to his reversion by the same alleged nuisances, and the verdict and judgment being for less than $2,000, the city could not have a writ of error to reverse it, as in the other case. When the present case came on for trial, the decision of this court in the *Lecraw Case*, being known, in order, if possible, to avoid the effect of that decision, a new count was added to the declaration, drawn with great ingenuity and subtlety, charging that "there had been a highway, or town way, or public way, to the sea or low water, duly laid out and established pursuant to law;" and that the drains made by the city had "caused mud, earth, and other materials, to be thrown and deposited upon and near the said wharves."

The report of our decision on this case will be found in 19 How. 263.

We then decided that a former verdict and judgment in an *action on the case for [***193** continuance of the same nuisance was not conclusive evidence, but is permitted to go to the jury as persuasive evidence. We stated in what cases it ought to have weight, and in what it could have little or none, as where the former verdict was the result of an erroneous instruction on the law by the court.

As the additional count, on which the plaintiff relied, was rather equivocal or ambiguous, as to what was meant by a "highway or town way" to the sea or low-water mark, we decided that public officers of a town have no power to lay out a town way between high water and the channel of a navigable river. A board of pilots may mark by buoys the best channel for vessels in a bay; but this would hardly be called a "town way on the ocean." Indeed, it did not seem to be seriously contended on the argument that the selectmen in 1683 had assumed or intended to extend a street or town way by water over the great ocean highway. But as the city of Boston was owner of the soil between high and low-water mark, it had equal right to reclaim the land as other owners; and having done so, a street or "town way" might be established thereon.

The court decided that, if the land was so reclaimed, and a highway laid out on it, the right to use it as a street or highway on land becomes appurtenant to the property of the adjoiners, who might well maintain an action for a nuisance on such street or highway.

The plaintiff had alleged in this count that he had received damage to his wharf by accretions of mud, etc., below low-water mark, and there was some evidence to support the allegation. The court decided that this fact should have been submitted to the jury. It was a question entirely distinct and separate from a claim of right of highway in the dock.

With this history of the antecendents of this case, there can be no difficulty in disposing of the exceptions.

The first exception is to the admission of the bills of indictment against the city. They constituted part of the history of the case, and were referred to in the testimony of the plaintiff, and were, therefore, not wholly irrelevant. They tended *to show "that the conduct [***194** of the city," as disclosed by the evidence, did not "tend to oppression," as has been charged in the argument in this court.

The next exception is to the charge of the court in their instruction, that the former verdict and judgment, though admitted in evidence, should have little or no weight on the decision of the case, because it was founded on erroneous instructions on the law. This instruction was in exact conformity with the ruling of this court. The verdict was on an agreed statement of facts, not now disputed, on which the court gave an opinion, since decided by this court to be a mistake. Like many other matters given in evidence to support a case, this verdict was received as not irrelevant, although the proof on the other side might show it to be worthless.

The last exception is to the charge of the court, "that there is not any evidence in the case which will authorize the jury to find that the supposed way or dock between the plaintiff's wharves, from high to low-water mark, for the free egress and ingress of boats and vessels to

and from the same, as alleged and described in the seventh count in his declaration, was ever dedicated by the town or city of Boston to the public use, either as a public highway, town way, dock, or public way, for the access of boats and vessels between said wharves to high-water mark, or the egress therefrom to the sea. That there is not any evidence in the case which will authorize the jury to find that the supposed way or dock between the plaintiff's wharves, from high to law-water mark, for the egress and ingress of boats and vessels, to and from the same, as alleged and described in the seventh count in his declaration, was ever duly laid out and established by the town of Boston. or the authorities thereof, pursuant to law, either as a public highway, town way, or public way, for the access of boats and vessels between said wharves to high-water mark, or the egress therefrom to the sea."

This instruction is in entire conformity with the previous decisions of this court on this subject.

There was nothing, in the opinion of this court, which should subject it to the miscon-
195*] struction of having decided that a*"town way" for boats and vessels could be laid out on the high seas, or of imputing to the town officers such an obliquity of understanding as the assumption of such a power would argue; on the contrary, the court decided that the public officers had no such power; but that the city, after it reclaimed the land to high-water mark, might continue Summer street as a highway on land, for a nuisance, to which the plaintiff might sustain an action; and this case was remanded in order to give the plaintiff an opportunity to have the verdict of the jury on this subject; and also for any injury he might have sustained by the drains causing an accumulation of matter at the outer end of the plaintiff's wharves. The record shows that the plaintiff abandoned any claim for damages for either of these causes, and he was, of course, left without any case to be submitted to the jury.

Judgment of the Circuit Court is, therefore, affirmed, with costs.

JAMES NATIONS and Joseph Nations, *Plffs. in Errr.*,
v.
NANCY ANN JOHNSON and James Johnson.

(See S. C. 24 How. 195-207.)

Decision of a court having jurisdiction, is binding in other courts—jurisdiction of courts of general jurisdiction, presumed—notice to defendant necessary to jurisdiction—writ of error—when notice of, by publication, sufficient—exceptions.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed, as a general rule, is regarded as binding in every other court.

Whenever the parties to a suit, and the subject-matter in controversy, are within the jurisdiction of a court of equity, the decree of that court is to every intent as binding as would be the judgment of a court of law. Courts of general jurisdiction are presumed to act by right, and not by wrong, unless it clearly appears that they have transcended their powers.

Notice to the defendant, actual or constructive, however, is essential to the jurisdiction of all courts. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals.

A writ of error does not act upon the parties; it acts only on the record, by removing the record into the supervising tribunal.

A writ of error is a continuation of the original litigation, rather than the commencement of a new action.

Where the record shows that the defendant appeared in the subordinate court, and litigated the merits there to final judgment, he cannot defeat an appeal by removing from the jurisdiction, so as to render a personal service of the citation impossible.

In that state of facts, service by publication, according to the law of jurisdiction and the practice of the court, is free from objection, and is amply sufficient to support the judgment of the appellate court.

A bill of exceptions does not bring into this court any of the prior proceedings for revision.

Argued Jan. 7, 1861. Decided Jan. 21, 1861.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee.

This case arose upon a petition filed in the court below, by the defendants in error, on certain foreign judgments or decrees, for certain negroes and their hire.

The trial resulted in a verdict and judgment in favor of the plaintiffs; whereupon the defendants sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Mr. **George W. Paschal,** for plaintiffs in error:

It may be safely stated, as a general principle, that a judgment obtained by publication and without personal service, cannot be the foundation of an action in another state. All suits are either *in personam* or *in rem*. When *in personam*, there must be personal service to give jurisdiction. When *in rem*, the remedy is exhausted when the *res* is disposed of.

But as there is no pretext that there was personal service in this case, or that the party appeared to the writ of error, or that it was a proceeding *in rem*, then it follows that the supreme court in Mississippi had no jurisdiction over the defendants and the decree rendered therein, and the subsequent decrees of the Vice-Chancellor's court were nullities for want of jurisdiction.

6 Mas. 40; 11 Wend. 647; 6 J. J. Marsh. 11, 14, 29, 193, 197; *Boswell* v. *Otis*, 9 How. 336; *Webster* v. *Reid*, 11 How. 437.

This question of jurisdiction may be raised collaterally, or at any time whenever the judgment shall be offered.

1 Pet. 328; 3 Pet. 193; 10 Pet. 474; 8 How. 340; 4 Cranch, 241; 11 Pet. 498; 3 How. 750; 9 Tex. 313; 4 N. Y. 513; *Green* v. *Custard*, 64 U. S. (23 How.) 484.

But it is presumed that the court below went upon the ground that as the parties appeared and pleaded in the chancery court, they were bound by the subsequent proceedings in the court of errors and appeals. Had the complainants prosecuted their appeal as the law required, this would be true; but as they let the time elapse, and the defendants had left the state, and had no attorney of record upon whom

NOTE.—*Conclusiveness of decrees in equity in subsequent proceedings at law*—see note, 50 C. C. A. 469.

to effect service, the proceeding upon the writ of error was as much a proceeding by a mere publication as though it had been a matter of original cognizance.

The Mississippi statute is not different from the statutes under which the decisions above quoted were made.

Hutch. Dig. 758, 759, §§ 34, 35; Hutch. Dig. p. 931.

The plaintiff did not perfect the appeal, the citation can only be served upon the party or his attorney of record, thus showing that the writ was, to all intent and purposes, one original proceeding.

A writ of error is an original writ.

2 Tidd, Pr. 1134; Co. Litt. 298 *b;* 2 Wm. Saund. 5 ed. 100.

A writ of error, like a scire facias, is considered a new action and, therefore, upon bringing it, the defendant in the original action may change his attorney without obtaining a judge's order therefor.

2 Tidd, Pr. 1141; *Batchelor* v. *Ellis*, 7 Durn. & E. 337; see, also, *Fairfax* v. *Fairfax*, 5 Cranch, 19; 2 Sm. Lead. Cas. 551, notes to the cases of *Mills* v. *Duryee*, 7 Cranch, 481, and *McElmoyle* v. *Cohen*, 13 Pet. 312; *Bissell* v. *Briggs*, 9 Mass. 462; *Green* v. *Sarmiento*, 1 Pet. C. C. 70; *Hall* v. *Williams*, 6 Pick. 232; *Woodward* v. *Tremere*, 6 Pick. 355; 4 Ga. 48; 9 Ga. 132; 11 Ga. 455; 25 Miss. 513; 2 Fost. (N. H.) 277; 1 R. I. 73; *D'Arcy* v. *Ketchum*, 11 How. 165; 4 Met. 333; *Lincoln* v. *Farver*, 2 McL. 473.

The principle is that in cases of service by publication every prerequisite to the judgment must be preserved and affirmatively shown.

Thatcher v. *Powell*, 6 Wheat. 119; *Ronkendorff* v. *Taylor*, 4 Pet. 359; *Bloom* v. *Burdick*, 1 Hill, 130; *Rea* v. *McEachron*, 13 Wend. 465; *Atkins* v. *Kinnan*, 20 Wend. 241; *Jackson* v. *Sheppard*, 7 Cow. 88; *Jackson* v. *Esty*, 7 Wend. 148; *Sharp* v. *Johnson*, 4 Hill, 99.

The court took the decree as conclusive as to the amount of hire due since the rendition of the judgment in Mississippi. This was clearly wrong. The judgment could not operate prospectively as to the rate of the hire.

No counsel appeared in this court for defendants in error.

Mr. Justice **Clifford** delivered the opinion of the court:

This case comes before the court upon a writ of error to the district court of the United **197*]** States for the western district of *Texas. It was a petitory suit, commenced by the present defendants, and was founded upon a certain final decree rendered at the April term, 1854, by the district chancery court, held at Carrollton, in the state of Mississippi, for the northern district of that state. Among other things, the petitioners allege that Nancy A. Johnson, then Nancy A. Alvis, and a minor, by her next friend, brought a suit by bill of complaint in that court against the present plaintiffs to recover three slaves belonging to her, together with hire for the same for a specified time; that she subsequently intermarried with James Johnson, who was admitted with her to prosecute the suit; that the cause was afterwards submitted to the court for a final hearing, and a decree entered dismissing the bill of complaint at the cost of the petitioners. They also allege that they prosecuted a writ of error to the high court of errors and appeals in that state, and that the decree of the district court of chancery was there reversed, and a decree entered in their favor. That decree, as set forth in the petition, shows that the appellate court was of the opinion that the slaves in controversy were the property and separate estate of the first named complainant. Wherefore it was considered by the court that the decree of the Vice-Chancellor ought to be reversed, and it was so ordered, adjudged, and decreed; and the court proceeding to pronounce such a decree as the subordinate court should have rendered, entered a decree that the complainants do have and recover of the respondents the slaves then in controversy, for the sole and separate use and right of the first named complainant, and requiring the respondents to restore the slaves and deliver the possession of the same to the said complainant, or her authorized agent. It is also recited in the decree that the court was of the opinion that the complainant was entitled to recover hire for the slaves from the time they were taken from her possession by the respondents. To carry out the directions of the court, it was further ordered, adjudged, and decreed, that the cause be remanded to the subordinate court, and that an account be taken of the hire of the slaves, and for such other and further proceedings as may be required in the premises. After the mandate went down, the cause was sent to a *commissioner to carry into effect the di- [*198 rections of the appellate court. He made a report, showing that on the 4th day of February, 1854, the reasonable hire for the slaves amounted to the sum of $2,200; and he also reported that the hire of the slaves was reasonably worth $200 per annum. That report was confirmed by the court, and on the 14th day of April of the same year a decree was entered in favor of the complainants, that they do have and recover of the respondents the said sum of $2,200 with interest; and also, that they do have and recover of the respondents at the rate of $200 per year for the hire of the slaves, from the date of the report until they shall be surrendered up according to the decree in the cause. As a part of this decree, it was also ordered and directed that execution issue, as at law, for the amount awarded to the complainants, together with the costs of suit. Plaintiffs also allege in their petition or declaration, that those decrees or judgments were in full force, and that they have never in any manner been annulled, reversed, satisfied, or discharged, either in whole or part. Process was duly served upon the defendants in this case, and on the 5th day of December, 1854, they appeared and made answer to the suit. From the minutes of the clerk it would seem that the suit was entered, in the first place, as a suit at law, and it was certainly so treated by the defendants in their first answer. Those proceedings, however, are of no importance in this investigation, because the record states, that on the 4th day of December, 1856, the cause was docketed on the chancery side of the court; and on the 2d day of June, 1857, the defendants again appeared and filed their answer to the petition, without objection to the transfer which had been made of the cause. To that answer the plaintiffs excepted on various grounds, and after a full hearing the

exceptions were sustained, and the answer was stricken out by the order of the court. Both parties again appeared before the court, sitting in chancery, on the 11th day of June, 1857, when, as the record states, "upon motion, and merits examined by the court, it was ordered that the cause be transferred to the law docket." 199*] No objection was *made to that order by either party, and for aught that appears to the contrary, the transfer was made by consent. Leave was subsequently granted to the plaintiffs to amend their petition, and on the 26th day of January, 1858, they filed an amendment to the same, alleging that they were citizens of the state of Tennessee, and that the defendants were citizens of the state of Texas. They also alleged in their amended petition, that the slaves in controversy were of the value of $3,200, and prayed judgment in their favor for the recovery of the slaves, and in default of the delivery of the possession of the same, they also prayed judgment for their value, and "for general relief."

Exceptions were filed by the defendants, to the amended petition, but the exceptions were overruled by the court. At the same time the defendants filed an additional answer to the petition, denying all the allegations and charges therein contained, and also pleaded the statute of limitations in two forms, as set forth in the transcript. Afterwards, on the 6th day of February, 1858, the defendants had leave to plead *nul tiel record* to the respective decrees set forth in the plaintiff's petition. On that issue the court found for the plaintiffs, and overruled the plea, and the parties went to trial upon the plea denying all the allegations and charges contained in the plaintiffs' petition, and upon the pleas setting up the statute of limitations. To support the issue on their part, the plaintiffs introduced duly certified copies of the two records and decrees set forth in their petition, and proved, by competent witnesses, the value of the slaves at the time of the trial. By that testimony it appeared that one of the slaves was of the value of $800, and that the other two were each of the value of $900. Defendants offered to prove that they removed from Mississippi on the 20th day of January, 1850; that they became citizens of Texas, and were domiciliated there on the 21st day of February of that year, and that they had ever since resided there as citizens of that state. That testimony was excluded by the court upon the objection of the plaintiffs, and the defendants excepted to the ruling. They offered no other evidence, 200*] and under the *instructions of the court the jury returned their verdict for the plaintiffs. At the trial, the defendants requested the court to instruct the jury that—

1. The transcript from the record to the high court of errors and appeals, and the chancery court for the northern district of the state of Mississippi, is not evidence sufficient to entitle the plaintiffs to recover.

2. That that portion of the decree of the chancery court fixing the hire of the negroes at $200 a year, from and after the date of that decree, is no evidence of the value of the hire of said negroes; and unless the plaintiffs have introduced some evidence independent of that record, proving the value of the hire, the jury cannot allow hire from the date of the judgment rendered by the Vice-Chancellor.

But the court refused so to instruct the jury, and did instruct them that the record was conclusive proof that the title of the slaves was in the plaintiffs, and of the value of their hire up to the 4th day of February, 1854, as shown by the record; and the jury were also instructed to return a verdict in favor of the plaintiffs for the additional hire, at the rate of $200 per annum, from the date of the decree. Instructions were also given to the jury as to the other matters of claim set forth in the petition; but inasmuch as they are not now made the subject of complaint, we shall pass the exceptions over without remark, except to say that they are evidently without merit.

On this state of the case three questions are presented for decision.

1. It is insisted by the plaintiffs in error that the court erred in charging the jury that the record offered in evidence was conclusive proof as to the title of the slaves in controversy, and of the value of their hire to the date of the decree. That theory is based upon certain facts which are apparent in the record of that suit, and the question is raised both by the instructions given to the jury and by the refusal of the court to charge as requested. It appears from the record of the suit, that the bill of complaint was filed in the district chancery court for the northern district of Mississippi on the 26th *day of November, 1846, and that the [*201 respondents entered their appearance on the 23d day of November, 1847, and made answer to the suit. Testimony was taken on both sides, and the respondents continued to prosecute their defense to the suit until the 11th day of April, 1850, when, upon final hearing, the bill of complaint was dismissed at the cost of the complainants. Respondents' attorney then withdrew his appearance; but the record states that the complainants, on the same day, prayed an appeal, which was granted, upon their giving bond for costs in ninety days, "and by consent it is agreed" that the appeal be taken directly to the high court of errors and appeals. Complainants, however, failed to prosecute the appeal within the appointed time, and consequently were obliged to prosecute the appeal by writ of error. It is not now questioned that a writ of error, under the circumstances of the case, was the proper process, by the law of that state, for the removal of the cause into the appellate court; but it is insisted that the subsequent decrees are void, because the respondents were not legally notified of the pendency of the writ of error. Personal service was not made on either of the respondents, and they never appeared in the appellate court. On the contrary, it appears that the attorney of the complainants, on the 18th day of January, 1852, filed an affidavit in the cause, that the defendants in error were not residents of the state, and that they had no attorney of record on whom process could be served. Provision, however, is made by the law of that state for service by publication in cases of this description. By the act of the 29th of January, 1829, it is provided, that "whenever a cause shall be removed to the Supreme Court by writ of error, and the court is satisfied that the defendant in error is a nonresident, and has no

attorney of record within this state, it shall be the duty of said court to cause notice of the pendency of said cause to be published for three weeks in some public newspaper, the first of which shall be at least three months before the sitting of the next term of the court in which the case is pending, within this state; on proof of which publication, the court shall proceed to 202*] hear and determine said cause, *in the same manner as if process had been actually served upon the said defendant." Hutchison's Dig. p. 931.

That regulation, by a subsequent act passed on the 2d day of March, 1833, is made applicable to the high court of errors and appeals, and it was conceded at the argument that the publication was made under that provision. On the filing of the affidavit, showing that the defendants in that suit were nonresidents of the state, it was ordered by the court, that unless they appeared on the third Monday of October, 1853, "the court will proceed to hear and determine the cause in the same manner as if process had been actually served; and it was further ordered that a copy of the order be published in a certain public newspaper published at the capital of the state, once a week, for three weeks." Publication was accordingly made, as appears by the decree in the cause, and on the 23d day of January, 1854, the decree was entered reversing the decree of the subordinate court; and the question is, whether the notice was sufficient to give the appellate court jurisdiction of the case and the parties. That the subordinate court had full jurisdiction is admitted. Both of the respondents appeared in that suit, and litigated the merits for the period of three years. From the evidence in the case, it appears that they got possession of the slaves in Tennessee, in violation of the rights of the first named complainant, and removed them to the state of Mississippi. Suit was brought against them in a subordinate court of the latter state, and after three years' litigation, and when they had succeeded in dismissing the bill of complaint, they removed to Texas, carrying the slaves with them, although they knew the complainants intended to seek a revision of the decree in the appellate court. All of the equities of the case are, therefore, with the present defendants. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court. Whenever the parties to a suit, and the subject-matter in controversy between them, are within the regular jurisdiction of a court of equity, the de-203*] cree of that *court is, to every intent, as binding as would be the judgment of a court of law. Accordingly, it was held by this court, in *Pennington* v. *Gibson*, 16 How. 65, that in all cases where an action of debt can be maintained upon a judgment at law, to recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount. and that the records of the two courts are of equal dignity and binding obligation. Had the decree, therefore, been rendered in the subordinate court before the appeal, the right of the plaintiffs below to recover in this suit would have been beyond question, unless there is some other error in the record. Courts of general jurisdiction are presumed to act by right, and not by wrong, unless it clearly appears that they have transcended their powers. *Gregnon* v. *Astor*, 2 How. 319; *Voorhees* v. *Bank of U. S.* 10 Pet. 449.

Notice to the defendant, actual or constructive, however, is essential to the jurisdiction of all courts, and it was held by this court, in *Webster* v. *Reid*, 11 How. 460, that when a judgment is brought collaterally before the court as evidence, it may be shown to be void on its face by want of notice to the person against whom it is entered. Numerous cases, also, are cited by the counsel of the present plaintiffs, applicable to the judgments or decrees of a court exercising original jurisdiction, which assert the general rule that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And some of them go much further, and lay down the rule as applicable to the inception of the suit, that notice by publication is insufficient to support the judgment in any jurisdiction, except in the courts of the state where it was rendered. *Boswell* v. *Otis*, 9 How. 350; *Oakley* v. *Aspinwall*, 4 N. Y. 513. None of these cases, however, precisely touch the question under consideration. Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily *absent himself from the jurisdiction of [*204 the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy. Contrary to the views of the counsel for the present plaintiffs, we think there is some distinction between the notice required to be given to an appellee or defendant in error and the service of process in the original suit. A writ of error is said to be an original writ, because, at common law, it was issued out of the court of chancery; but its operation is rather upon the record, than the person. Under the judiciary act, says Mar-

shall, Ch. J., the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record, by removing the record into the supervising tribunal. Suits cannot, under the judiciary act, be commenced against the United States; and yet writs of error, accompanied by citations, have uniformly issued for the removal of judgments recovered in favor of the United States into this court for re-examination. Such cases are of daily occurrence, and the judgments are here reversed or affirmed as they are, with or without error; and it has never been supposed that the writ of error in such cases, though **205***] sometimes *involving large amounts, was a suit against the United States. Plainly, therefore, there is a distinction between a writ of error and the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action; and such, it is believed, is the general understanding of the legal profession in the United States. *Cohens* v. *Virginia*, 6 Wheat. 410; *Clark* v. *Matthewson*, 12 Pet. 170.

No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the appellate court; and where, as in this case, personal service was impossible in the appellate court, through the act of the defendant in error, it must be held that publication, according to the law of the jurisdiction, is constructive notice to the party, provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits. Constructive notice, says Mr. Justice Baldwin, in *Hollingsworth* v. *Barbour*, 4 Pet. 475, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders for publication, and providing that the publication, when made, shall authorize the courts to decree. *Regina* v. *Lightfoot*, 26 Eng. L. & E. 177 (6 El. & B. 822).

As stated by this court in *Harris* v. *Hardeman*, 14 How. 339, a judgment upon a proceeding *in personam* can have no force as to one on whom there has been no service of process, actual or constructive, and who has had no day in court or notice of any proceeding against him. Judgment in that case had been rendered without any sufficient notice, either actual or constructive and, of course, it was held to be irregular; but the opinion of the court clearly recognizes the principle that constructive notice in certain cases may be sufficient to bind the party. Every person, as this court said in the case of *The Mary*, 9 Cranch, 144, may make himself a party to an admiralty proceeding, and appeal from the sentence; but notice of the controversy is necessary, in order to enable him to become a party. When the proceedings are against the person, notice is served personally, **206***] or by publication; *but where they are *in rem*, notice is served upon the thing itself. Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, the record shows that the defendant appeared in the subordinate court, and litigated the merits there to final judgment, it cannot be admitted that he can defeat an appeal by removing from the jurisdiction, so as to render a personal service of the citation impossible. On that state of facts, service by publication, according to the law of the jurisdiction and the practice of the court, we think is free from objection, and is amply sufficient to support the judgment of the appellate court. *Mandeville* v. *Riggs*, 2 Pet. 489; *Hunt* v. *Wickliffe*, 2 Pet. 214.

2. It is insisted, in the second place, by the counsel of the plaintiffs, that the court erred in allowing the decree to go to the jury as evidence of the value of the hire of the slaves subsequently to the 4th day of February, 1854. That theory overlooks the fact that testimony had been introduced by the present defendants showing the value of the slaves at the time of the trial; and that the decree was to be taken in connection with the parol testimony, showing that the slaves were still living, and in the possession of the parties originally charged with their abduction. No evidence had been offered by the defendants, and, in view of the circumstances, we think the charge was correct, and that the prayer for instruction was properly refused.

3. While the cause was pending on the chancery side of the court, on motion of the plaintiffs, the court struck out the answer of the defendants, and it is now insisted that the action of the court in that behalf was erroneous. All we think it necessary to say in reply to this objection, is to remark that the cause was subsequently transferred to the law docket without objection, and that a bill of exceptions does not bring into this court any of the prior proceedings for revision. Whatever may be the practice in the state courts, counsel must bear in mind that there is a broad distinction between a suit at law and a suit in equity, and must understand that this court cannot and will not overlook that distinction.

The judgment of the District Court is* [207 *affirmed, with costs.*

GEORGE R. SAMPSON and Lewis W. Tappan, merchants doing business under the firm and name of Sampson & Tappan, claimants of the ship Sarah, etc., *Appts.*,

v.

SAMUEL WELSH, John Welsh, and William Welsh, trading as S. & W. Welsh.

(See S. C. 24 How. 207, 208.)

Jurisdiction as to amount—consent, or stipulation, will not confer.

Where the final decree of the circuit court was for less than $2,000, no appeal from its decree will lie to this court.

The decree by the circuit court was in favor of

NOTE.—*Jurisdiction of the United States Supreme Court dependent on amount*—see note to Gordon v. Ogden, 7 L. ed. U. S. 592, and note to Schunk v. Moline, M. & S. Co. 37 L. ed. U. S. 256.

the libelants for the sum of $2,302.78, with leave to the respondents to set off the balance due them for freight, if they should elect to do so. Afterwards, the respondents appeared in court, and elected to set off this balance against the sum decreed against them, which reduced the amount to $1,071.27.

But in making this election, the proctors for the respondents stated in writing, and filed in the court, that the election to set off was made without any waiver of their right to appeal from the decree.

After this election was made, the court, on the 31st of August, 1858, passed its decree in favor of the libelants for the above-mentioned sum of $1,071.27, with interest from July 20, 1858.

This was a final decree of the court, and the one from which the appeal is taken; and as it is below $2,000, no appeal will lie, under the act of Congress. And neither the reservation of the respondents in making their election, nor even the consent of both parties, if that had appeared will give jurisdiction to this court where it is not given by law.

Submitted Jan. 7, 1861. Decided Jan. 21, 1861.

APPEAL from the Circuit Court of the United States for the District of Pennsylvania.

The history of the case and a sufficient statement of the facts, appear in the opinion of the court.

Messrs. **G. W. Wharton** and **R. P. Kane** for appellants.

Messrs. **Fallon** and **Serrill** for appellees.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case is brought up by an appeal from the circuit court of the United States for the eastern district of Pennsylvania.

A libel was filed in the district court for that district by S. & W. Welsh, the appellees, against the ship Sarah (of which Sampson & Tappan, the appellants, are the owners) to recover compensation for damages sustained by a cargo of coffee shipped on board The Sarah, at Rio, and consigned to the libelants; and also to recover compensation for sundry disbursements 208*] *made by the libelants for the payment of wages and provisions for the ship.

The ship owners appeared and answered; but it is unnecessary to state more particularly the facts in controversy between the parties, because the final decree of the circuit court was for less than $2,000, and consequently no appeal from its decree will lie to this court.

At the hearing in the district court the libel was dismissed; but upon an appeal to the circuit court this decision was reversed, and a decree passed by the circuit court in favor of the libelants for the sum of $2,302.78, with leave to the respondents to set off the balance due them for freight, if they should elect to do so. Afterwards, the respondents appeared in court, and elected to set off this balance against the sum decreed against them, which reduced the amount to $1,071.27. But in making this election, the proctors for the respondents stated in writing, and filed in the court, that the election to set off was made without any waiver of their right to appeal from the decree. After this election was made, the court, on the 31st of August, 1858, passed its decree in favor of the libelants for the above-mentioned sum of $1,071.27, with interest from July 20, 1858. This was the final decree of the court, and the one from which the appeal is taken; and as it is below $2,000, no appeal will lie, under the act of Congress. And neither the reservation of the respondents in making their election, nor even the consent of both parties, if that had appeared, will give jurisdiction to this court where it is not given by law.

The appeal must, therefore, be dismissed for want of jurisdiction.

JAMES A. CHANDLER, *Plff. in Err.*,

v.

OTTO VON ROEDER, Hamilton Ledbetter, and Charles Van Rosenburg.

(See S. C. 24 How. 224-228.)

Texas act of limitations—question for court and jury—it is error to submit question to jury where there is no evidence—evidence of fraud—where decision is favorable, party cannot except to the evidence.

Where there was not five years from the date of the deed to defendant to the commencement of the suit; held, that the pleas of the Texas statute of limitations were not proved.

Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury.

The court erred in submitting the decision of questions to the jury when there was no evidence to raise them.

The district court erred in refusing to receive evidence to impeach a deed for fraud.

Where it appears from the charge that the decision of the court was favorable to the plaintiff, he has no cause for complaint upon his exceptions to the competency of the evidence.

Argued Dec. 27, 1860. Decided Jan. 21, 1861.

IN ERROR to the District Court of the United States for the Western District of Texas.

This case arose upon a petition filed in the court below by the plaintiff in error, to try title to a league of land. The trial resulted in a verdict and judgment in favor of the defendants; whereupon the plaintiff sued out this writ of error.

A further statement of the case appears in the opinion of the court.

Messrs. **Badger & Carlisle** and **G. W. Paschal**, for plaintiff in error:

The court should not charge upon an issue to which there is no evidence.

Austin v. *Talk*, 20 Tex. 164; *Andrews* v. *Smithwick*, 20 Tex. 118; *Steagall* v. *McKellar*, 20 Tex. 268; *Chandler* v. *Fulton*, 10 Tex. 21.

The court ought to have instructed the jury that there was no evidence to warrant a finding upon either statute of limitations.

Lea v. *Hernandez*, 10 Tex. 137; *Parker* v. *Leman*, 10 Tex. 116.

A charge in the abstract might be harmless, and yet ruinous if not warranted by the evidence.

Thompson v. *Shannon*, 9 Tex. 537; *McGreal* v. *Wilson*, 9 Tex. 429; *Wheeler* v. *Moody*, 9 Tex. 372; *Davis* v. *Loftin*, 6 Tex. 492; *Crozier* v. *Kirker*, 4 Tex. 252; *Spence* v. *Onstott*, 3 Tex. 147; *Love* v. *Wyatt*, 19 Tex. 312; *Hancock* v. *Horan*, 15 Tex. 507.

There having been no written evidence whatever, to sustain the pleas of three or five years' limitation, it was error not to give the charge

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NOTE.—*Questions of law and fact, for court or jury in civil and criminal cases*—see note to King v. Delaware Ins. Co. 3 L. ed. U. S. 155.

which said there was no such issue before them, because the refusal was calculated to leave the jury in doubt as to the fact.

Wintz v. *Morrison*, 17 Tex. 372.

The court must not assume that as doubtful which is clear and indisputable. The courts for the district of Texas having adopted the state practice in common-law cases, this court will follow the state decisions, although Texas may not be embraced in the act of Congress.

U. S. v. *Wanson*, 1 Gall. 5; *Fullerton* v. *Bank of U. S.* 1 Pet. 612; *Hiriart* v. *Ballon*, 9 Pet. 156; *Wright* v. *Lessee of Hollingsworth*, 1 Pet. 165; *Life and Fire Ins. Co.* v. *Wilson*, 8 Pet. 291.

The rules of the supreme court of Texas, however, on this subject, are consistent with the common law.

Greenleaf v. *Birth*, 9 Pet. 297; *Rhett* v. *Poe*, 2 How. 483; *C. & O. Canal Co.* v. *Knapp*, 9 Pet. 541.

Messrs. **W. G. Hale** and **C. Robinson** for defendants in error.

Mr. Justice **Campbell** delivered the opinion of the court:

The plaintiff claimed in the district court a league of land in the county of Fayette, originally granted by the Mexican government to William H. Jack, and which was in the possession of the defendants. His title consists of a record of a suit in one of the district courts of Texas, in favor of Bremond and Van Alstyne against a number of persons associated under the name of the German Emigration Company, founded upon notes and bills of the company, dated in the years 1846 and 1847, and upon which judgment was recovered in 1852.

An execution was issued upon this judgment, and a levy, sale, and conveyance of the property in controversy were made in 1853, according to the exigency of the writ. The plaintiff was 226*] *the purchaser at the sale. There was testimony conducing to prove that Von Roeder entered upon the land as the agent of the company. The defendants in their answer denied the sufficiency of this title, and pleaded that they had had adverse and peaceable possession of the land for more than five years under deeds duly registered, and had paid taxes thereon; and also that they had possessed the land peaceably for more than three years, under title or color of title, derived from the sovereign authority, thus claiming the benefit of the 15th and 16th sections of the act of limitations. Hartley's Dig. arts. 2391, 2392.

The title exhibited on the trial by the defendants consisted of a deed purporting to be made by the German Emigration Company, through an attorney, Gustavus Dressell, in the year 1848, in favor of the defendant, Von Roeder, in which this and other property was conveyed to him, and deeds from Von Roeder to the codefendants dated in 1850, and that the defendants had had adverse possession under them. There was not five years from the date of the deed to Von Roeder to the commencement of the suit, and there was no testimony to show in what manner the German Emigration Company had become entitled to the property. No conveyance from William H. Jack, the original grantee, was produced either to the company or to the defendants. Thus, the pleas of the statute of limitations were not proved. The plaintiff's counsel requested the court to instruct the jury that there is no documentary evidence, title, or color of title, to support these pleas of the defendants the court declined to advise the jury as requested, but after informing them of the nature of the title and possession that would support such pleas, directed the jury to inquire whether the defendants had adduced sufficient evidence to sustain them. The entire case, in so far as such pleas were concerned, was contained in written documents and undisputed facts. It is the duty of the court to determine the competency of evidence, and to decide all legal questions that arise in the progress of a trial and, consequently, when, assuming that all the testimony adduced by the one or the other party is true, *it does or does not sup- [*227 port his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury.

Company of Carpenters v. *Haywood*, 1 Doug. 385; *Jewell* v. *Parr*, 13 C. B. 909.

The court erred in refusing to instruct the jury as requested, and in submitting the decision of questions when there was no evidence to raise them. The defendants having introduced their title, the plaintiff proposed to produce testimony of a variety of circumstances, to show that the possession of the property by Von Roeder was collusive and fraudulent, and that the deed was made to him with the intent to defraud and delay the creditors of the German Emigration Company, who were insolvent.

The court overruled this attempt of the plaintiff, and excluded all testimony to establish fraud or collusion. The statute of the 13th Elizabeth concerning fraudulent conveyances has been adopted in Texas. The supreme court of that state have decided that when a deed is a mere pretense, collusively devised, and the parties do not intend other than an ostensible change of the property, the property does not pass as to creditors; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with the intent to defraud creditors, that the conveyance is void.

Baldwin v. *Peet*, 22 Tex. 708.

This decision conforms to the current doctrine relative to the just construction of this statute. The plaintiff proposed to prove that the deed to Von Roeder was fraudulent within the meaning of the act. The bills and notes upon which the judgment was founded were filed as part of the record, and are certified with the judgment of the district court.

These show that the plaintiffs in the suit were creditors at the date of the conveyance to Von Roeder, and within the protection of the statute of frauds.

Without considering the part cular testimony offered, it is *our opinion that the dis- [*228 trict court erred in refusing to receive evidence to impeach the deed for fraud.

The plaintiff objected to the introduction of the deed to Von Roeder as testimony, because it was not shown that there was such a corporation as the Germar Association, and because a letter of attorney to Dressell was not exhibited. The deed was admissible, because it ap-

peared that the defendants held their possession under it. But whether it was sufficient evidence of title in the German Emigration Company, or of transfer to the defendants, were questions which it was competent to the court to determine in its instructions to the jury. It appears from the charge that the decision of the court was favorable to the plaintiff. He, consequently, has no cause for complaint upon his exceptions to the competency of the evidence.

For the errors we have noticed, the judgment of the District Court is reversed, and the cause remanded for further proceedings.

ROBERT GUE, *Appt.*,
v.
THE TIDE WATER CANAL COMPANY.

(See S. C. 24 How. 257-264.)

Franchise cannot be sold on execution—remedy of single creditor of corporation, to sell its property and franchises, is in chancery.

A franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias.

It would be against the principles of equity to allow a single creditor to destroy the value of the property of the stockholders, by dissevering from the franchise, property which was essential to its useful existence.

If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, for the benefit of all concerned.

A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object.

The circuit court was right in granting an injunction against the sale.

Argued Jan. 9, 1861. Decided Jan. 21, 1861.

APPEAL from the Circuit Court of the United States for the Southern District of Maryland.

Gue, the appellant, having, on request, furnished work and materials for the construction of the Tide Water Canal, recovered a judgment against the company on the 12th of November, 1849. A scire facias to revive this judgment was sued out Nov. 1, 1855, and resulted in a *fiat* on the first Monday of April, 1856, and thereupon a fieri facias issued upon the judgment under which the marshal of the district of Maryland levied upon and advertised for sale certain land lying around the canal basin and other property which, by agreement, is to be taken as the whole property of the company in the state of Maryland.

To enjoin this sale, the company filed its bill on the equity side of the court below, and an injunction was issued. Appellant put in his answer, and upon final hearing the injunction was made perpetual.

From this decree the present appeal is prosecuted.

The case further appears in the opinion of the court.

Messrs. **J. Mason Campbell** and **P. McLaughlin**, for appellants:

After discussing certain questions not passed upon by the court, the counsel said: The last point is, whether the canal, from its peculiar character, with its appurtenances, can be taken in execution. It will be observed that the agreement admits that what has been levied on is not a part of the company's property, but the whole of it, and the inquiry, therefore, is not as to any attempt to break up the work by detaching a fraction from the rest, but to sell it as a unit. It will be further observed that the act of 1825, ch. 180, which defines the extent of the company's powers and privileges in its 13th section, authorizing it to procure the necessary land for the canal and its works, either by agreement or condemnation, declares that the company shall be seised of such land as of an absolute estate in perpetuity, or with such less quantity and duration of interest as may be required; and that by the deed of Dec. 23, 1841, the land levied on has been acquired and is held in fee, because the words of conveyance necessarily so import.

The question, then, is, whether land held in fee by a company for a canal and its appurtenances can be seized and sold, not by piece-meal, but so that the purchaser will take the land with the entire improvement as it stands.

See *Tippets* v. *Walker*, 4 Mass. 596; 13 Serg. & R. 212; *Leedom* v. *Plymouth R. Co.* 5 Watts & S. 265; *Susquehannah Can. Co.* v. *Bonham*, 9 Watts & S. 27; *Macon R. Co.* v. *Parker*, 9 Ga. 394; *Seymour* v. *Milford & Chil. Turnpike Co.* 10 Ohio, 476; 5 B. Mon. 1; *Coe* v. *Hart*, before Mr. Justice McLean, 6 Am. L. Reg. 42; *State* v. *Rives*, 5 Ire. 297; *Arthur* v. *Comm. & R. R. Bank*, 9 Sm. & M. 429.

The differing views in these cases make it difficult to say that there is any settled rule at common law, and throw us back on principle; and, so considered, it seems hard to escape the conclusion, that as, after all, a corporation is merely placed on a level with individuals, it cannot hold its property exempt from the payment of its debts. But, of course, a purchaser would take, not the corporate franchise, but the estate of the corporation in the land, and would take that estate of course as the corporation held it. Holding it in this case on the condition of allowing the public to use the canal on payment of certain fixed tolls, the same user on the terms would continue to exist after the sale as before.

1825, ch. 180, § 12.

Perhaps, however, the true view in which to regard this case is, to look at it as controlled by the law of Maryland and the analogies of that law. The element, which elsewhere seems to settle that a public improvement cannot be sold on execution, is its inalienability. If the legislature will allow a voluntary assignment, the presumption of a prohibition against involuntary alienation falls to the ground. Act of Maryland of 1835, ch. 356, § 5, authorized the company to raise money by a loan, and the court of appeals of that state in *Susq. Bridge & Banking Co.* v. *Gen. Ins. Co.* 3 Md. 311, decided it to be the law of Maryland, that the power in a corporation to borrow, carried with it the power to mortgage. But a power to mortgage necessarily involves a sale as a possible result; and if, therefore, in the present instance, the general assembly of Maryland have authorized the company to part with its land and canal, it cannot

be said that any public policy forbids a sale on execution.

Mr. **George W. Dobbin,** for appellee:

The property levied upon is not properly the subject of a levy and sale under a fieri facias.

The levy was made on the locks of the canal, its toll-house or collector's office, and the lands surrounding the outlet locks, necessary to the uses and working of the canal. It must, therefore, be something other than the canal itself, and it is obviously intended to apply to that part of the thing levied upon which is not visibly a part of the canal; that is, the land which the marshal in his levy calls wharf property and building lots, etc., all of which are admitted to be necessary for the uses and workings of the Tide Water Canal.

The appellee will contend that it possesses only an easement acquired for the purposes of its incorporation, connected with the franchise of taking toll from the public for the use of that easement, and that the said easement and franchise are not subject to levy and sale under a fieri facias;

Ammant v. *New Alexandria and Pittsburg Turnpike Co.* 13 Serg. & R. 210; *Leedom* v. *Plymouth R. Co.* 5 Watts & S. 265; *Susquehannah Can. Co.* v. *Bonham,* 9 Watts & S. 27; *Seymour* v. *Milford & Chil. T. R. Co.* 10 Ohio 476; *Winchester and Lex. Turn. Co.* v. *Vimont,* 5 B. Mon. 1; *Coe* v. *Hart,* 6 Am. L. Reg. 41, 42; *Ludlow* v. *Hurd,* 6 Am. L. Reg. 502; *Tippets* v. *Walker,* 4 Mass. 596; *Macon R. Co.* v. *Parker,* 9 Ga. 377;

That even if a portion of the property levied upon is liable to sale, the levy having blended it with that which is not liable, is void for the whole.

Ammant v. *New Alexandria and Pittsburg Turnpike Co.* 13 Serg. & R. 210.

Mr. Chief Justice **Taney delivered the opinion of the court:**

It appears from the record in this case that a judgment was obtained by Robert Gue, the appellant, against the Tide Water Canal Company, in the circuit court of the United States for the district of Maryland, upon which he issued a fieri facias, and the marshal seized and advertised for sale a house and lot, sundry canal locks, a wharf, and sundry other lots; all of which property, it is admitted, belonged to the canal company in fee.

The canal company thereupon filed their bill in the circuit court, praying an injunction to prohibit the sale of this property under the fieri facias. The injunction was granted, and afterwards, on final hearing, made perpetual. And from this decree the present appeal was taken.

The Tide Water Canal is a public improvement situated in the state of Maryland, and constructed and owned by a joint stock company chartered by the state of Maryland for that purpose. The canal extends from Havre de Grace, in Maryland, to the Pennsylvania line; and it is admitted that the property levied on is necessary for the uses and working of the canal.

Upon the matters alleged in the bill and answer, several questions of much interest and importance have been raised by the respective parties and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, because, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would be against equity and unjust to the other creditors of the corporation, and to the corporators who own the stock, to suffer the property levied on to be sold under this fi. fa. and, consequently, the circuit court was right in granting the injunction.

*The Tide Water Canal is a great [*263 thoroughfare of trade, through which a large portion of the products of the vast region of country bordering on the Susquehanna river usually passes, in order to reach tide water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of assembly which created the corporation. The property seized by the marshal is, of itself, of scarcely any value apart from the franchise of taking toll, with which it is connected, in the hands of the company, and if sold under this fieri facias without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a fieri facias. If it can be done in any of the states, it must be under a statutory provision of the state; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties show it was not seized, and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks, and lots adjoining them.

The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise, property which was essential to its useful existence.

*In this view of the subject, the court [*264 does not deem it proper to express any opinion as to the right to this creditor, in some other form of judicial proceeding, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt. Nor do we mean to express any opinion as to the validity or operation of the deeds of trust and acts of assembly of the state of Maryland, referred to in the proceedings. If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corpora-

tion disposed of to the best advantage, for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object; *and the Circuit Court was right in granting the injunction, and its decree is, therefore, affirmed.*

THE LESSEE OF ISAIAH FROST *et al., Plffs. in Err.,*
v.
THE FROSTBURG COAL COMPANY.

(See S. C. 24 How. 278–284.)

Powers of corporation—person dealing with, cannot set up irregularities in organization.

The defendants were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate.

If some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted, or its nonperformance shown, a party dealing with the company is not permitted to set up the irregularity.

The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it.

Argued Jan. 11, 1861. Decided Jan. 21, 1861.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action of ejectment brought in the court below, by the plaintiffs in error, against the present defendant in error.

The trial resulted in a verdict for the defendant, and the plaintiff brought the case to this court by writ of error.

The case further appears in the opinion of the court.

Messrs. **Benjamin Howard Shackelford, Henry Winter Davis,** and **J. R. Partridge,** for plaintiffs in error:

The plaintiffs in error will insist:

1. That the act of assembly of Feb. 24, 1845, did not create the Frostburg Coal Company a body corporate.

2. The proceeding of the parties named in that act have not sufficed in law to constitute them a body corporate under the law of Maryland.

3. That there was, therefore, no corporate body in law competent to take by the name of the Frostburg Coal Company on the 13th March, 1845, nor at any time thereafter during the life of Isaiah Frost, the ancestor of plaintiff, and therefore.

4. That the instrument in writing relied on by the defendants for their title, purporting to be a deed from said Isaiah Frost to the Frostburg Coal Company, dated 13th March, 1845, was never operative as a deed, but was void for want of a grantee competent to take.

5. That neither the said Isaiah Frost nor the plaintiffs, are or can be estopped by said deed, or by any act mentioned in the record from claiming the lands in controversy.

The existence of the company was not proved by the subscription and distribution of stock and organization in pursuance of the law. Several things are here required to be done.

1. The capital stock of 5,000 shares at $100 each must all be taken.

2. The lands and minerals of Messrs. Frost and McKaig were to be subscribed.

3. Other persons were to be associated with them by subscriptions of stock payable in money.

4. It requires more than five stockholders to organize.

5. The stock must not be subscribed for or distributed in illegal proportions.

It is a well-settled principle of the law of corporations that organization must be in pursuance of the charter.

A charter is a voluntary grant from the legislature, imposing no obligation unless accepted, and leaving it discretionary with the individuals interested to organize or not. As a condition precedent to the existence of a corporation, it must organize in pursuance of the terms of its charter.

An incorporated company is precisely such as the incorporation act makes it, derives its power from that act, is capable of exercising them only in the manner authorized by it.

2 Cranch, 126; 24 Barb. 514; 2 McLean, 202.

Conditions precedent must be fairly complied with.

Redf. Rail. 7, 8; Ang. & Ames, Corp. § 87.

Where a given amount of capital stock is required to be used or paid in before the corporation goes into operation, this is to be regarded as an indispensable condition precedent.

Redf. Rail. 8, 10, 80; 39 Me. 571; 10 Wend. 266; 39 Me. 571, 587.

From the nature of things, the artificial person must be created before it can be capable of taking anything.

When the corporation is to be brought into existence by some future acts of the corporators, the franchises remain in abeyance until such acts are done.

4 Wheat. 518.

The counsel then reviewed the evidence, and endeavored to show that the corporators in this case had not perfected an organization in accordance with the charter and the general law.

Messrs. **George A. Pearre** and **William Price,** for defendant in error:

There was a corporate body, the Frostburg Coal Company, in existence on the 13th of March, 1845, capable of taking this land by deed. This corporation is complete as a corporate body by the terms of the charter itself, as soon as accepted by the corporators.

Ang. & Ames, Corp. 475, 476, §§ 2, 3; 16 Mass. 94; *Vermont Cen. R. Co.* v. *Clayes,* 21 Vt. 30.

There is nothing in the charter which prevents the corporation from having an existence until any given amount of stock is subscribed, either in land or money, and in the absence of such a restriction, may go into operation before the whole or any given quantity of the capital stock is subscribed.

Ang. & Ames, Corp. 111, 112, ch. 5, § 1; 1 Pet. 46.

Even if the act of 1838, ch. 267, applies, and any of the causes of forfeiture declared by the 15th section of that act have occurred, yet these are causes for which the state herself, through

NOTE.—*Estoppel to deny character or powers of foreign corporation*—see note to 24 L. R. A. 297.

her judicial tribunals, may declare the charter forfeited. The company was not notified by an action of ejectment at the suit of private persons, to be prepared to show it has not violated its charter. Until the state forfeits the charter, the franchise continues.

1 Md. 553; 10 Gill & J. 346; 9 Gill, 404; 4 Gill & J. 1; 5 Mass. 230; Ang. & Ames, Corp. 746.

To prove the existence of a corporation, it is only necessary to prove the charter and user under it.

Ang. & Ames, 572, ch. 18, § 2; see, also, 10 Wend. 276; 2 Gill & J. 478.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Maryland. **279*]** *The action in the court below was an ejectment brought by the heirs of Isaiah Frost, to recover the possession of a tract of land situated in the county of Allegany, Maryland. The defense set up was a conveyance of the land by their ancestor to the defendants. The only question in the case is, whether or not the Frostburg Coal Company was capable of taking and holding real estate at the date of the deed, the 13th March, 1845.

The court charged the jury, if they found that Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, the parties named in the act of incorporation of 1845, accepted the charter, and proceeded to act as a corporate body under it, by the name of the Frostburg Coal Company, opened their coal mines, transported the coal to market, borrowed money on the credit of the company, and made large and costly improvements on the lands in controversy, during all which time Isaiah Frost, the ancestor, acted as one of the directors; and further found, that the said Frost executed and delivered to the company the deed of the 13th March, 1845, given in evidence, they must find a verdict for the defendants.

The act of incorporation, which was passed February 24, 1845, provided that Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, and such other persons as may be associated with them in the manner afterwards provided, shall be, and they are hereby incorporated and made a body politic and corporate, by the name of the Frostburg Coal Company, and by that name shall have succession, etc., conferring the usual corporate power for the manufacture of iron, and mining of coal, and for transporting the same to market; and among others, the power to purchase and hold all such property, real, personal, and mixed, as the company may require for the purposes aforesaid.

The 2d section provided, that the capital stock of the company should consist of five thousand shares of $100 each, for which the lands and mines of Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, on one part, and those who may associate with **280*]** them *and constitute the aforesaid subscription for stock, payable in money, on the other part.

The 3d section provided, that the subscriptions to the capital stock should be made at such places, and in such manner, as should be designated by the four persons above named, and that the shareholders of one or more shares of stock should be members of the corporation, and entitled to one vote for each share so held; and making the shares assignable and transferable, as may be provided in the by-laws of the company.

The 4th section provided, that the affairs of the company should be managed by a president and four directors, to be chosen by the stockholders, to serve one year, and till others shall be elected; and until the first election of directors shall be held, the said Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, shall have full power and authority to exercise all the corporate powers of the said company, etc.

The 5th section provided that a general meeting of the stockholders should be held as soon as the company is organized, and annually thereafter, on the first Monday of June in each year, for the election of directors, and to consult upon the business of the company.

On the 12th March, 1845, the associates met in pursuance of the authority given in the 3d section of the act, at which meeting the whole number of shares, constituting the capital stock, were subscribed, and the company proceeded to the election of the president and four directors, the number required by the charter for the ensuing year; and at the same time, directed that the secretary should procure deeds to the company for the lands, which should constitute part of the capital stock. And on the 21st of the month, the board met, and provided for the issuing of certificates of the capital stock to each stockholder.

It was in pursuance of the resolution of the 12th March, that the deed of Isaiah Frost, the ancestor of the lessors of the plaintiff, was executed. This deed contained some four hundred and sixty-four acres of land, which, together with several parcels conveyed by Mechack Frost, another of the stockholders, *dated on **[*281** the same day, and adjoining the former tract, embraced the coal mines of the company for the working of which it was incorporated.

The company immediately commenced preparations for opening the mines, and for transporting the coal to market, by constructing rail and tram roads leading into the mines, erecting buildings for the accommodation of the workmen, together with other necessary improvements, at an expense of some $15,000; also, a large amount of coal had been taken out of the mines, and sent to the market; all of which was done during the lifetime of Isaiah Frost, and while he was one of the most active and efficient directors, and all or nearly all of said fixtures and improvements had been made upon the parcel of land in question, and for which he had received stock. He was the largest stockholder but one in the company, and had dealt in the stock, by pledging it for money borrowed.

As we have already said, the main ground relied upon, on behalf of the heirs, to avoid the deed to the defendants, is the failure to organize under the charter, so as to constitute them a corporation capable of taking and holding real estate. It is supposed that there are some conditions precedent to the existence of the corporation which have not been performed, and that the act, of its own force, did not constitute them

a corporate body. But a slight reference to the charter will show that the position is a mistaken one. The 1st section declares, that the four persons, and such others as may be associated with them, shall be, and are hereby incorporated and made a body politic and corporate, by the name of the Frostburg Coal Company; and then confers upon it the usual powers belonging to a corporation, and among others, to purchase and hold real estate for the purposes of the company; and in the 4th section declares that, until the first election of directors shall be held, the four persons named shall have full power and authority to exercise all the corporate powers of the company. The charter took effect immediately on its acceptance by the persons named, and the subsequent steps, such as the subscription of the stock, procurement of 282*] the coal *lands, elections of the directors, of the president and secretary, passing by-laws, etc., were steps taken in perfecting the organization, and enabling it to use the powers and privileges conferred for the purposes for which they were granted.

It was supposed, in the argument, that the words, "and such other persons as may be associated," etc., in connection with the four persons named in the 1st section, imported that other persons must be associated with the four before the charter could take effect; but, if any doubt could be raised upon the language of the 1st section, the 4th removes it, as there the power and authority to exercise all the corporate powers of the company is expressly conferred upon the four persons, until the first election of directors. These corporate powers are not only conferred upon the four persons named, but are continued until their successors are appointed to take their places. The true meaning of the words referred to in the 1st section probably is, that a privilege was intended to be given to the company of uniting other associates with the four in the enterprise, if they so elected.

The same observation is also applicable to the 2d section, which declares that the capital stock shall consist of 5,000 shares of $100 each, of which the lands of the four persons named in the 1st section may be one part, and those who may associate with them, and constitute the corporation by subscription for stock, payable in money, the other. The charter does not provide that any given amount or portion of the stock shall be in land, or in money, and the true construction probably is, that the whole of it may have been payable in money.

The language of the section would seem to confer upon the four persons the privilege of paying their shares of stock by the conveyance of land, rather than imposing it upon them as an obligation. This is the construction of the charter under which the company has acted, as the subscription for the shares is a moneyed subscription. The land was purchased from two of the principal subscribers, by the company, at a valuation which was applicable to 283*] their subscriptions. They *would be liable to the company for the balance of their stock, as would the other subscribers for the whole amount of theirs.

The subscription of the stock was in form for a given number of shares; but as each share was fixed by the charter at $100, the amount each was liable for to the company was readily ascertained, and it is well settled that a subscription in this form is as obligatory as if it had been in money. 14 Wend. 20.

The 9th section of the charter provides that the corporation shall be subject to all the restrictions imposed by the general act of 1838, regulating incorporations for manufacturing and mining companies. The 15th section of this act provides that when over four fifths of the capital stock of the company to which the act applies shall become concentrated, by purchase or otherwise, in the hands of less than five persons, etc., all the corporate powers and privileges granted shall cease and determine. And it is insisted, that the stock of this company, at the time of its organization, was held in violation of this section of the general act. Although the 9th section of the charter subjected the company to the general act, yet the provision is to be construed as subject only, when not inconsistent with the express provisions of the charter; and in this view, the better opinion, we think, is that this four-fifths provision does not apply. But whether it does or not, it is unimportant to determine; for, conceding that it does, a private party cannot take advantage of the forfeiture. That is a question for the sovereign power, which may waive it, or enforce it, at its pleasure. 9 Wend. 382; 4 Den. 397.

Without pursuing the case further, the main ground upon which we intend to place the judgment of the court is, that the defendants were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate; and second, even if it were otherwise, and some irregularities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted, or its nonperformance shown, a party dealing with *the company is not permitted to set up [*284 the irregularity. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it. Angell & Ames, § 774, and cases referred to.

Judgment affirmed.

WILLIAM H. PHILLIPS, *Plff. in Err.*,

v.

GEORGE PAGE.

(See S. C. 24 How. 164-168.)

Patents, when claim is not new—notice of witnesses.

Where there is a defect both in the specification and in the claim for a patent, and the former does not distinguish the new parts from the old, and the latter, instead of claiming the old parts, should have excluded them, and claimed the new, by which the old were adapted to the new use, producing the new result; held, there is nothing new in this combination.

In defendant's notice of witnesses, notice of the time when the person possessed the knowledge of use of the invention is not required; the name of the person, and his residence, and the place where it has been used, are sufficient.

Submitted Dec. 17, 1860. Argued Jan. 28, 1861.

IN ERROR to the Circuit Court of the United States for the Northern District of New York.

This was an action brought by George Page against William H. Phillips in the court below, for an alleged infringement of certain letters patent granted to said Page, July 16, 1841, for a new and useful improvement in the circular saw-mill.

The trial resulted in a verdict and judgment for the plaintiff, and the defendant brought the case to this court by writ of error.

The case further appears in the opinion of the court.

Mr. **Charles M. Keller** for plaintiff in error.

Messrs. **Reverdy Johnson** and **John H. B. Latrobe** for the defendant in error.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the circuit court for the northern district of New York.

The suit was brought in the court below by Page, the defendant in error, to recover damages for the infringement of a patent for certain improvements in the construction of the portable circular saw-mill. After describing minutely the different parts, and manner of constructing the machine, with drawings annexed, and also the use and operation of the respective parts, the patentee sets forth the particular portion of the construction which he claims as his own, as follows:

"I claim the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it (the saw) by friction rollers, embracing it near its periphery, so as to leave its center entirely unchecked laterally. I do not claim the use of friction rollers, embracing and guiding the edge of a circular saw, as these have been previously used for that purpose; but I limit my claim to their use, in combination with a saw having free lateral play at its center."

Evidence was given on the part of the defendant, in the course of the trial, tending to prove that, long before the time of granting the plaintiff's patent, and before the date of his invention, machines for sawing shingles from short **166***] blocks of *timber, and sawing lath and blinds for windows, with circular saws, varying in size from ten to thirty inches in diameter, had been in public use; in which machines the circular saw was guided by means of guide pins, embracing it (the saw) near the periphery, and its shaft having end play, and being entirely unchecked laterally; but it did not appear that such machines had been used in a saw-mill for sawing timber, or in a mill, or a machine of a size or character adapted to the sawing of ordinary logs, or other large unsawed timbers.

When the evidence closed, the defendant's counsel prayed the court to charge the jury, that according to the true construction of the patent, the claim is for the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near its periphery, so as to leave its center entirely unchecked laterally.

But the court refused so to charge, and instructed the jury that the claim was limited to the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near its periphery, so as to leave its center unchecked laterally, in a saw-mill capable of being applied to the sawing of ordinary logs.

And in refusing another prayer, the court charged, that in order to defeat the plaintiff's patent by the use of prior machines of this construction, they must have been machines for the purposes of sawing in mills of a size and character adapted to the sawing of ordinary logs.

There can be no doubt but that the improvements of the patentee in the manner of constructing the portable circular saw-mill described in his specification were designed to adapt it to the sawing of logs in a saw-mill, and which could be carried from place to place, and put into operation by the use of horse power; and it may very well be, if he had set up in his claim the improvements or particular changes in the construction of the old machine, so as to enable him to adapt it to the new use, and one to which the old had not and could not have been applied without these changes, the patent might* have been sustained. The utility [*167 is not questioned, and, for aught there appears in the case, such improvements were before unknown, and the circular saw-mill for sawing logs, the first put in successful operation.

But no such claim is set up by the patentee; nor does he distinguish in the description of the parts of the machine, nor in any other way, the old from the new, or those parts which he has invented or added in its adaptation to the use of sawing logs, not before found in the old machine for sawing shingles, blinds for windows, and other light materials. On the contrary, his claim is for the precise organization of the old machine, namely: the manner of affixing and guiding the circular saw, by allowing end play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near to its periphery, so as to leave its center entirely unchecked laterally. There is nothing new in this combination. It had long been known and used in the circular saw for sawing timbers of smaller dimensions than an ordinary saw-log. Nor does the enlargement of the organization of the machine compared with the old one (the same being five feet in diameter, and the other parts corresponding) afford any ground, in the sense of the patent law, for a patent. This is done every day by the ordinary mechanic in making a working machine from the patent model.

The patentee in the present case must carry his improvements farther, in order to reach invention; he must contrive the means of adapting the enlarged old organization to the new use, namely: the sawing of saw-logs, and claim, not the old parts, but the new device, by which he has produced the new results.

The learned judge, by interpolating the new purpose of the improvement, namely: the sawing of logs, not only inserted what was not specified in the claim; but, if it had been, it would not have helped out the difficulty, as it was in effect, upon the construction given, simply applying an old organization to a new use, which is not a patentable subject.

The defect here is both in the specification

168*] and in the claim. *The former does not distinguish the new parts from the old, nor is there anything in the specification by which they can be distinguished; and the latter, instead of claiming the old parts, should have excluded them, and claimed the new by which the old were adapted to the new use, producing the new result.

We are also of opinion that the court below erred in rejecting the evidence of the witness as to the prior knowledge and use of the improvement of the patentee.

The 15th section of the patent law provides that when the defendant relies in his defense on the fact of a previous invention, knowledge, or use of the thing patented, he shall give notice of the names and places of residence of those whom he intends to prove possessed the prior knowledge, and where the same was used.

In this case the notice stated that Hiram Davis, who resides at Fitchburg, Massachusetts, had knowledge of the said improvement, and of the use thereof at that place, during the years 1836, 1837, 1838, etc, and that he resided there.

The court, on objection, refused to allow a witness to prove the use of the improvement, by Davis prior to the year 1836 at Fitchburg, holding that the notice limited it within that time.

Notice of the time when the person possessed the knowledge or use of the invention is not required by the act; the name of the person, and of his place of residence, and the place where it has been used, are sufficient.

The time, therefore, was not material; nor could it have misled the plaintiff, as he had the name and place of residence of the person, and also the place where the improvement had been used.

With this information of the nature and ground of the defense, the plaintiff was in possession of all the knowledge enabling him to make the necessary preparation to rebut, that the defendant possessed to sustain it.

Judgment reversed and venire.

WILLIAM A. HALL, *Plff. in Err.*,
v.
JOSEPH L. PAPIN.

(See S. C. 24 How. 132-147.)

Peoria lots—act of March 3, 1823—survey necessary to a title—only one claim could be made.

The act of 3d March, 1823, in regard to the village of Peoria, can only embrace lots in the new village or others appertaining to it.

The first section of the act gave to the claimant an incipient or inchoate right to a lot, when, in conformity with the second section of the act, a survey had been made of the several lots reported by the register, with a designation or a plat of the lot confirmed and set apart to each claimant.

When that had been done, the claimant became a confirmee under the act, and his right to the lot, as between himself and the United States, was complete.

The law was intended to grant the lot settled upon and improved, and no other land described as an equivalent.

No location of the lots could be made after a patent for them had been issued by the United States.

The inchoate right of the claimant under the act was subject to a survey and designation before it could be matured into a title.

Under the act the claimant was to have one confirmation of "a lot so settled and improved," which had been claimed and entered in the report of the register.

No claimant, though he made several claims, could, after having had one of them confirmed, transfer any right of property in the others to any persons whatever.

No one could be confirmed in more than ten acres of Peoria claims.

Argued Jan. 11, 1861. Decided Jan. 28, 1861.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment commenced in the court below, by the present defendant in error.

The first trial resulted in a judgment for the plaintiff. A new trial was ordered, and judgment again entered for the plaintiff.

The defendant below brought the case to this court by writ of error.

The case further appears in the opinion of the court.

Mr. **O. H. Browning** for plaintiff in error.

Messrs. **Walter Merriman** and **M. Blair** for the defendant.

Mr. Justice **Wayne** delivered the opinion of the court:

This is a suit for the recovery of ten acres of land, which is *admitted by the parties [*139 to be a part of the northwest quarter of section three, in township eight, north; of range eight, east, of the fourth principal meridian, in the district of lands subject to sale, formerly at Springfield, Illinois, and afterwards at Quincy.

Upon the trial below, the plaintiff gave in evidence: 1st, the act of Congress of May 15, 1820 (3 Stat. at L. 605), entitled, an Act for the Relief of the Inhabitants of the Village of Peoria, in the State of Illinois; 2d, the act of 3d March, 1823 (3 Stat. at L. 786); 3d, the report of Edward Coles, in the 3d vol. state papers, page 421; 4th, the special and general plat and field notes of the survey of the village, made May 11, 1837, approved September 1, 1841, and approved by the surveyor of public lands in Illinois and Missouri; 5th, the deed of lot 13 by Bartholomew Fortier and his wife, Angelica, to plaintiff, September 23, 1854; 6th, depositions showing that Angelica was the only representative of Francis Willette, and that, when she made her claim before J. W. Coles, she was the wife of Louis Pilette, and that she married Fortier in 1838.

The defendant below, here the plaintiff in error, introduced in evidence a patent from the United States to Seth and Josiah Fulton, dated March 18, 1837, a pre-emption certificate of the same, laid July 11, 1833, and a conveyance by the Fultons to him of the land covered by the patent dated the 11th July, 1838. The patentees, Seth and Josiah Fulton, had lived upon the quarter section for several years before their entry was made, and Hall, also, had occupied the quarter section for some years before the Fultons sold to him. Also, a patent from the United States to the representatives of Francis Willette, for a lot which had been claimed by them under the act of the 3d March, 1823, and sundry depositions, which it is not necessary for us to notice in this opinion.

The defendant in error, Joseph L. Papin, claims the ten acres sued for in virtue of his purchase from Bartholomew Fortier, and Angelica, his wife, she being the sole representative of her father, and had claimed the land under the act of Congress of the 15th May, 1820 (3 Stat. at L. 605), and that of the 3d March, 1823 (3 Stat. at L. 786).

140*] *The first of these acts declares that "every person, or the legal representatives of any person, who claims a lot or lots in the village of Peoria, in the state of Illinois, shall, on or before the first day of October next, deliver to the register of the land office for the district of Edwardsville, a notice in writing of his or her claim, and it shall be the duty of the register to make to the Secretary of the Treasury a report of all claims filed with him, with the substance of the evidence in support thereof; and also his opinion, and such remarks respecting the claim as he may think proper to make; which report, with a list of claims which, in the opinion of the register, ought to be confirmed, shall be laid by the Secretary of the Treasury before Congress for their determination." Under this act, claims were made by Louis Pilette in right of his wife, Angelica, the daughter of Francis Willette, and they appear in the register's report, dated the 10th November, 1820, entered as Nos. 11, 12 and 13. That report, however, was not finally acted upon by Congress until the 3d March, 1823. (3 Stat. at L. 786). The 1st section of that act declares: "There is hereby granted to each of the French and Canadian inhabitants, and other settlers of the village of Peoria, in the state of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of Congress approved May 15, 1820 (3 Stat. at L. 605), and who had settled a lot in the village aforesaid prior to the 1st day of January, 1813, and who have not heretofore received a confirmatory claim or donation of any tract of land or village lot from the United States, the lot so settled upon and improved, where the same shall not exceed two acres; and where the same shall exceed two acres, every such claimant shall be confirmed in a quantity not exceeding ten acres: Provided, nothing in this act contained shall be so construed as to affect the right, if any such there be, of any other person or persons to the said lots, or any part of them, derived from the United States, or any other source whatever, or be construed as a pledge on the part of the United States to make good any deficiency occasioned by any other interfering claim or claims." And it was made the duty of the surveyor of the public lands of the United States 141*] *for that district, to cause a survey to be made of the several lots, and to designate in a plat thereof the lots confirmed and set apart to each claimant, and forward the same to the Secretary of the Treasury, who shall cause patents to be issued in favor of such claimants, as in other cases.

The land sued for is described in the declaration as an out-lot or field of ten acres, near the old village of Peoria, in the state of Illinois, confirmed to Louis Pilette in right of his wife, Angelica, the daughter of the late Francis Willette, by the act of Congress of the 3d March, 1823 (3 Stat. at L. 786), entitled "An Act to Confirm Certain Lots in the Village of Peoria, it being Claim No. 13 of the Report made by the Register of the Land Office at Edwardsville, in Pursuance of an Act of Congress of the 15th May, 1820" (3 Stat. at L. 605). The lot is claimed in the report of the register as an out-lot or field, containing fifteen or twenty arpents of land, situated three-fourths of a mile northeastwardly (northwestwardly) from the village of Peoria. There can be no uncertainty whether the old or new village was meant, as the survey establishes it to have been near the old; and in our consideration of the act of the 3d March, 1823 (3 Stat. at L. 786), our conclusion is that that act can only embrace lots in the new village, or others appertaining to it.

The old village of Peoria was situated on the northwest shore of Lake Peoria, about one mile and a half above the lower extremity or outlet of the lake. The village had been established by Frenchmen at an early date, previous to the recollection of any one. About the years 1778, 1779, the first house was built on what was then called La Ville de Maillet, afterwards the new village of Peoria, and afterwards known by the name of Fort Clark. It was situated about one mile and a half below the old village, immediately at the lower front or outlet of the lake. This situation was preferred on account of the water being better and the place more healthy than at the old village. In consequence the inhabitants gradually deserted the old village, and before the years 1796, 1797, had entirely abandoned it, and removed to the new village.

The inhabitants were generally Indian traders, hunters, and voyagers. They formed a link of connection between the *French resid- [*142 ing on the waters of the great lakes and the Mississippi river. From that happy facility of adapting themselves to their situation and associates for which the French are so remarkable, the inhabitants of Peoria generally lived in harmony with their savage neighbors. But about the year 1781, an apprehension of Indian hostilities induced them to abandon the new village. They returned to it, however, after the peace of 1783, between England and the United States and the powers which had engaged in our Revolutionary War, and continued there until the autumn of the year 1812. Then they were forcibly removed from it and their village destroyed by a Captain Craig of the Illinois Militia, on the ground, it was said, that himself and his company had been fired upon in the night by Indians, while at anchor in their boats before the village, with whom Craig suspected the villagers to be on too intimate and friendly terms. Craig and his company were in the service of the United States. The inhabitants of Peoria settled there without any grant or permission from any government. Each person took such a portion of unoccupied land as he wished to occupy and cultivate; but as soon as he abandoned it, his right to the land ceased with his possession, and it reverted to its natural state. It was then liable to be improved and cultivated by any who thought proper to take possession. Sometimes a settler sold out his improvements before abandoning. That and the itinerant character of the inhabitants,

account for the number of persons who claimed the same lot. As was usual in French villages, the lots in the village were small. They were large enough for houses, outhouses, and gardens, and in some instances, those who were able to do so cultivated what were known as out-lots or fields near to, but outside or beyond, the village. Those out-fields were of different sizes, depending upon the industry and means of persons to till them. The village lots, as contradistinguished from out-lots, contained generally the half of an arpent. Neither the old nor new village had ever been surveyed or occupied upon any fixed plan. Seventy claims were made under the act of the 15th May, 1820 (3 Stat. at L. p. 605). They were returned on 143*] the report of the register *to the Secretary of the Treasury, on the 10th of November, 1826. In a little less than three years the act of 1823 (3 Stat. at L. 786) was passed. Coles's Report, Am. State Papers, 3 Land.

The narrative just given has an important bearing upon the construction of the acts of 1820 (3 Stat. at L. 605), and 1823 (3 Stat. at L. 786). It serves to show the locality of the village of Peoria, for which those acts were passed, the purposes to be accomplished, and the extent and conditions upon which a lot may be confirmed to a claimant who had settled and improved a lot in the village before the 1st day of January, 1813, and who had not before received a confirmation of claims, or donation of any tract of land or village lot from the United States, when the lot settled upon and improved did not exceed two acres; and when it did, to confirm to the claimant ten acres, subject to the proviso in the act.

It was a gratuity to such settlers of a single lot in the village. Such was the 1st section of the act of 3d March, 1823 (3 Stat. at L. 786). It gave to the claimant an incipient or inchoate right to a lot, when, in conformity with the 2d section of the act, a survey had been made of the several lots reported by the register, with a designation or a plat thereof of the lot confirmed and set apart to each claimant. When that had been done, the claimant became a confirmee under the act and his right to the lot, as between himself and the United States, was complete. Such was the view taken by this court of the acts of 15th May, 1820 (3 Stat. at L. 605), and of the 3d March, 1823 (3 Stat. at L. 786), in *Bryan* v. *Forsyth*, 19 How. 336. Its language then was, when the survey was made, and the plats returned and approved and recorded by the surveyor general of Illinois and Missouri, and recognized as valid at the General Land Office, it bound the parties to it, the confirmee and the United States.

The law was intended to grant the lot settled upon and improved, and no other land described as an equivalent. But, in this instance, no survey was made in conformity with the 2d section of the act until the 11th April, 1837. It was not examined and approved by the surveyor of the public lands in Illinois and Missouri until the 1st September, 1840, seven years after Seth and Josiah Fulton had made their entry upon the quarter section, and three years after they 144*] had received *their patent for it from the United States. The land was unconditionally sold to them. Hall, the plaintiff in error, bought from the Fultons in July, 1838. Under the decision of this court, already cited, no location of the out-lots could be made upon this quarter section after the patent had been issued to the Fultons. It follows, then, that there was no confirmation of the land sued for to the representative of Francis Willette; and consequently, that the quitclaim conveyance by Angelica Fortier and her husband, of the 23d September, 1854, to Papin, the defendant in error, gave to her no title to the ten acres for which he has sued. We have shown that the inchoate right of the claimant under the act—supposing that no out-lot was meant to be confirmed—was subject to a survey and designation before it could be matured into a title. The requirement of a survey before a claimant could be considered as having a legal title to land upon a concession, has frequently been passed upon by this court; and the case before us is within that of *Menard* v. *Massey*, in 8 How. 309.

It now remains for us to consider two of the instructions which were asked by the defendant in the court below, which the court refused to give to the jury.

They were: "If the jury believed from the evidence that the original French settlement or improvement, upon which the plaintiff's claim in this suit is based, was not upon or within the northwest quarter of section 3, in township 8 north, in range 8 east of the 4th meridian, nor located upon that quarter section by the United States Surveyor until after that was sold to the Fultons by the United States, that the jury were to find for the defendant.

The court did not give the first branch of the instructions asked, and in our opinion, rightly so; for there was no proof in the case to show that the French settlement, which was the basis of the suit, was not a part of it. Indeed, no such instruction would have been asked; for it was admitted by the parties that the tract sued for was a part of the quarter section described in the patent to the Fultons. But the court refused, also, the second branch of the prayer, which, in our opinion, *should have been [*145 given, and gave the jury an instruction as follows: He told the jury that the acts of Congress of 1820 and 1823, taken in connection with the report of the register of the land office and the survey under the authority of law, vested in the parties entitled, under the acts of Congress, with an absolute right of property in the lot surveyed; and that Angelica, the person named in the evidence, was the daughter and sole heir of her father, Francis Willette, the settler; that she was within the meaning of the law; and her claim being in the report, was confirmed by the acts of 1823.

And the jury was further instructed, that the survey of the claimed lots, as reported by the register, was duly made and approved, because the survey for the purposes of this action made the title of the claimants, under the acts of Congress, complete; and that the court was of the opinion that the persons taking under the patent of March 18th, 1837, and under the entry of July 11th, 1833, must be considered as taking their grant subject to the contingency of the better title which might thereafter be perfected under the acts of 1820 and 1823; and when a party brought himself within those acts, his

title was the paramount title, notwithstanding the patent to the Fultons.

The defendant, in our view, had asked for such an instruction as he had a right to have under the authorities cited in a previous part of this opinion. The instruction given to the jury was erroneous.

The defendant had also asked in his second prayer, that the court would instruct the jury, if they believed from the evidence that by the plaintiff's recovering in this case the legal representatives of Willette would be confirmed in more than ten acres of Peoria French claims, that they were to find for the defendant. The prayer is inartificially drawn; but when taken in connection with the evidence in the case and the act of 1823, its purport could not have been misunderstood. The object of the defendant was to get an instruction from the court, upon the evidence he had given, in conformity with the limitation in the act, as to the quantity of land which could be confirmed to a claimant under it. It declares when the lot shall not exceed two acres, that it shall be confirmed; **146*]** and *when the same shall exceed two acres, that every such claimant shall be confirmed in a quantity not exceeding ten acres.

Pilette, the husband of Angelica, had filed in her behalf, in the year 1820, before the register, claims for lots eleven, twelve, and thirteen. The first, being the land numbered as number eleven, contained about one half of an arpent of land; number twelve the same quantity, situated directly in the rear of eleven, and separated from it by a street; number thirteen was a claim for an out-lot or field, containing fifteen or twenty acres of land, and situated about three fourths of a mile northeastwardly (northwestwardly) from the village of Peoria; number eleven was also claimed before the register by Felix Fontain, his claim being in the report No. 41; but it turned out, according to the survey, that both were for the same land, and that they covered the southwest part of Etienne Barnard's claim number 1, the northeast part of it being also covered by another claim of Felix Fontain, numbered in the survey as 42. For land so described, containing fifty four thousand eight hundred and ninety and fourteen hundredths of a square foot, designated as covered by the claim one, eleven, forty-one, and forty-two, a patent was issued by the United States to the representatives of Francis Willette, on the 28th August, 1845. That patent was introduced in evidence by the defendant below, the plaintiff in error. The purpose was to show that the heirs of Willette having already had one confirmation of "a lot settled and improved," under the act of 3d March, 1823 (3 Stat. at L. 786), that they were not entitled to another, or to any confirmation of the title to the land in litigation. If that were allowed, they would get more than the ten acres, to which every claimant was limited by the act. Our construction of the act is that a claimant was to have one confirmation of "a lot so settled and improved," which had been claimed and entered in the report of the register of the land office at Edwardsville, in pursuance of the act of the 15th May, 1820 (3 Stat. at L. 605); that no claimant, though he shall appear in the register's report as having made several claims, could, after having one of them confirmed, transfer any right of property in the others to any persons whatever.

*Papin, the plaintiff below, took from the [*147 representatives of Willette a quitclaim conveyance for the land for which he sues on the 23d September, 1854—more than thirty years after the passage of the act of the 3d March, 1823 (3 Stat. at L. 786); more than twenty years after the Fultons had made their entry upon the quarter section—eighteen years after they received their patent for it from the United States—seventeen after Hall had the land in possession by purchase from the Fultons, and ten years after the patent of confirmation to the representatives of Willette had been recorded in the General Land Office. Under these circumstances, Papin took a conveyance, which gave him no right to the land. When the plaintiff in error, Hall, asked the court to instruct the jury, that if they believed from the evidence that, by the plaintiff's recovery in this case, the legal representatives of Francis Willette will have been confirmed in more than ten acres of Peoria French claims, they were to find for the defendant, the prayer ought to have been apprehended by the court, according to its relation to the subject-matter in controversy, and such an instruction should have been given, accordingly, to the jury. The refusal, then, was error.

For the reasons given, we shall direct the judgment of the court below to be reversed; that a venire facias de novo shall be issued; and that the court, in its further proceedings in the cause thereon, conform to the rulings of this opinion.

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*JOHN C. ALMY, JR., *Plff. in Err.*, [*169

v.

THE PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C. 24 How. 169–175.)

State law, imposing duty on export of gold and silver, is unconstitutional.

Law of California, imposing a stamp tax on bills of lading for the transportation from any place in that state to any place without the state, of gold or silver coin, gold dust, or gold or silver in bars, or other form, is repugnant to the Constitution of the United States, which declares that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The state tax in question is a duty upon the export of gold and silver, and consequently repugnant to said clause in the Constitution.

Argued Jan. 17, 1861. Decided Jan. 28, 1861.

IN ERROR to the Court of Sessions for the City and County of San Francisco, in the State of California.

John C. Almy, the plaintiff in error, was indicted under a law of the state of California, and convicted of misdemeanor in the court of sessions of the city and county of San Francisco.

The court of sessions being the highest court of California in which a decision could be had in this case, the question on the constitutionality of the statute, decided by that court, is brought before this court by writ of error.

The case further appears in the opinion of the court.

Mr. **Montgomery Blair,** for plaintiff in error:

A bill of lading (as found by the jury) being invariably required for every shipment, and being from its nature and object indispensable, the question presented by the case, as to the right of a state to tax such instruments when used in commerce among the states, resolved itself into the question of the right of the states to tax such commerce. Against such right the principles settled by this court in the cases of *McCulloch* v. *Maryland*, 4 Wheat. 431; *Brown* v. *Maryland*, 12 Wheat. 419; *Gibbons* v. *Ogden*, 9 Wheat. 186; *Weston* v. *Charleston*, 2 Pet. 447; the *Passenger Cases*, 7 How. 283, and others, are conclusive.

The provision of the Constitution, giving to Congress the power to regulate commerce among the several states, is a part of the same sentence giving to Congress the power over foreign commerce. The power being conferred by the same language is equally extensive, and accordingly the court added, in ruling *Brown's Case*, that "the principles laid down in this case apply equally to importations from a sister state."

See, also, 2 Story, § 1062.

It is not essential to the argument, that the power claimed is capable of being exercised so as to destroy this commerce. It is sufficient if power is exercised over a matter relating to exterior commerce, and which, from its nature, ought to be regulated exclusively by the general government.

The law in question is also in violation of the provisions of the Constitution prohibiting the states from taxing exports; and the reasoning of the court in *Brown's Case* is equally applicable to this branch of the case.

There is even less room for controversy here, as to the application of the prohibition, than in that case. Every export is taxed by an impost on the paper which represents it, and which is indispensable.

Mr. **J. P. Benjamin,** for defendant in error:

That a state has the power to levy taxes on everything within its own jurisdiction, unless prohibited from so doing by the Constitution of the United States, must, of course, be conceded.

10th Amendment to Constitution.

1. Levying a stamp tax is not "regulating commerce."

If the state had forbidden merchandise to be exported except when accompanied by a bill of lading, this would be a regulation of commerce. But the state has assumed no such power, and has in no just sense undertaken to regulate commerce.

It is now the settled doctrine of the court, that this power of regulating commerce is not exclusive, but may be exercised by the state concurrently with the general government, whenever their action does not conflict with that of Congress; and Congress has not acted on the subject under discussion.

License Cases, 5 How. 504; *Passenger Cases*, 7 How. 283; *Cooley* v. *Wardens of Phil.* 12 How. 299.

2. Is a stamp tax on a bill of lading a duty on exports?

It is said to be an indirect tax on exports, because the jury have found that it was the usual and invariable custom to make and issue such bills of lading, etc., and "no vessel or steamer could practically fill up with or obtain freight," unless the master executes one.

It is submitted that the argument proves quite too much and, if once admitted, would inaugurate a most dangerous system of construction, under which all right of taxation might be taken away from a state, thus leaving it shorn of powers which were never intended to be abandoned, and which are absolutely indispensable to its existence.

Drays and carts are necessary for loading merchandise on board ships. Cannot a state tax drays and carts?

In Mobile harbor and many others, large vessels cannot load at all without the aid of lighters. Is the state of Alabama without power to tax lighters?

No man is, by the law in question, forbidden to ship his gold dust. He may accompany it. He may send an agent to take care of it; he may make a valid parol contract for its delivery abroad, and take twenty witnesses in order to retain the evidence of his contract; but if he wishes to reduce it to writing within the state, he must put his writing on a paper on which the state of California has levied a stamp tax.

It is worthy of notice that in the draft of the Constitution offered in Convention by Mr. Patterson, of New Jersey, there was an express authority in Congress to raise revenue "by stamp on paper, vellum or parchment."

1 Elliott's Debates, 175.

Yet, notwithstanding the fact that the attention of the Convention was thus specially directed to this precise tax, no attempt was made to inhibit its exercise by the states.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The only question in this case is upon the constitutionality of a law of California, imposing a stamp tax upon bills of lading.

By an act passed by the legislature of that state to provide a revenue for the support of the government from a stamp tax on certain instruments of writing, among other instruments mentioned in the law, a stamp tax was imposed on bills of lading for the transportation from any point or place in that state, to any point or place without the state, of gold or silver coin, in whole or in part, gold dust, or gold or silver, in bars or other form; and the law requires that there shall be attached to the bill of lading, or stamped thereon, a stamp or stamps, expressing in value the amount of such tax or duty.

By a previous law upon the same subject, it was made a misdemeanor, punishable by fine, to use any paper without a stamp, where the law required stamped paper to be used.

After the passage of these acts, Almy, the plaintiff in error, being the master of the ship Ratler, then lying in the port of San Francisco, and bound to New York, received a quantity of gold dust for transportation to New York, for which he signed a bill of lading upon unstamped paper, and without having any stamp attached to it. For this disobedience to the law of California he was indicted in the court of sessions

for a misdemeanor, and at the trial the jury found a special verdict setting out particularly the facts, of which the above is a brief summary, and upon the return of the verdict the counsel for the defendant moved for a judgment 173*] of acquittal, *upon the ground that the law of California was repugnant to the Constitution of the United States. But the court decided that the state law was not repugnant to the Constitution of the United States, and adjudged that Almy should pay a fine of $100 for this offense. And the court of sessions being the highest court of the state which had jurisdiction of the matter in controversy, this writ of error is brought to revise that judgment.

We think this case cannot be distinguished from that of *Brown* v. *Maryland*, 12 Wheat. 419. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question.

The case was this: The state of Maryland, in order to raise a revenue for state purposes, among other things required all importers of certain foreign articles and commodities enumerated in the law, or other persons selling the same by wholesale before they were authorized to sell, to take out a license, for which they should pay $50; and in case of refusal or neglect, should forfeit the amount of the license tax, and pay a fine of $100, to be recovered by indictment.

Brown, who was an importing merchant, residing in Baltimore, refused to pay the tax, and was thereupon indicted in the state court, which sustained the validity of the state law, and imposed the penalty therein prescribed. This judgment was removed to this court by writ of error, and it will be seen by the report of the case that it was elaborately argued on both sides, and the opinion of the court, delivered by Chief Justice Marshall, shows that it was carefully and fully considered by the court. And the court decided that this state law was a tax on imports, and that the mode of imposing it, by giving it the form of a tax on the occupation of importer, merely varied the form in which the tax was imposed, without varying the substance.

So in the case before us. If the tax was laid on the gold or silver exported, everyone would see that it was repugnant to the Constitution of the United States, which, in express terms, declares that "no state shall, without the consent 174*] of Congress, *lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property into the hands of a shipmaster without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the state, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States.

In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any *other cargo is in the same form, and ex- [*175 ecuted in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other.

In the judgment of this court the state tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the Constitution hereinbefore referred to; *and the judgment of the Court of Sessions must, therefore, be reversed.*

SUSAN VIGEL, *Plff. in Err.*,
v.
HENRY NAYLOR, Administrator of George Naylor, Deceased,

(See S. C. 24 How. 208-214.)

Verdicts and judgments—when evidence on question of freedom of slaves.

In a petition for a freedom by a slave under a will by which all testator's slaves over thirty-five years of age were emancipated; and all those under that age were to be emancipated, the males at thirty-five, and the females at thirty years of age, records of verdicts and judgments establishing that petitioner's mother and sister were the slaves of testator at his death, and acquired their freedom under his will, are proper evidence.

A presumption could have been founded on this proof by the jury, that the infant child of the same family was the slave of testator also.

The records of the judgments were not *inter alios acta* and, therefore, incompetent.

The evidence offered had weight enough in it to be pertinent and ought, therefore, to have been submitted to the jury.

Argued Jan. 11, 1861. Decided Jan. 28, 1861.

IN ERROR to the Circuit Court of the United States for the District of Columbia.

This was a petition for freedom filed in the court below by the present plaintiff in error.

The jury found that the petitioner was not free, and judgment was rendered accordingly. The petitioner brought the case to this court by writ of error. The questions raised related to the rejection, by the court below, of evidence offered by the petitioner and are fully stated in the opinion.

Mr. **M. Blair** for plaintiff in error.

Mr. **J. H. Bradley** and *Messrs.* **Badger & Carlisle** for defendant in error.

Mr. Justice **Catron** delivered the opinion of the court:

Susan Vigel sued Henry Naylor, administrator of George Naylor, by a petition for freedom in the circuit court of this district. He pleaded that she was his slave. On the trial of this issue, she offered in evidence the will of John B. Kirby, by which all his slaves over thirty-five years of age were emancipated; and all those under that age were to be emancipated —the males at thirty-five, and the females at thirty years of age. This was allowed by an act of the legislature of Maryland of 1796, ch. 67, § 13.

A witness testified on the petitioner's behalf "that, a few days after the death of Kirby, which took place in 1828, George Naylor brought to his house, where witness was then at work, the petitioner, her mother, and her sister; and said George Naylor stated to the witnesses at the time, that he had brought said negroes from the residence of said Kirby; and that the petitioner was then between six and eight years of age."

The petitioner then offered to prove that her brother Richard, and her mother Sarah, and her **210*]** sister Eliza, had obtained *their freedom under the will of Kirby; that Sarah, the mother, and Eliza, had recovered their freedom by suits brought against George Naylor, which were defended by him. In the one instituted by Sarah, judgment was rendered in 1838; and that brought by Eliza was decided in her favor in 1842. The petitioner also offered to prove that it is very unusual for children of the age of the petitioner at the time of Kirby's death to be separated from their parents; but the court excluded the testimony offered, from the jury; to which exception was taken.

The defendant then proved by two witnesses that they had known the petitioner from her birth, and that she was born on the property of George Naylor; and that she never was out of his possession, or that of his successor and administrator. It is objected that no records of the verdicts and judgments were offered to prove the recoveries. The bill of exceptions states, generally, that she offered to prove the facts, but the court refused to hear the evidence.

Transcripts of the records being the best evidence, and their production necessary, it is manifest that the offer to prove the recoveries was not refused for the reason that the record evidence was absent, but because the recoveries were deemed irrelevant, or that they were *inter alios acta* and, therefore incompetent as proof in the cause for any purpose. And the first question is, Was the evidence offered relevant, when taken in connection with the parol evidence?

The girl was six or eight years old, when George Naylor brought her home in 1828, with her mother and sister, from the late residence of Kirby, the testator. It was offered to be proved, and we must take it to be true, that it could have been proved that it was unusual to separate the mother from a slave child as young as the petitioner was at the time Kirby's will took effect.

If Sarah, the mother, Richard, the brother, and Eliza, the sister, were the slaves of Kirby at his death, and acquired their freedom under his will, does this circumstance furnish evidence from which a jury might infer, in connection with other evidence, that the petitioner was also the slave of Kirby when *he died, and [***211** entitled to her freedom on arriving at thirty years of age? It is immaterial whether the evidence offered and rejected was weak or strong to prove the fact. The question is, Was it competent to go to the jury? *Castle* v. *Bullard*, 23 How. 187. If so, it was for them to judge of its force and effect. If this child had been only one year old or under when Naylor got possession of her and of her mother, and other children in company with her, the presumption would be stronger, that her condition and that of her mother was the same, and both the slaves of Kirby, and were manumitted by his will.

By the rejection of the evidence the case was stripped of all proof that Susan, the petitioner, ever belonged to Kirby, the testator; whereas, had it been admitted, it would have proved that Susan's mother, and her other children, belonged to the estate of Kirby after his death, and were emancipated by his will; and having emancipated all his slaves, a presumption could have been founded on this proof by the jury, that an infant child of the same family was the slave of Kirby also, especially as Naylor brought the slaves as a family from Kirby's late residence.

2. Was the record of the judgment *inter alios acta* and, therefore, incompetent?

In the case of *Davis* v. *Wood*, 1 Wheat. 6, it was held by this court that a judgment in favor of the mother establishing her freedom against Swan, a third person, could not be given in evidence in a suit by the child of that mother as tending to prove his freedom. On the trial below, the petitioner offered to prove by witnesses that they had heard old persons, now dead, declare that a certain Mary Davis, now also dead, was a white woman, born in England, and such was the general report in the neighborhood where she lived; and further offered to prove by the same kind of testimony, that Susan Davis, the mother of the petitioner, was lineally descended in the female line from the said Mary; which evidence, by hearsay and general reputation, the court refused to admit, except so far as it was applicable to the fact of the petitioner's pedigree. And the ruling below, this court affirmed.

*There is no question arising in the [***212** cause before us involving the consideration to what extent hearsay evidence to prove the status of freedom is admissible and, therefore, we refrain from discussing the first point decided in *Davis* v. *Wood*, 1 Wheat. 6. In that case, Susan, the mother of John, was sold by Wood, the defendant, to Caleb Swan; and she and her daughter Ary, who had likewise been sold, sued

Swan for their freedom, and recovered it. This record of recovery was offered in evidence on behalf of John, but was rejected on the trial.

This court held that "as to the second exception, the record was not between the same parties. The rule is, that verdicts are evidence between parties and privies. The court does not feel inclined to enlarge the exceptions to this general rule and, therefore, the judgment of the court below is affirmed."

This is the judgment with which we have to deal. The difference in the case under consideration and the one found in 1 Wheat., is, that here Susan's mother and sister recovered their freedom from Naylor, he being the defendant in both actions. There the mother and daughter recovered their freedom from Swan, who had purchased them of Wood.

This court having cut off all evidence by hearsay and general reputation—1st, that the female ancestor of the petitioners was a white English woman, and free; and 2d, that the record of the recovery of freedom by John's mother and sister from Swan was incompetent—of course the petitioner had to go out of court, having proved no case.

There the verdict was not between the same parties. Here the suit was between George Naylor and the mother of Susan; as between the mother and Naylor, the verdict was conclusive of her right to freedom; and Susan, the child, was a privy in blood to the mother, (being her heir, if free), and, as such heir, comes within the rule laid down in *Davis* v. *Wood*, and could avail herself of that verdict as equally conclusive, if she could further prove that she was born after the impetration of the mother's writ. *Alexander* v. *Stokely*, 7 Serg. & R. 300; *Pegram* v. *Isabell*, 2 Hen. & M. 193; *Chancellor* v. *Milton*, 1 B. Mon. 25. Or, if she could prove that she was born after Kirby's death, and that her mother recovered her freedom 213*] *under his will—and which facts might have been established by further proof—these circumstances could be let in as additional evidence. 2 Hen. & M. 211.

Owing to the lapse of time since Mr. Kirby died, the petitioner sought to establish her case by circumstantial evidence. It was rejected; for what particular reason, does not appear.

As already stated, we think the evidence offered had weight enough in it to be pertinent, and ought, therefore, to have been submitted to the jury. 23 How. 187.

How it was proposed to be proved that Richard was a free man, and acquired his freedom under the will, does not appear; but as to Eliza, the sister, a record of recovery by her of her freedom against Naylor was offered as evidence and rejected. The record could have proved the existence of the verdict and judgment as a fact, and the legal consequences flowing from the fact, namely: that the petitioner, Eliza, was a free person. As to George Naylor and his representative, her status of freedom is a conclusive fact. And what is the effect of the record as respects other persons? Eliza sued George Naylor, declaring that she was free. He replied that she was his slave. She had a verdict that she was free. By the verdict and judgment she took to herself all Naylor's title; it was vested in her as Naylor had it. *Harris* v. *Clarissa*, 6 Yerg. 243. He had had her in possession twelve years, and had title by the act of limitations of six years, as to other contestants who might set up claim to her as a slave. She can rely on his title as if he had manumitted her; the record has this effect. It stands on the footing that a recorded deed of manumission to her from Naylor would stand, or that a recorded bill of sale from him to a purchaser would stand. In either case, the title paper could be given in evidence to prove the title; and the title thus acquired must be deemed valid until some one else legally establishes a better. This record evidence may be used in any suit by a third person, where the evidence is pertinent, of which the court must judge from facts and circumstances appearing on the trial; and to this effect are the adjudications of the state courts generally. *Pegram* v. *Isabell*, in Virginia, 2 Hen. & M. 210; *Alexander* v. *Stokeley*, 7 Serg. *& R. 290, in Pennsylvania; [*214 *Vaughan* v. *Phebe*, Mart. & Y. 6, in Tennessee; *Chancellor* v. *Milton*, 1 B. Mon. 25, in Kentucky. In Maryland, no decision is found on the subject.

In the next place, the record operates on the status of the person; it sets him free or pronounces him a slave, and binds him by the verdict either way. *Shelton* v. *Barbour*, 2 Wash. (Va.) 82.

In some of the states, the suit may be in equity, and the status of freedom be established by a decree. *Fisher's Negroes* v. *Dabbs*, 6 Yerg. 119; *Reuben* v. *Parrish*, 6 Humph. 122.

It is ordered that the judgment of the Circuit Court be reversed, and the cause remanded for another trial.

WILLIAM THOMPSON and John Pickell, *Plffs. in Err.*,

v.

LEWIS ROBERTS, Gideon R. Burbank, and Addison Roberts.

(See S. C. 24 How. 238-242.)

Res judicata—where parties were not same in both suits—favorable error, no ground of reversal—formal parties.

The judgment of a court of law, or a decree of a court of equity, directly upon the same point, and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit.

An error, one favorable to the plaintiffs in error, is not ground of reversal.

An objection that the parties were not the same in both suits cannot be sustained, where both the parties were parties in the former suit; and the subject-matter was the same, and the defense here set up was the same, which the pleadings and the evidence show to have been adjudicated in the former suit.

A question as between the parties is *res judicata*, and none the less binding because others are concluded also, where the first issue was in chancery, and other parties collaterally interested were made parties, that it might be final, and not because they were legal parties to the original contract on which the litigation is founded.

NOTE.—*Conclusiveness of judgments*—see notes to 11 L. ed. U. S. 75; 38 L. ed. U. S. 429; 42 L. ed. U. S. 355.

Judgments of state courts, effect of in other states, and how far conclusive in Federal courts—see note to 13 L. ed. U. S. 648.

Argued Jan. 17, 1861. Decided Jan. 28, 1861.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

The action was based upon two promissory notes made by the plaintiffs in error in favor of William H. Smith, and indorsed by him to the defendants in error, under the circumstances stated in the opinion of the court.

The present action was commenced in the court below in November, 1858, and resulted in a verdict and judgment for the complainants, the present defendants in error. The defendants below tendered their bill of exceptions and brought the case to this court.

Messrs. **Charles F. Mayer** and **Washington Yellott**, for plaintiffs in error:

As to the instruction given to the jury by the court below, the plaintiffs in error maintain:

It submits to the jury the whole question of the identity of the defenses taken in this suit and in the equity case in the United States court, which question, on the contrary, is one of law and fact, in regard to which the court should at least have specified the particular point of defense to which they referred.

2 Johns. 29, 30, 210; 16 Johns. 136; 1 Esp. 43; 1 East, 355; 2 Barn. & C. 230; 10 Eng. C. L. 62.

It was for the court to compare the respective defenses; and on such comparison it will appear that they do not coincide; and the court should, therefore, have refused to leave to the jury the inquiry as to the identity of defenses.

2 Gall. 229, 230; 17 Pick. 7, 14; 1 Greenl. Ev. §§ 528-534.

The instruction was erroneous because, even assuming that the defense of fraud was taken in the equity suit, the decree there is not to be understood as determining or at all considering that defense. In that suit *in rem*, it was not an appropriate defense and could not have availed, since, whether there were fraud or not, the land, inferior in coal value as it might be, ought to have been charged with the purchase-money debt under the mortgage. The personal liability on the notes is a distinct question. The sale upon the mortgage was inevitable; and for any amount, reclaimable for the misrepresentation, of the purchase money paid, the remedy was against the proceeds of sales under the mortgage decree.

1 Greenl. Ev. 528; 2 Gall. 229, 230; 1 Pet. C. C. 203; 3 Day, 138; 8 Conn. 268; 3 Simons, 447; 4 Irish, 75.

Identity of defenses does not bear on the defendants in this suit, and preclude the bar now set up, because they were not necessary nor proper parties to the equity suit.

Calvert, Part. 181; 17 Law Libr.

The defense and testimony in the equity case were not between the same parties as the parties to this suit; and cannot operate against the defendants here, as *res judicata*, by virtue of the equity decree.

6 Pet. 328; 1 Wash. C. C. 70, 75; 4 Wash. C. C. 186-188; 1 Paine, C. C. 549; 2 Gall. 228; 1 Munf. 398.

Mr. **Thomas S. Alexander**, for defendants in error:

The verdict for the plaintiffs below, establishes the identity of the defenses in the two causes; so that it is presumed the only subject for inquiry is, whether the decree of the court of equity on the matter of a defense taken in a proceeding *in rem*, to enforce payment of a debt by sale of the pledge, is conclusive on the same matter, offered as a defense in an action *in personam*, for recovery of the same debt. The defendants in error maintain the affirmative on this question.

To render the decree conclusive, it is sufficient that there exists identity of matter in issue, and of parties.

The identity of the matter in issue is established by the verdict. As to parties there can be no question.

Duchess of Kingston's Case, 2 Sm. Lead. Cas. 573; *Outram* v. *Morewood*, 3 East, 346; *Beall* v. *Pearre*, 12 Md. 564; *Hopkins* v. *Lee*, 6 Wheat. 109; *Bank of U. S.* v. *Beverly*, 1 How. 134; *Smith* v. *Kernochen*, 7 How. 198.

Mr. Justice **Grier** delivered the opinion of the court:

The defendants in error were plaintiffs below, and brought this suit as indorsees of two notes given by the plaintiffs in error to William H. Smith. These notes were given in part payment of some tracts of coal land sold and conveyed to Thompson and Pickell by Smith, and the defense endeavored to be established on the trial was a want of consideration, in that Smith had falsely represented the lands to contain 300 acres of "big vein" coal, when in fact they contained but 150 acres. A mortgage had been given to secure these notes; a bill had been filed in chancery to foreclose this mortgage, in which Smith, the assignor, and Roberts and others, the equitable assignees of the mortgage, and indorsees of these notes, were complainants, and Thompson and Pickell, together with their assignees, the Pickell Mining Company, were respondents. They put in a joint and several answer admitting the execution of the notes and mortgage, and alleging as a defense the representations made by Smith, by which Thompson and Pickell were induced to purchase the lands, supposing them to contain 300 acres of the "big vein" coal, when, in fact, as they afterwards discovered, the lands contained but 150 acres of the same. For this reason, and "because they did not receive a valuable consideration for said notes or mortgage, respondents aver that plaintiffs are not entitled to demand payment of them, or any part of them, but the same are to be regarded as absolutely void."

This case was fully heard by the Chancellor on the pleadings and evidence, who overruled the defense set up, and decreed a sale of the mortgaged premises. The record of that case was put in evidence on the trial of this case by the defendants *below, for the purpose. [*240 as they alleged, "of showing that the plaintiffs were not holders for value."

They offered, for that purpose, a part only of the record. Whereupon the plaintiffs gave in evidence the entire record, and insisted that the decree is conclusive, and estops the defendants from again alleging the same matter as a defense to the suit at law on the notes. The evidence was, however, again presented to the jury, without a waiver of plaintiffs' right to treat the decree as an estoppel.

The court rejected a number of prayers offered by each party, and gave the following in-

struction to the jury, which is the subject of exception:

"If the jury shall find from the evidence that the promissory notes offered in evidence in this case were duly executed and delivered by the said defendants to William H. Smith, and by him indorsed over to the said plaintiffs for value; and that, in the cause on the equity side of this court, in which the said plaintiffs, with the said Smith, were complainants, and the said Thompson and Pickell, with the Pickell Mining Company, were defendants (the record of which has been offered in evidence), the same defense was made and set up in said cause to prevent the passage of a decree for the sale of the said lands to pay the said notes as is now made to prevent a recovery in this case, then the decree passed in that case is conclusive upon the point of this defense, and the plaintiffs are entitled to recover in this action."

The plaintiffs in error have not called in question the correctness of the general principle of law assumed by the court below, *viz.:* "that the judgment of a court of law, or a decree of a court of equity, directly upon the same point, and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit."

But it is objected to this instruction, that it submits as a question of fact to the jury what ought to have been decided by the court as matter of law from the face of the record produced. This, if an error, was one favorable to the plaintiffs in error, as it gave them the chance of a verdict on a point which, if decided by the court, must have been decided against 241*] *them; for the record shows conclusively, that the very same defense against these notes was the only point in dispute in the court of equity, to wit: whether plaintiffs in error were "deceived by" the alleged misrepresentations of Smith, fraudulent or otherwise, and whether the notes were, therefore, "without consideration," and "absolutely void."

The objection that the parties were not the same in both suits cannot be sustained.

Both parties to this litigation were parties in that suit; the subject-matter was the same; the defense now set up was the same which the pleadings and the evidence show to have been adjudicated in the court of chancery.

It is true, Smith, who indorsed the notes to the plaintiffs below, and who was interested in the question, was joined as complainant, and the Pickell Mining Company, who had purchased the mortgaged property, were made respondents, according to the practice in courts of chancery, where all parties having an interest in the question to be tried are made parties, that the decree may be final as to all the matters in litigation. No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree, because others having an interest in the question or subject-matter were admitted by the practice of a court of chancery to assist on both sides.

The question as between the present parties is *res judicata*, and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule having no foundation in reason; making a distinction where there is no difference.

Such was the ruling of the court in the case of *Lawrence* v. *Hunt*, 10 Wend. 82, where it was objected that in the former suit there was another plaintiff joined. Where the former suit was at law, this objection might have some weight, for it could not well be said that a contract of A and B with D and C was the same as that in another suit where A was sole plaintiff and D sole defendant. But this objection cannot apply where the first issue is in chancery, and parties collaterally interested are made parties to the litigation, that it may be *fi- [*242 nal, and not because they were legal parties to the original contract on which the litigation is founded. In such a case the pleadings may show the contract or subject-matter of the litigation to be the very same, and directly in issue; in the other, it could not be well so. As we are of opinion that there was no error in this instruction, it will not be necessary to notice the other points alluded to in the argument, this one being conclusive of the whole case.

The judgment of the Circuit Court is, therefore, affirmed, with costs.

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, *Plffs. in Err.*,

v.

FREDERICK E. SICKLES and Trueman Cook;

and

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, *Plffs. in Err.*,

v.

FREDERICK E. SICKLES and Trueman Cook.

(See S. C. 24 How. 333–346.)

Docket of courts of District of Columbia—when prior judgment is a bar or an estoppel—same matter in controversy—extrinsic evidence, to prove what facts and issues were tried and decided—judgment, conclusive of what facts.

In the courts of the District of Columbia, the docket stands in the place of, or, perhaps, is the record, and is entitled here to all the consideration that is yielded to the formal record in other states; and to the same faith and credit.

In order that the judgment or decree may be set up as a bar by plea or relied on as evidence by way of estoppel, it must have been made by a court of competent jurisdiction upon the same subject-matter, between the same parties for the same purpose.

It is not necessary, as between parties and privies, that the record should show the question upon which the right of the plaintiff to recover, or the validity of the defense, depended, but only that the same matter in controversy might have been litigated.

Extrinsic evidence will be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury.

NOTE.—*Estoppel by judgment*—see note to Aspden v. Nixon, 11 L. ed. U. S. 1059.

The judgment rendered, while it remains in force, is conclusive of all the facts properly pleaded by the plaintiffs.

But when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it.

Where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues.

The subsequent application of the verdict, to a single count by the court, does not preclude this inquiry.

Argued Dec. 31, 1860. Decided Jan. 2, 1861.

ERRORS to the Circuit Court of the United States for the District of Columbia.

The two above cases are alike in all material points. They were actions of assumpsit, brought in the court below by Sickles and Cook, the present defendants in error, against the plaintiffs in error. The trial resulted in a verdict and judgment for the plaintiffs below. The defendants brought the cases to this court by writs of error. The questions involved are stated by the court.

Messrs. **George E. Badger** and **J. M. Carlisle**, for the plaintiffs in error:

The court below held that the proceedings offered were not only evidence, proper and admissible, but conclusive against the plaintiffs in error as an estoppel. We submit that the court below erred in holding that these proceedings were proper evidence, for there was no judgment nor verdict shown. The docket entries, admitted by the court on this point, are in these words: "22d November, jury found verdict for the plaintiffs; damages $1,695.75, with interest from 16 March, 1846. Verdict rendered 7th December, 14th December, judgment for plaintiffs on the first count in the declaration."

We submit there was no evidence of a verdict or a judgment. This was merely a memorandum or minute from which a verdict might afterwards be drawn up. If there had been a verdict in full, properly entered up, it could not be offered as evidence without showing the judgment; but a judgment can only be shown by the production of an examined copy, or an exemplification of the judgment entered of record, or in the same court by the production of the judgment itself.

Tuthill v. *Davis*, 20 Johns. 285; Phil. Ev. 384.

It cannot be proved by the judgment book, although the judgment roll may not have been made up, and though the person interested in showing the judgment be no party to the record.

Ayrey v. *Davenport*, 2 B. & P. N. R. 474.

Nor by the minutes kept, from which a judgment is to be made up.

Wade v. *Odeneal*, 3 Dev. 423; *Leveringe* v. *Dayton*, 4 Wash. C. C. 698; *Furguson* v. *Harwood*, 7 Cranch, 408; *Lowry* v. *Cady*, 4 Vt. 504; *Seaton* v. *Cordray*, 1 Wright (O.) 102; *Vaughan* v. *Phebe*, 1 Mart. & Y. 24; *Sheldon* v. *Frink*, 12 Pick. 568.

But if there was no judgment shown, then there was no evidence of a verdict, for a verdict is of no force until followed and consummated by a judgment. The rule is the same in the courts of England as in this country, *viz.:* that a judgment only exists, and can only be shown by the record thereof, when finally reduced to its ultimate form according to the course of the court, whether that be enrollment, insertion in a book kept for that purpose, or otherwise, and whilst there is something to be done in order to make the judgment hereafter assume that form, there is no judgment in law.

See 2 Lill. 103; Latch. 216; 1 Danv. 722; Palmer, 281; *Pitton* v. *Walter*, 1 Str. 162; *Rex* v. *Page*, 2 Esp. 649, note; *Fisher* v. *Kitchingman*, Willes, 363; *Goodbread* v. *Wells*, 4 Dev. & B. 271.

We, therefore, submit that the court below erred in receiving the proceeding in evidence at all; but if they were admissible, then we contend that there was error, in holding them to amount to an estoppel.

There are two questions which have been presented on the briefs in this case, which seem to be confounded by the counsel for defendants, but which are distinct and different. The first is as to the effect of a previous judgment on the merits upon a subsequent suit for the same thing, the same cause of action; as, for example, where the same debt or demand is the subject of each of the suits.

The second is, where one brings a suit for a certain demand or cause of action, which has never before been the subject of a suit; but he has in a former suit, sought to recover another demand; both demands growing out of one title or interest in the plaintiff. What, in such case, is the effect of the former proceedings upon the second action? This is the question now before the court.

Now, the rule we take to be this:

If in the former proceeding the title of the party has been directly alleged, and an issue taken upon it which involves no other matter, or if any fact being part of that title has been thus separated from all other matters and made the point of an issue, the finding upon it may, in such subsequent suit, be relied on in pleading as a technical estoppel, but not otherwise. And that where, in the former suit, there has not been such separation of the title from all other matters, but the same has been involved in a general issue with other matters, whether this arise from the mode of pleading adopted by the parties, or required by the nature of the action, no finding thereon can either establish or disaffirm the title so as to estop either of the parties in a subsequent suit; and that if it cannot operate as an estoppel by pleading, neither can it have the effect of an estoppel when given in evidence to the jury.

Outram v. *Morewood*, 3 East, 346; *Hooper* v. *Hooper*, McC. & Y. 509; *Miles* v. *Rose*, 5 Taunt. 704; *Carter* v. *James*, 13 Mees. & W. 137; and there is no English case to the contrary.

But further, the declaration contained, and the trial was had, on two counts. In law these are supposed to be on different contracts. In the second there was no averment of a suit having been brought on that contract. Yet the court applied the estoppel to both counts, and refused to hear evidence to disprove the contract alleged in either. This is a fatal objection to holding the proceedings an estoppel, which we are now considering, and not their admission as evidence.

We insist, then, that the judgment was not conclusive, but only evidence to be left to the jury, persuasive, or perhaps prima facie, but

still not to preclude the plaintiffs in error from going into their case and rebutting the evidence by other proofs. And surely if it throws the burden of the proof on the defendant in the action, and is to be deemed conclusive, unless disproved, weight enough for every fair and reasonable purpose is given to the record. To make it conclusive of the contract, which is the title or right of the plaintiffs in successive actions for new damages, during 14 years—to give a defendant no opportunity to correct a slip or oversight, or to have the benefit of evidence subsequently discovered, such as, that the witness, by whose testimony the former verdict was obtained, has been discovered to have been largely interested in the recovery—is, it seems to us, to shut out truth where authority does not compel, justice does not demand, and expediency does not warrant.

Messrs. **William J. Stone, Jr., and Joseph H. Bradley,** for the defendants in error:

I. Did the verdict and judgment in the case tried in 1855 conclusively establish the said contract between the plaintiffs and defendant, and the rate of compensation under it?

In *Hopkins* v. *Lee*, 6 Wheat. 113, this court decided that a verdict and judgment in a court of record, or a decree in chancery, put an end to all further controversy concerning the points thus decided between the parties to the suit.

See, also, *Bank U. S.* v. *Beverly*, 1 How. 134; *Shafer* v. *Stonebreaker*, 4 Gill & J. 345.

In the first count of the declaration in the cause tried in 1855, the contract is specifically set out, and as a part of it, the experiment and its result which fixed the plaintiffs' compensation. The defendant pleaded *non assumpsit*, and the jury gave a verdict for the plaintiffs, thereby finding all questions of fact stated in the plaintiffs' declaration to be true as stated, and the court gave judgment thereon. The contract and experiment as a part of it were questions of fact directly in issue, were necessarily passed upon by the court and jury, and the defendant, on the principle settled in the beforementioned cases, is estopped to deny it.

II. The estoppel is conclusive when given in evidence, even if not pleaded.

See *Phila. W. & Balt. R. Co.* v. *Howard*, 13 How. 335; *Trevivan* v. *Lawrence*, 1 Salk. 276.

A verdict and judgment, of a court of competent jurisdiction, puts an end to all further controversy between the same parties concerning the points thereby decided. Parol evidence is admissible, if necessary to show what questions or points were in issue in the first suit.

Young v. *Black*, 7 Cranch, 565; *Rogers* v. *Libby*, 35 Me. 202; *Doty* v. *Brown*, 4 N. Y. 71; *Beirckhead* v. *Brown*, 5 Sand. 140; *Grant* v. *Ramsey*, 7 Ohio St. 162; *Henley* v. *Foley*, 18 B. Mon. 522; *Fischli* v. *Fischli*, 1 Blackf. 361; *Chamberlain* v. *Gaillard*, 26 Ala. 509; *Bebee* v. *Elliott*, 4 Barb. 459; *Hunter* v. *Davis*, 19 Ga. 415; *Stevens* v. *Hughes*, 31 Pa. 381; *Perkins* v. *Walker*, 19 Vt. 149; 2 Zab. (N. J.) 699; 7 Ga. 434; 2 Mich. 276; 15 Ill. 453; 5 Smith (N. Y.) 108; 12 Md. 550; 10 Wend. 83.

III. Are the plaintiffs to be deprived of the benefit of the estoppel for the reason that when the verdict was rendered, the declaration, in addition to the special count in the contract, contained also common counts?

The jury, by their verdict, necessarily found the statements of fact in all the counts of the declaration to be true. The theory of several counts is, that they represent distinct and independent transaction, otherwise the declaration would be subject to the charge of duplicity. When the verdict was rendered, the plaintiff might have had it entered on the first count, and the judgment following the verdict there could have been no question as to the estoppel in this case (if there can be an estoppel in any case): for that count sets forth the contract and experiment with the result of it.

Although the plaintiffs did not, when the verdict was rendered, have it entered on the first count alone, yet they subsequently had the verdict amended and applied to the count by the court, who were satisfied that the evidence given applied to it and not to the other counts. That the court had power to do this is well settled.

Stockton v. *Bishop*, 4 How. 167; *Matheson's Admin.* v. *Grant's Admin.* 2 How. 281, 282; *Bank of the U. S.* v. *Moss*, 6 How. 39; *Parks* v. *Turner*, 12 How. 45.

IV. The defendant's first bill of exceptions related to the docket entries and original papers. This suit was pending in the same court in which the former suit had been tried, and the docket entries and original papers offered were under the control of the court. If the reason given, that the clerk had not made out the record, is not sufficient, then there may be a failure of justice, as the record is to be made up by an officer of the court, over whom suitors have no control. The original declarations and pleadings should certainly be deemed of as high credit and as satisfactory evidence as copies could be, and a court and jury as fully capable of examining them as the clerk.

Boteler v. *State*, 8 Gill & J. 381–383.

*Mr. Justice **Campbell** delivered [*340 the opinion of the court:

The defendants in error, as plaintiffs, sued the plaintiffs in error, in assumpsit, in the circuit court, upon a special parol contract, purporting to have been made in 1844, to the effect that they having a patent for Sickle's cut-off, for saving fuel in the working of steam engines, and the defendants being the owners of a certain steamboat, it was agreed between them that the said patentees should attach to the engine of the defendants one of their machines; and that the defendants should pay for the use thereof three fourths of the saving of fuel produced thereby, the payments to be made from time to time, when demanded. That, to ascertain the saving of fuel, an experiment should be made in the manner described in the declaration, and that the result should be taken as the rate of saving during the continuance of the contract, which was to be as long as the patent and the steamboat should last. The plaintiffs aver that the experiment had been made, and the rate of saving had been duly ascertained; and that the machine had been used in connection with the engine on the said boat until the commencement of the suit.

In the first count of the declaration, the plaintiffs further stated, that they brought, in March, 1846, a suit on this contract in the cir-

suit court for the sum then due, and had obtained a verdict and judgment therefor in the circuit court in 1856, and had thus established conclusively the contract between the parties. These last allegations are not contained in the second count. The defendants pleaded the general issue.

The plaintiffs produced upon the trial, as the only testimony of the contract, the proceedings of the suit mentioned in the declaration, and insisted that these proceedings operated as an estoppel upon the defendants. These proceedings consisted of a writ, a declaration, containing two counts upon the contract, and the common counts, and the plea of the general issue; also a docket entry of a general verdict, in favor of the plaintiffs, on the entire declaration, and a docket entry of judgment, subsequently rendered on the first count—a count similar to the counts in the declaration in the present suit. The defendants objected to these docket entries as evi-**341***] dence *of a verdict and judgment, but insisted they were simply memoranda or minutes, from which a record of a verdict and judgment were to be made. It appears that in the courts of this district, as in Maryland, the docket stands in the place of, or perhaps is, the record, and receives here all the consideration that is yielded to the formal record in other states. These memorials of their proceedings must be intelligible to the court that preserves them, as their only evidence, and we cannot, therefore, refuse to them faith and credit. *Boteler* v. *State*, 8 Gill & J. 381; *Ruggles* v. *Alexander*, 2 Rawle, 232. Besides this testimony of the contract, the plaintiffs proved the quantity of the fuel that had been used in the running of the boat, and relied upon the rate as settled to determine their demand, and insisted that the defendants were estopped to prove there was no such contract; or to disprove any one of the averments in the first count of the declaration in the former suit; or to show that no saving of the wood had been effected; or to show that the so-called experiment was not made pursuant to the contract, or was fraudulently made, and was not a true and genuine exponent of the capacity of the said cut-off; or to prove that the said verdict was in fact rendered upon all the testimony and allegations that were submitted to the jury, and was in point of fact rendered, as by the docket entry it purports to have been, upon the issues generally, and not upon the first count specially.

The circuit court adopted these conclusions of the plaintiffs, and excluded the testimony offered by the defendants, to prove those facts.

The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the Canonists. Whether a judgment is to have authority as such in another proceeding, depends, *an idem corpus sit; quantitas eadem, idem jus; et an eadem causa petendi et eadem conditio personarum; quæ nisi omnia concurrent alia res est;* or, as stated by another jurist, *exceptionem rei judicatæ, obstare quotiens eadem quæstio inter easdem personas revocatur*. The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of **342***] the thing demanded, the identity of *the cause of the demand, and of the parties in the character in which they are litigants. This court described the rule in *Aspden* v. *Nixon*, 4 How. 467, in such cases to be, that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, must have been made by a court of competent jurisdiction upon the same subject-matter, between the same parties for the same purpose. The thing demanded in the present suit is a sum of money, being a part of the consideration or price for the use of a valuable machine for which the plaintiffs had a patent, and is the complement of a whole, of which the sum demanded in the first count of the declaration in the former suit is the other part. The special counts in the declaration of each suit are similar, being framed upon this contract; and a decision in the one suit on those counts in favor of the plaintiffs necessarily included and virtually determined its sufficiency to sustain the title of the plaintiffs on it. It was, therefore, admissible as testimony. This conclusion is supported by adjudged cases, and the authority of writers on the law of evidence. *Gardner* v. *Buckbee*, 3 Cow. 120; *Dutton* v. *Woodman*, 9 Cush. 255; Bonnier des Preuves, § 766; 8 Dalloz, *Jur. Generale*, 256, 257, 258. Buller, in his work on Nisi Prius, says: "If a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial were not had for the same lands, for the verdict in such a case is very persuading evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the jury. . . . It is not necessary that the verdict should be in relation to the same land; for the verdict is only set up to prove the point in question, and every matter is evidence that amounts to a proof of the point in question." Bull. N. P. 232. The plaintiffs in error contend that, conceding the record to be admissible as evidence, to render the verdict and judgment in the first suit an estoppel, it must be shown by the record that the very point which it is sought to estop the party from contesting was distinctly presented by an issue, and expressly found by the jury, and that no estoppel by verdict and judgment can arise in an action on the case, or an *action [***343** of assumpsit, tried upon the general issue, because in no such action can any precise point be made and presented for trial by a jury, and the cases of *Outram* v. *Morewood*, 3 East, 346, and *Vooght* v. *Winch*, 2 Barn. & Ald. 662, are cited in support of this proposition. And the conclusion would seem to be proper for the attainment of the end, for which authority was allowed to the *res judicata* as testimony. Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the facilities for litigation. For this purpose, the presumption has been adopted, that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth.

This presumption is a guaranty of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judgment shall be preserved by the court, which renders it in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and ad-

miralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of the judge and jury, in common-law courts, created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision, and subjecting parties to over-technical rules, prolixity and expense. A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for by the plaintiffs impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res judicata*. It was, consequently, decided that it **344***] was not necessary *as between parties and privies that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material and was, in fact, contested and that it was referred to the decision of the jury.

In *Young* v. *Black*, 7 Cranch, 565, this court admitted in evidence a record of a former suit between the parties, in which judgment was rendered for the defendant, supported by parol proof that the cause of action in the two suits was the same. The court say: "The controversy had passed in *rem judicatem;* and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question." The current of American authority runs in the same direction. *Wood* v. *Jackson*, 8 Wend. 9; *Eastman* v. *Cooper*, 15 Pick. 276; *Marsh* v. *Pier*, 4 Rawle, 288; Green. Ev. § 531.

In the case before the court, the verdict was rendered upon two special counts, and the general counts in assumpsit, but the verdict in the subsequent stage of the proceedings was applied by the court only to the first count. The record, produced by the plaintiffs, showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial, or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the *facts properly pleaded by the [*345 plaintiffs. But when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it. *Merriam* v. *Whittemore*, 5 Gray, 316; *Hughes* v. *Alexander*, 5 Duer, 488. The defendants in error contend, the jury, by their verdict, necessarily found the statements of fact in all the counts of the declaration to be true; and the effect of a verdict and judgment on the whole declaration and a verdict and judgment on the first count is precisely the same, in producing an estoppel, as respects the matters contained in that special count. But this is not true. If the verdict had been rendered on the special count in exclusion of the others, the record itself would have shown that the existence and validity of the contract were in question. There would have been no ground for the inquiry whether any other issue was presented to the jury. But where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues. *Henderson* v. *Kenner*, 1 Rich. 474; *Sawyer* v. *Woodbury*, 7 Gray, 499. Nor do we think that the subsequent application of the verdict to a single count by the court precludes this inquiry. The authority of the courts to make the application, and the circumstances under which it is allowable, was considered by this court in *Matheson* v. *Grant*, 2 How. 263. It is done for the purpose of preventing the consequences of a misjoinder of counts in a declaration, or of the union of insufficient counts with others, so as to allow a valid judgment on the verdict. It had no reference to the use that might be made of the proceedings as testimony in another proceeding. In Maryland, the power to amend the record in this form was conferred by the act of 1809. 3 Maxey, Laws, 484. The case is not embraced in the earlier act of 1785 upon this subject. 3 Har. & J. 9; 3 Har. & J. 91. It is the opinion of the court, that the circuit court erred in holding that the plaintiffs in error were estopped by the proceedings in the former suit, for any inquiry in respect to the matters in issue and actually tried in that cause; *and* *its judgment is reversed, and the cause* [*346 *is remanded for further proceedings, in conformity with this opinion.*

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*HENRY M. KELLOG *et al.*, Heirs at [*186
Law of William Kellogg,
v.
ROBERT FORSYTH.

(See S. C. 24 How. 186–188.)

Landlord may use name of tenant, or those of his heirs, in writ of error.

When a landlord has undertaken the defense of a suit in the name of the tenant, with his consent.

the tenant cannot interfere with the cause, to his prejudice.

It is competent to the landlord to use the names of the heirs of his deceased tenant to prosecute his writ of error upon his engagement to bear all the costs and expenses of the suit.

Should the judgment be reversed, and the cause remanded to the circuit court for further proceedings, he may apply in that court for leave to become defendant, instead of the heirs of the tenant.

Argued Jan. 18, 1861. Decided Feb. 4, 1861.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Motion to dismiss under the circumstances, stated in the opinion.

Mr. **Williams** for defendant in error.

Mr. **Ballance** for plaintiff in error.

187*] *Mr. Justice **Campbell** delivered the opinion of the court:

The defendant in error recovered a judgment in ejectment, in the circuit court of the United States for the northern district of Illinois, against William Kellogg, deceased, as tenant in possession of a parcel of land in that district. After the judgment, the defendant died. The attorney of the decedent, who was also his landlord, and who had conducted the suit on behalf and in the name of the tenant, with his consent, sued out a writ of error to this court in the name of the heirs of said Kellogg. The bond for the prosecution of the writ, and the stipulation for costs in this court, have been supplied by the said attorney. One of the heirs of Kellogg objects to the prosecution of the writ of error, and alleges, on behalf of himself and his coheirs, that it is prosecuted without authority, and that they have no desire that it should be maintained, and authorize the attorney of the defendant in error to move for its dismissal. It appears to the court that the attorney of the deceased defendant is a bona fide claimant of the land, and that he is prosecuting the writ of error in good faith. That he is responsible for the costs and damages that may arise from the use of the names of the plaintiffs in error. The statutes of Illinois require that the declaration in ejectment shall be served upon the actual occupant, and the practice of the courts of that state authorizes the appearance of the landlord, and his defense of the suit, either in his own name or that of the tenant, with his consent. *Williams* v. *Brunton*, 3 Gilm. 600.

And when a landlord has undertaken the defense of a suit in the name of the tenant, with his consent, the tenant cannot interfere with the cause to his prejudice. *Doe* v. *Franklin*, 7 Taunt. 9. We think it was competent to the landlord to use the names of the plaintiffs to prosecute his writ of error, upon his engagement to bear all the costs and expenses of the suit. Should the judgment be reversed, and the cause remanded to the circuit court for further proceedings, he may apply in that **188*]** *court for leave to become defendant, instead of the heirs of the tenant.

Motion to dismiss, overruled.

THOMAS M. LEAGUE, *Plff. in Err.*,

v.

CYRUS W. EGERY, Jos. F. Smith and Sarah A. Smith, Administratrix, etc.

(See S. C. 24 How. 264-267.)

Mexican grant—state decisions are rules of property.

The consent of the Federal Executive of Mexico was essential to the validity of a grant of lands within the border and coast leagues.

A grant wanting such consent, was void.

Decisions of the court of last resort of the state in which property is situated, and in which the transactions that form the subject of this litigation took place, are conclusive testimony of the rule of action prescribed by the authorities of the State, as applicable to their interpretation and adjustment.

Argued Jan. 22, 1861. Decided Feb. 4, 1861.

IN ERROR to the District Court of the United States for the Eastern District of Texas.

Thomas M. League, the present plaintiff in error, commenced this action in the court below against the defendants in error, by petition, to try title to a certain tract of land in the county of Refugio, in Texas, lying on Aransas bay.

On the trial, numerous instructions were asked in behalf of each of the parties, some of which were given and some refused. Among other things, the court instructed the jury that "the grant in question, if made within the littoral leagues without the approbation of the national government of Mexico, was void, though on a sale grant given by virtue of concessions in sale to the *empresarios* in the colony of Power and Hewetson, to be located in that colony, and though by a law or decree of Congress of the state of Coahuila and Texas, the same was ratified and confirmed, and though the republic of Texas received the dues on said grant, and though colonization was authorized within the colony by the approbation of the national Executive." Verdict and judgment were for the defendants. The plaintiff brought the case to this court on a writ of error.

Mr. **Rob. Hughes** for the plaintiff in error.

Mr. **Joseph F. Smith** for himself and agent for the others.

Messrs. **P. Phillips** and **John Hemphill** for the defendants in error.

Mr. Justice **Campbell** delivered the opinion of the court:

The plaintiff sued in the district court for a parcel of land containing two and one half leagues in the county of Refugio, in the state of Texas. The answer and amended answer of the defendants contain some twenty pleas, and a number of questions are presented by the record; but as the decision of the cause will be complete by the opinion the court have formed of

NOTE.—*Jurisdiction of United States Supreme Court to declare state law void, as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws. Power of state courts to construe their own statutes*—see note to Jackson v. Lamphire, 7 L. ed. U. S. 679.

It is for state courts to construe their own statutes. Supreme Court will not review their decisions except when specially authorized to by statute—see note to Commercial Bank v. Buckingham, 12 L. ed. U. S. 169.

the original grant from the state of Coahuila and Texas, from which the claim of the plaintiff is derived, and on which it depends, a statement of that grant will be sufficient. In the year 1826, Power and Hewetson proposed to the government of Mexico to establish a colony on the seacoast of Texas, within what is termed in their law of colonization the littoral leagues. This proposal was accepted, and the partners entered upon the fulfilment of that enterprise. In December, 1829, they respectively applied to the governor of the state of Coahuila and Texas for the purchase of eleven leagues of land each, within the limits of the colony. This offer was accepted; the petitioners were authorized to locate their grant upon any lands in the colony that were vacant, or elsewhere, if there was not a sufficiency of vacant land for that purpose; and the general commissioner of the colony was directed to deliver possession of the land selected, and to perfect the corresponding titles. In November, 1834, Power represented to this general commissioner that the partners had selected only seventeen and one quarter leagues, and requested him to issue grants for two tracts, one containing two and a half leagues, and the other two and one quarter leagues, to complete this contract, at a place designated. This request of the petitioner was complied with, and one of these grants is that which was introduced to support the plaintiff's title, and with which he connected himself by mesne conveyances.

266*] *The location is within the littoral or coast leagues described in the 4th section of the colonization laws of Mexico, of 1824 and 1828.

The litigation between the grantees and their assigns and the defendants for this land has been protracted in the courts of Texas, and the opinion of the supreme court of that state has been very definitely expressed upon the validity of their titles on two several occasions.

Smith v. *Power*, 14 Tex. 146; *Smith* v. *Power*, 23 Tex. 29.

In the latter case the supreme court said: "No question is more authoritatively settled by the repeated decisions of this court, than that the consent of the Federal Executive of Mexico was essential to the validity of a grant of lands of the character of the present within the border and coast leagues. *Edwards* v. *Davis*, 3 Tex. 321; 10 Tex. 316; *Republic* v. *Thorn*, 3 Tex. 499; 5 Tex. 410; 9 Tex. 410, 556. In the case of *Smith* v. *Power*, 14 Tex. 146, the parties to this appeal, it was held, that the grant here in question, under which the defendant claims, could not be distinguished from those which had been passed upon in former cases; and upon the authority of those cases, it was decided, that the grant wanting such consent was void. That question, therefore, cannot be considered as now an open one. A series of decisions, continued almost from the organization of this court down to the present time, thus settling the construction of the old local law, upon which the titles to real property in the oldest and most densely peopled portions of the state so largely depend, must be regarded as emphatically the law of the state." In accordance with well established principles in this court, we accept this uniform and stable body of judicial decision from the court of last resort of the state in which the property is situated, and in which the transactions that form the subject of this litigation took place, as conclusive testimony of the rule of action prescribed by the authorities of the state, as applicable to their interpretation and adjustment. We do not inquire whether a more suitable rule might not have been adopted, nor whether the arguments which led to its adoption were forcible or just. We receive *the [*267 decisions, having the character that is mentioned in the extract we have made from the opinion of the supreme court of Texas, as having a binding force almost equivalent to positive law. Such being our conclusion in respect to this grant, we must sanction the judgment of the district court that denies to it validity.

Judgment affirmed.

HENRY S. FOOTE, *Plff. in Err.*,
v.
CYRUS W. EGERY and Joseph F. Smith.

(See S. C. 24 How. 267, 268.)

League v. *Egery*, next preceding case, affirmed; this case is governed by that.

Argued Jan. 21, 1861. Decided Feb. 4, 1861.

IN ERROR to the District Court of the United States for the Eastern District of Texas.

The case is substantially the same as the preceding case.

Mr. **Robert Hughes** for plaintiffs in error.

Mr. **Joseph F. Smith** for himself.

Messrs. **P. Phillips** and **John Hemphill** for the defendants in error.

Mr. Justice Campbell delivered the opinion of the court:

The plaintiff claimed, in the district court two leagues and one half of land in the county of Refugio, in the state of Texas, which were in the possession of the defendants. The defendant answered the claim by asserting title under grants from the state of Texas, and by the operation of the statute of limitation.

The plaintiff maintained his claim by producing a grant to James Power and James Hewetson, issued under the authority of the state of Coahuila and Texas, in the year of 1834, upon a contract of sale of a certain quantity of lands in the colony of Power and Hewetson, situate within the littoral or coast leagues. In deriving his title under these grantees, the plaintiff produced a deed, or an agreement for a conveyance, from Hewetson to Power and Walker; this paper was rejected as testimony by the court. Walker, this vendee, died in 1836, *being a citizen of, and resident in, the [*268 United States. His brother, also a citizen of the United States, succeeded to his estate, and in the year 1837 conveyed his interest to a person under whom the plaintiff claims.

Three questions were made upon the trial in reference to the validity of the plaintiff's title; 1st. Whether the state of Coahuila and Texas, in the year 1829, or in the year 1834, could sell and convey land to a colonist within the littoral or coast leagues, without the consent or approbation of the central government of Mexico.

2d. Whether the paper executed by Hewetson to Power and Walker was a conveyance of the land, or merely an agreement to convey. 3d. Whether, in 1836, Walker, a citizen of the United States, could inherit land in Texas, from one who was also a citizen of, and a resident in, the United States. The decision of either of these questions in favor of the defendants is fatal to the plaintiff's right to recover.

The first of these questions has been determined by this court in the case of *League* v. *Egery* (24 How. 264), and others in the negative.

This decision is in accordance with the decision of the District Court, whose judgment is, consequently, affirmed.

CHARLES F. MAYER, Surviving Permanent Trustee of John Gooding, *Appt.*,

v.

WM. PINKNEY WHYTE, Administrator *de bonis non* of John Gooding, and Robt. M. Gibbes and Charles Oliver, Surviving Executors of Robt. Oliver, Deceased.

(See S. C. 24 How. 317-322.)

Award to Baltimore Company—right of trustee of insolvent is prior to that of personal representative of a claimant to an interest in such award.

The history of the litigation among the several claimants to the money awarded to the Baltimore Company by the commissioners, under the convention with Mexico (amounting to the sum of $354,436.42, of which the fund in controversy is a part) will be found in the 52 U. S. 11 How. 529; 53 U. S. 12 How. 111; 55 U. S. 14 How. 610; 58 U. S. 17 How. 234, and 61 U. S. 20 How. 535.

In the case of Gooding v. Oliver, 17 How. 274, the court held that the administrator was entitled to the fund as assets of the estate, upon the ground that the courts of Maryland had decided that the contract of the Baltimore Company, which had been made in violation of our neutrality laws, was so illegal and void, that no claim to it passed under their insolvent laws to the trustee.

The present case is between the trustee in subsequent insolvent proceeding in 1829, under the assignment for the benefit of creditors and the present personal representative of the estate of Gooding, and the question is whether or not this trustee took the interest of the insolvent in the Baltimore Company in 1829 by virtue of these proceedings.

Mexico, after she had gained her independence in 1824, assumed the debt due to the Baltimore Company, and after the recognition and adoption of this claim by the Mexican authorities, the government of the United States made it the subject of negotiation which resulted in its satisfaction, under the Convention of 1839.

Therefore held: that the demand in 1829 constituted a right of property or interest in Gooding, the insolvent, that passed to plaintiff as trustee, by virtue of the assignment under the insolvent proceeding.

The plaintiff is not concluded by the decision of this court in the case of The Administrator of Gooding v. The Executors of Oliver, reported in 17 How. 274. 15 L. ed. 148.

Argued Jan. 24, 1861. Decided Feb. 4, 1861.

APPEAL from the Circuit Court of the United States for the District of Maryland.

This was a bill in equity filed in the circuit court for Baltimore County, Md., by Charles F. Mayer, trustee, etc., the present plaintiff in error.

It states that, under an application of John Gooding, on October 3d, 1829, for the benefit of the insolvent laws of Maryland, the plaintiff in error, and his original co-complainant, John Barney (now dead), were appointed permanent trustees of all Gooding's estate, for the benefit of his creditors; and that part of that estate was a claim against the Republic of Mexico, which, by that government's assumption of it in the year 1824, accrued to the insolvent; that the whole of that claim had been vested in John Glenn and David M. Perrine as trustees, to prosecute it for those entitled to share in it before the commissioners under the Convention of April 11, 1839, and that on June 9, 1841, the commissioners awarded payment to Glenn and Perrine of $354,436.42, one ninth of which belonged to Gooding, and that this one ninth was paid over to the executors of Robert Oliver, who claimed it under an invalid assignment from a trustee of Gooding, appointed under an application of Gooding, in 1819, for the benefit of the insolvent laws of Maryland. The bill further states that Gooding died in 1840, and that another John Gooding became the administrator and by bill in equity, filed in the United States circuit court of Maryland against the executors of Oliver, is seeking to recover the one ninth share thus paid over to them, and is so claiming it in violation of the rights of the complainants in this cause.

The present bill made Gooding, the administrator, and the executors of Oliver, defendants; and Gooding, as a citizen of Virginia, removed the cause to the circuit court of the United States for the district of Maryland.

During the suit, the administrator, Gooding, died, and was succeeded by the present appellee, William P. Whyte; and the trustee, Barney, also died during the suit.

The circuit court rendered a decree dismissing the bill, and the complainant took this appeal.

The facts of the case further appear in the opinion of the court and in the following cases, which have been heretofore determined, relating to the same general subject, to wit:

Gill v. *Oliver*, 11 How. 529; *Williams* v. *Oliver*, 12 How. 111, 125; *Deacon* v. *Oliver*, 14 How. 610; *McBlair* v. *Oliver*, 58 U. S. (17 How.) 232; *Williams* v. *Gibbes*, 58 U. S. (17 How.) 239; *Gooding* v. *Oliver*, 58 U. S. (17 How.) 274.

There was an agreement in this case signed by the appellant and the solicitor for Oliver's executors, to the effect that since the stocks and money in question had, in pursuance of orders of the circuit court, come into the possession of Whyte, the claim of the appellant herein, in case of the establishment of his title to said stock and money, is exclusively against said Whyte as administrator.

Messrs. **Charles F. Mayer and R. Johnson** for appellant.

Mr. **J. Mason Campbell** for Oliver's Executors.

Messrs. **G. L. Dulany** and **W. P. Whyte** for Whyte.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The bill was filed in the court below by Charles F. Mayer, the surviving trustee of John

Gooding, appointed under certain proceedings instituted by Gooding before the commissioners of insolvent debtors for the city and county of Baltimore, for the benefit of the insolvent laws of Maryland, in October, 1829. Gooding was an original owner of a share in what is known as the Baltimore Mexican Company, which, in 1816, furnished General Mina with the means to fit out a warlike expedition against Mexico, then a province of Spain. The expedition failed, and Mina perished with it soon after he landed. Mexico having subsequently achieved her independence, the company made application to the new government to assume the debt, which it did, by a decree of the 28th June, 1824; but payment was delayed, from time to time, until this, with other claims against the government, were adjusted and discharged, under the Convention between this government and Mexico, of April, 1839. The share of Gooding, which was one ninth of the interest in the contract with Mina, amounted, at the time of its allowance by the commissioners under this Convention, to the sum of $39,381.82. The complainant claims this amount, with interest, under the insolvent assignment made by Gooding for the benefit of all his creditors, as already stated, under the insolvent laws of Maryland, in 1829.

The defendant, Whyte, the administrator *de bonis non* of Gooding, sets up a title to the fund as the personal representative of the estate, and claims it as part of the assets which belong to the heirs and distributees.

320*] *The history of the litigation among the several claimants to the money, awarded to the Baltimore Company by the commissioners, under the Convention with Mexico (amounting to the sum of $354,436.42), of which the fund in controversy is a part, will be found in 11 How. 529; 12 How. 111; 14 How. 610; 17 How. 234; and 20 How. 535.

In the case of *Gooding* v. *Oliver*, 17 How. 274, the present fund was in controversy between the administrator of the estate, claiming it as assets, and the representatives of Robert Oliver, claiming it by virtue of a purchase from an insolvent trustee, under proceedings instituted by Gooding for the benefit of the insolvent act of Maryland in 1819. As between these parties, the court held that the administrator was entitled to the fund as assets of the estate. The reasons for this decree will be found in the report of the case referred to.

Gooding, as has been already stated, again took the benefit of the insolvent act in 1829, and the question now is between the trustee appointed under these insolvent proceedings, as assignee of his estate for the benefit of creditors, and the present administrator *de bonis non*, the personal representative.

The executors of Oliver, who claimed under the trustee in the first insolvent proceedings in 1819, failed to hold the fund against the personal representative in the case referred to, upon the ground the courts of Maryland had decided that the contract of the Baltimore Company with General Mina, which had been made in violation of our neutrality laws, was so fraught with illegality and turpitude, and so utterly null and void, that no claim to, or interest in it, passed under their insolvent laws to the trustee; and such being the construction of a statute of Maryland by her own courts, this court, according to the established course of decision, felt bound by it, and consequently the insolvent trustee took no interest in the Mina contract, nor Robert Oliver, or his personal representatives who claimed under him.

The case now comes before us between the trustee in the *insolvent proceedings of [*321 1829, under the assignment for the benefit of creditors, and the present personal representative of the estate of Gooding, the former in the meantime having died; and the principal question is, whether or not this trustee took the interest of the insolvent in the Baltimore Company, in 1829, by virtue of these proceedings. If the interest is to be regarded in the same condition as it stood, according to the judgment of the Maryland courts, at the time of the former insolvent proceedings, our conclusion must be the same as in the case of *Gooding* v. *Oliver*. The personal representative would be entitled to the fund.

It is insisted, however, by the learned counsel, on behalf of the trustee, that the state and condition of this interest had in the meantime changed, and had become an admitted legitimate demand or debt against the Mexican government, wholly exempt from any taint of illegality or turpitude, and hence to be regarded as property of the insolvent, to be devoted to the benefit of his creditors.

This interest or demand, as it stood in 1819, at the time of the first insolvent assignment, as we have seen, arose out of a contract between the Baltimore Company and General Mina, which, as admitted, was illegal, being in violation of our neutrality laws. Whether that constituted a valid objection to the assignment under the insolvent laws of Maryland, for the benefit of creditors, is not a question now before us. The affirmative was held by a court having jurisdiction to decide it. If an original question, we should not have had much difficulty in disposing of it. This contract, then, stood simply upon the personal obligation of Mina, and as between the parties it was void and of no effect, if Mina or his legal representatives chose to avail themselves of its illegality. But Mexico, after she had gained her independence in 1824, assumed the debt due to the Baltimore Company as one of national obligation, which had been contracted for the service and benefit of the nation by a general declared *bene meritos de la patria*. The assumption was the free act of a sovereign power, and wholly independent of the question as to the legal qualities or character *of the debt, as viewed [*322 under the statute or common law of the country in which it originated. It was assumed by the Congress of Mexico, upon public political considerations, in favor of persons who had contributed their means in support of the struggle which resulted in the achievement of her independence, and the obligation rests, not upon the contract of General Mina, or municipal regulations, but upon the decree of the sovereign power and public law of the nation.

We may add, that after the recognition and adoption of this claim by the Mexican authorities, the government of the United States, through its minister to that country, made it

the subject of negotiation on behalf of the parties in interest, who were citizens, for the purpose of procuring indemnity for the same, and which resulted, as has been already stated, in its satisfaction under the Convention of 1839.

We have no difficulty, therefore, in holding that the demand in 1829 constituted a right of property or interest in Gooding, the insolvent, that passed to the plaintiff as trustee, by virtue of the assignment under the insolvent proceedings of 1829. The case of *Comegys* v. *Vasse*, 1 Pet. 193-220, is a full authority upon this point.

As to the objection that the plaintiff is concluded by the decision of this court in the case of the former, *Gooding* v. *Oliver*, 16 How. 274: one of the questions decided in that case furnishes a conclusive answer to it. We need not repeat the reasons or authority which led this court to its conclusion, which are there stated at large.

The decree of the court below reversed and remanded, with directions to enter a decree for the plaintiff against the administrators of Gooding, deceased, in pursuance of above opinion and stipulations of parties.

THE UNITED STATES, *Appt.*,
v.
JOSE CASTRO *et al.*

(See S. C. 24 How. 346–352.)

Mexican grant, when invalid—record evidence of, is the highest—evidence of loss or destruction of records—what necessary to show, to maintain title by secondary evidence—survey and possession—parol evidence is open to doubt—not sufficient alone—authenticity of, to be first established.

A paper wanting in all the written proceedings which the Mexican law required before a grant could be issued, which had never been seen by any one of the witnesses until produced two years after the cession of the territory, with no evidence of the time or place of its execution, with no trace of it in the Mexican archives, and the witnesses produced to prove the possession contradicting each other, is not entitled to confirmation as a valid grant.

But apart from these circumstances the grant is invalid, and not supported by legal proof, even if all the testimony adduced by the claimants was credible, and the witnesses above suspicion.

Whenever a party claims title to lands in California under a Mexican grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence.

But as the loss or destruction of public documents may in some instances have occurred, upon proof of that fact, secondary evidence to a certain extent will be received.

But in order to maintain a title by secondary evidence, the claimant must show, 1st, that the grant was made in the manner the law required, and recorded in the proper public office; 2d, that the papers in that office, or some of them, have been lost or destroyed; and 3d, that within a reasonable time after the grant was made, there was a judicial survey of land, and actual possession by him, by acts of ownership exercised over it.

The survey and possession are open and public acts, and would support the parol evidence of the former existence and destruction or loss of the grant, and would show the knowledge of the officers of the government of the title claimed and their acquiescence in the justice and legality of the claim.

But without a survey and possession, the authenticity of the grant would have nothing to support it but parol testimony resting only in the knowledge of individual witnesses.

If what purports to be a grant is produced by the party from some private receptacle and the handwriting of the official signatures proved by witnesses, and even proved to have been executed when it bears date, it is but parol testimony, open to doubt.

There is nothing in the history of Mexican jurisprudence or Mexican grants which would justify this court in supporting a Mexican title made out by such testimony only, or by secondary evidence of of any kind short of that above stated.

Written documentary evidence, produced by a claimant from a private receptacle, and proved by oral testimony, is not of equal authenticity and entitled to equal respect with the public and recorded documents found in the public archives.

The authenticity of the grant must first be established before any question can arise upon the conditions annexed by law to such grants, or concerning the certainty or uncertainty of the boundaries specified in it.

Argued Jan. 24, 1861. Decided Feb. 4, 1861.

APPEAL from the District Court of the United States for the Northern District of California.

Castro, the claimant and present appellee, filed his claim with the board of land commissioners in the state of California, for eleven leagues of land in San Joaquin Valley. The commission adjudged the claim to be valid.

The United States appealed to the district court of the United States for the northern district of California.

That court confirmed the decision of the commissioners, and the United States appealed to this court.

The case further appears in the opinion of the court.

Mr. **Edwin M. Stanton,** *Atty-Gen.*, for appellants.

Mr. **Edw. Swann** for appellee.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The appellees claim title to eleven leagues of land in California under a Mexican grant.

In March, 1853, they filed a petition before the board of land commissioners, stating that the land in question was, on the 4th of April, 1846, granted by Pio Pico, then governor of California, to Jose Castro, one of the appellees, under whom the others claim as purchasers. The petition states that the land was occupied and improved by the grantee soon after the date of the grant.

*It appears that the paper purporting [*347 to be the original grant was deposited in the government archives of the United States, on the 8th of June, 1849, more than three years after its date, and two years after the cession of the territory. It was deposited not by Castro, but by Bernard McKenzie, whose representatives claim a portion of the land under a conveyance from Castro; and the deed to him bears date on the same day—that is, June 8, 1849. The following is the translation of the grant as it appears in the record:

Pio Pico, Constitutional Governor of the Department of the Californias.

[SEAL.]

Whereas the lieutenant colonel of cavalry, Don Jose Castro, Mexican citizen, has petitioned, for the benefit of himself and his family, for a tract of land, for pasturing cattle, on the bank of the river San Joaquin, consisting of eleven leagues, whose measurement is to be commenced from the edge of the Snowy Moun-

tains, following down stream—having previously made the necessary investigations, I have, by a decree of this day, granted to the said Señor the eleven *sitios* he prays for, declaring to him the ownership thereof, by these present letters, in conformity with the law of August 18, 1824, and the regulations of 21st November, 1828, in conformity with the powers with which I find myself invested by the supreme government, in the name of the Mexican nation, under reservation of the approval of the departmental assembly, and under the following conditions:

1st. He may fence it, without injury to the cross roads, highways, and rights of way. He may enjoy it freely and exclusively, directing it to the best cultivation or use which may be to his convenience.

2d. He shall request the judge of that district to give him the juridical possession, by virtue of these patents, who shall mark out the boundaries with the respective landmarks, placing, in addition to them, some fruit trees, or others of known utility.

3d. The land, of which donation is made, con-
348*] sists expressly *of eleven (*sitios*) ranges of large cattle, upon the banks of the San Joaquin. Measurement shall commence from the edge of the Sierra Nevada. The judge who may give the possession shall have it measured with entire observance of the ordinances, and in view of the sketch or topographical plan which the grantee shall present.

In consequence whereof, I order that the present title, being held as firm and valid, be recorded in the corresponding book, and delivered to the party in interest for his protection, and other purposes.

Given in the governor's house, at the city of Los Angeles, upon common paper, there being none stamped, on the fourth day of the month of April, one thousand eight hundred and forty-six. Pio Pico.

Jose Matias Moreno,

Sec'y *pro tem.*

Record has been taken of this superior patent in the respective book. Moreno.

The handwriting of Pio Pico and Jose Matias Moreno were proved by a single witness. But no testimony was offered to show when or where this paper was executed, nor any testimony to show who had the custody of it, until it was deposited in the public archives, as above mentioned; nor is any reason given for keeping it out of the public office for so long a time, nor how McKenzie obtained possession of it, except by the deed from Castro, which he produced at the same time. And nothing was then produced to support the grant but this paper; no petition from Castro; no *informe*, or decree, as required by the laws of Mexico. And notwithstanding Moreno's certificate that a record had been taken of it in the respective book, no trace of anything in relation to it is to be found in the archives of the Mexican authorities; nor was any attempt made to take possession until 1849, for although the appellees state in their petition that Castro took possession soon after the grant was made—that is, in 1846, and some of his witnesses swear to the same fact, and some even carry back his possession to 1844,
349*] under a promise of Micheltoreno *to make him a grant in that place; yet all of this testimony is contradicted by Vinsenhaler, who appears to have been an active agent in this matter, and directed the surveyor who made the survey in 1853, where he should begin, and where he should run the lines. He says that he was at the place in October, 1849; that Castro took possession in August or September of that year, and built a *corral*, and had cattle there in the early part of 1850; and that it would have been unsafe, in consequence of the hostility of wild Indians, to have attempted to occupy it earlier. A paper thus wanting in all the written proceedings which the Mexican law required before a grant could be issued, which had never been seen by any one of the witnesses until produced by McKenzie, with no evidence of the time or place of its execution, with no trace of it in the Mexican archives, and the witnesses produced to prove the possession contradicting each other, can hardly be entitled to confirmation as a valid grant. And even if the witness who proves the handwriting of Pio Pico and of Moreno is entitled to belief, yet the conclusion would seem to be irresistible that the paper was fraudulently antedated.

But, apart from these circumstances, the grant is invalid, and not supported by legal proof, even if all the testimony adduced by the claimants was credible, and the witnesses above suspicion.

The grants of portions of the public domain of Mexico, the mode of obtaining them, and the officers by whom they were to be issued, and the conditions to be annexed to them, were, with great precision, regulated by law. This law has so often been referred to and commented on in former opinions of this court, that it is unnecessary to report here its particular provisions. It is sufficient to say that it was required to be in writing, the officers and tribunals before which it was to pass designated, and every step in the process, from the petition of the party to the final consummation of the title, was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the republic.

Whenever, therefore, a party claims title to lands in California *under a Mexican [*350 grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence.

But as the loss or destruction of public documents may in some instances have occurred, it would be unjust that a party should be deprived of his property by reason of an accident which he had not the power to prevent; and upon proof of that fact, secondary evidence to a certain extent will be received.

But in order to maintain a title by secondary evidence, the claimant must show to the satisfaction of the court: 1st, that the grant was obtained and made in the manner the law required, at some former time, and recorded in the proper public office; 2d, that the papers in that office, or some of them, have been lost or destroyed; and 3d, he must support this proof by showing, that within a reasonable time after the grant was made, there was a judicial survey of the land, and actual possession by him, by acts of ownership exercised over it.

The survey and possession are open and pub-

lic acts, and would support the parol evidence of its former existence and destruction or loss. It would show the knowledge of the officers of the government of the title claimed, and their acquiescence in the justice and legality of the claim.

But without a survey and possession the authenticity of the grant would have nothing to support it but parol testimony, resting only in the knowledge of individual witnesses; for if what purports to be a grant is produced by the party from some private receptacle, and the handwriting of the official signatures proved by witnesses, and even proved to have been executed when it bears date, it is but parol testimony, open to doubt, since its authenticity depends upon the truth or falsehood of the witnesses, instead of resting upon the certainty of the public records of the nation.

We find nothing in the history of Mexican jurisprudence or Mexican grants which would justify this court in supporting a Mexican title made out by such testimony only, or by secondary evidence of any kind short of that above stated.

It will be found, upon referring to the various 351*] cases which *have come before us from California, that none have been confirmed, unless the grant was established according to the rules of evidence above stated. And they are recognized in the cases of *Fuentes* v. *The United States*, 22 How. 445; *U. S.* v. *Bolton*, 23 How. 341; *Luco* v. *U. S.* 23 How. 615; and *Palmer* v. *U. S.* 24 How. 125, decided at the present term. We repeat again these rules of evidence, because it would seem from the case before us that the board of land commissioners and the circuit court regard written documentary evidence, produced by a claimant from a private receptacle, and proved by oral testimony, as of equal authenticity and entitled to equal respect with the public and recorded documents found in the public archives. But such a rule of evidence is altogether inadmissible. It would make the title to lands depend upon oral testimony and, consequently, render them insecure and unstable, and expose the public to constant imposition and fraud. Independently, therefore, of the strong presumptions against the authenticity of the paper produced as a grant, it cannot, upon principles of law, be maintained, even if the testimony produced by the claimant was worthy of belief.

The case of *Frémont* v. *The United States*, 17 How. 542, is referred to, both in the opinion of the board of land commissioners and the circuit court, and relied on to support their respective opinions. But that case has no analogy to this. There the title papers, from the petition down to the grant, were found in regular form in the Mexican archives. Their authenticity was, therefore, attested by the record; and the reasons for the delay in making the survey and taking possession were made known at the time to the governor, and approved and allowed by him. All of this appeared in the regular official documents; and the difficulty that arose in his case arose upon the conditions annexed by law to an undoubted and admitted grant. Here the difficulty is, whether there is legal evidence to prove that this alleged grant was ever made by the Mexican authorities. And the fact that it was so made must be established by competent evidence, before any of the questions which arose and were decided in *Frémont's Case* can arise in this.

*The authenticity of the grant must [*352 first be established before any question can arise upon the conditions annexed by law to such grants, or concerning the certainty or uncertainty of the boundaries specified in it. And in the case before us, the grant itself not being maintained by competent testimony, we need not inquire whether the conditions were complied with, or the description of place and boundaries sufficiently certain.

And for the reasons above stated the judgment of the Circuit Court must be reversed, and the case remanded to the District Court, with directions to dismiss the petition.

JOHN GREER *et al., Plffs in Err.*,
v.
S. M. MEZES, Maria De La Solidad, Ortega De Arguello, and Jose Ramon Arguello.

(See S. C. 24 How. 268-278.)

Ejectment not defendable, on mere equitable title—what defendants may be joined in—effect of joinder—when separate trial may be had—effect of general verdict.

Defendants claiming under a merely equitable title, are not in a condition to dispute in a court of law the correctness of the survey made by the public officer or resist the plaintiffs' perfect legal title.

Although the circuit court has adopted the mode of instituting the action of ejectment by petition and summons, it is still governed by the principles of pleading and practice which have been established by courts of common law.

In an action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself.

But he is not bound to bring a separate action against several trespassers on his single, separate and distinct tenement or parcel of land.

Each defendant has a right to defend, especially for such portion of the land as he claims; and if on the trial he succeeds in establishing his title to it, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict.

He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs unconnected with his separate litigation.

If he pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as taking defense for the whole.

If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain.

Argued Jan. 25, 1861. Decided Feb. 11, 1861.

IN ERROR to the Circuit Court of the United States for the Northern District of California.

This was an action of ejectment commenced by Mezes and others, the present defendants in error, in the court below, against the present plaintiffs in error; who had intruded upon various portions of a tract of land claimed by the complainants. The verdict having been rendered in favor of the complainants, the defendants brought the case to this court on exceptions taken to the ruling of the court below,

NOTE.—*What title or interest will support an action of ejectment*—see note to 18 L. R. A. 781.

excluding certain testimony offered by them and giving certain instructions, the reverse of those requested by them.

The nature of these exceptions appears in the opinion of the court.

Messrs. **J. B. Crockett and M. Blair,** for plaintiffs in error:

1. The Coppinger grant is by metes and bounds and not by quantity, and is without the usual provision as to the surplus. No survey was necessary to locate and segregate the land. A grant or confirmation of a specific parcel of land conveys the title *proprio vigore* without a survey.

Guitard v. *Stoddard*, 16 How. 494; *Bissell* v. *Penrose*, 8 How. 317; *Stanford* v. *Taylor*, 59 U. S. (18 How.) 409; *U. S.* v. *Sutherland*, 60 U. S. (19 How.) 363.

2. The grant to Coppinger conveyed the legal, and not a mere equitable title. The fact that it is made subject to the approval of the departmental assembly, does not impair its effect as a legal title.

Ferris v. Coover, 10 Cal. 589.

3. If the title was before only equitable, the final confirmation by metes and bounds has converted it into a complete legal title, conclusive as against the United States; and after such confirmation there was no title, either legal or equitable, in the United States which it could convey by a patent to a third person.

Layfayette's Heirs v. *Kenton*, 59 U. S. (18 How.) 197; *Guitard* v. *Stoddard*, 16 How. 494; *Stanford* v. *Taylor*, 59 U. S. (18 How.) 409; *Ledoux* v. *Black*, 59 U. S. (18 How.) 473; *La Roche* v. *Jones*, 9 How. 155; *Grignon* v. *Astor*, 2 How. 319; *Chouteau* v. *Eckhart*, 2 How. 344; *Strother* v. *Lucas*, 12 Pet. 410; 3 Dall. 456; *Harrold* v. *Simonds*, 9 Mo. 323.

4. If the foregoing positions are not maintainable, nevertheless it cannot be doubted that, by virtue of the grant and confirmation, Coppinger acquired a clear, definite, and fixed equity to all the land covered by the grant and included within the boundaries confirmed to him. It is not a general floating equity to a given quantity of land to be afterwards located by a survey, and attaching to no particular land until thus located, but a present and certain equity attaching to this particular tract and to the whole of it. Even where it is not a grant by metes and bounds, but by quantity to be taken within certain exterior limits, as in the case of *Frémont*, 58 U. S. (17 How.) 542, and *Reading*, 59 U. S. (18 How.) 1. The Supreme Court decides that the grant conveys a present and immediate interest, subject, however, to be defeated by a subsequent grant of the land to another; but in a grant by metes and bounds, the grantee acquires a direct and immediate interest in the whole, which cannot be defeated by a subsequent grant.

Garland v. *Wynn*, 61 U. S. (20 How.) 6; *Les Bois* v. *Bramell*, 4 How. 62.

5. If the confirmation of the Coppinger grant conveyed or operated by law as a legal title, it is equivalent to a patent, and in an action of ejectment, those holding under it may assail an adverse patent and survey, and dispute their correctness, even without the aid of the act of Congress of March 3, 1851, establishing the land commission.

Les Bois v. *Bramell*, 4 How. 462; *Doe* v. *Eslava*, 9 How. 421.

6. But even though the confirmation is not a legal, but only an equitable title, still it is a definite and fixed equity to the whole land conveyed by the confirmation, and the defendants being in possession under this equity, the plaintiff's patent and survey cannot "affect" their interest.

See the act of March 3, 1851; *Cousin* v. *Blanc*, 60 U. S. (19 How.) 202.

7. Adverse claimants, holding either a valid legal or equitable title, may contest the correctness of the patent and survey under a conflicting grant, so far as relates to boundaries and location.

Menard v. *Massey*, 8 How. 293; *Boyce* v. *Papin*, 11 Mo. 16; *Archer* v. *Bacon*, 12 Mo. 149.

8. The court erred in directing a general verdict against all the defendants when they pleaded separately, and there was no proof of a joint occupancy of any part of the disputed premises. The verdict should have found of what part each defendant was severally in possession, and the court should so have instructed the jury.

Mr. **Louis Janin,** for defendant in error:

I. By the uniform legislation of Congress, the title passed out of the government only by the patent. In respect to California land claims, this is especially provided for.

9 Stat. at L. 632; see, also *Hooper* v. *Scheimer*, 64 U. S. (23 How.) 249; *Bagnell* v. *Broderick*, 13 Pet. 450.

II. The title of the plaintiff in error is an equitable and not a legal title. It was a grant by the governor, subject to the approbation of the departmental assembly, which it never received. It was unaccompanied by judicial possession and never surveyed, so far as the record enables us to judge.

See Carey Jones's Report of March 9, 1850, pp. 4, 8; *U. S.* v. *Reading*, 58 U. S. (18 How.) 7; *Hancock* v. *McKinney*, 7 Tex. 384; *U. S.* v. *Pacheco*, 61 U. S. (20 How.) 261; *Yontz* v. *U. S.* 64 U. S. (23 How.) 498; *Hanson's Case*, 16 Pet. 196.

III. The title of the plaintiffs in error, being only equitable, cannot be set up in an action of ejectment, as a defense against the legal title of the defendants in error, and any error which may have been committed in the survey of the legal title, cannot be investigated or corrected in this form of action.

Baird v. *Wolfe*, 4 McL. 552; *Fenn* v. *Holme*, 21 How. 483; *Hickey* v. *Stewart*, 3 How. 750; *Bagnell* v. *Broderick*, 13 Pet. 436; *Minter* v. *Crommelin*, 59 U. S. (18 How.) 88; *Boardman* v. *Reed*, 6 Pet. 328; *Spencer* v. *Lapsley*, 61 U. S. (20 How.) 272; *Field* v. *Seabury*, 60 U. S. (19 How.) 323, *Waterman* v. *Smith*, 13 Cal. 373; *Bissell* v. *Penrose*, 8 How. 317; *Ledoux* v. *Black*, 59 U. S. (18 How.) 475; *Willot* v. *Sandford*, 60 U. S. (19 How.) 81; *West* v. *Cochran*, 58 U. S. (17 How.) 413; *Cooper* v. *Roberts*, 59 U. S. (18 How.) 192; *Bryan* v. *Forsyth*, 60 U. S. (19 How.) 334; *Ballance* v. *Papin*, 60 U. S. (19 How.) 343; *U. S.* v. *Fossat*, 61 U. S. (20 How.) 426; *Moore* v. *Wilkinson*, 13 Cal. 478; *Boggs* v. *Merced Mining Co.* 14 Cal. 279, and *Yount* v. *Howell*, 14 Cal. 465, decided by the supreme court of California in 1859, pamphlet edition, pp. 50 and 73.

Ferris v. *Coover*, 10 Cal. 589.

IV. But it will be said that it has been held by the supreme court of California, that an action of ejectment will lie directly upon a Mexican grant and that, accordingly, the plaintiffs in error should have been permitted to give their Mexican title in evidence, and to connect themselves with it. By the practice of California, these parties would not be permitted to give that grant in evidence, because it was not set up in the answer.

Piercy v. *Sabin*, 10 Cal. 22.

But whatever be the rule of proceeding in the state courts of California, the Federal courts established in that state are bound to maintain the distinction between cases at law and in equity.

See *Bennett* v. *Butterworth*, 11 How. 669; *Penn* v. *Holme*, 62 U. S. (21 How.) 481; *Hooper* v. *Scheimer*, 23 How. 249.

V. Another point suggested by the bill of exceptions of the plaintiffs in error is, that inasmuch as they had several in their answers, they were each entitled to a separate verdict. There might be some reason in this, if in their answers and their proof they had shown their separate holding, and the original plaintiff had obtained against them a verdict for damages in compensation for rents and profits. But to require it in a case like this, would be a vexatious and impracticable technicality. We proved that they were all within the limits of our patent, whatever might be the extent of their respective claims.

Vallejo v. *Fay*, 10 Cal. 377; *Smith* v. *Shackleford*, 9 Dana, 453; *Winans* v. *Christy*, 4 Cal. 80; 5 Wend. 98; *Jackson* v. *Stiles*, 3 Cow. 356; *Ellis* v. *Jeans*, 7 Cal. 409; *Ritchie* v. *Dorland*, 6 Cal. 40; *Anderson* v. *Parker*, 6 Cal. 201.

Mr. Justice **Grier** delivered the opinion of the court:

The defendants in error are the owners of the tract of land called Las Pulgas, the title to which was confirmed to the heirs of Arguello by this court (18 How. 539). This action of ejectment was brought by them against Greer and a number of others, now plaintiffs in error. The 274*] defendants pleaded *severally the general issue, but no one of them took defense specially for any definite part of the land claimed in the writ, or made a disclaimer as to any portion of it. The plaintiffs gave in evidence the survey and patent of the Las Pulgas tract, and proved the defendants to be in possession within its boundaries.

Their Mexican title was dated in 1835, and had the approbation of the departmental assembly, preceded and followed by possession.

Their grant, as confirmed by this court, is bounded on the north by the Arroyo of San Francisquito, on the south by that of St. Mateo, on the east by the estuary, and on the west by the cañada or valley of Raymundo, "being four leagues in length and one in breadth." The plaintiffs having shown a complete legal title to the land in dispute, were entitled to a verdict, unless the defendants could show a better.

They claimed under a grant to Juan Coppinger, dated in 1840, for the valley of Raymundo, specifying nothing as to quantity, but describing it as bounded on the east by the *rancho* of Las Pulgas, and on the west by the Sierra Morena, south by *rancho* of Martinez, and north by the lagune. The *espediente* provides, that "the judge who shall deliver possession of the land shall have it measured according to the ordinance, specifying the amount of *sitios* it contains."

This grant had never received the sanction of the departmental assembly, nor had possession ever been delivered, or any precise boundaries ascertained by survey; and although confirmed as a valid, equitable claim by the district court of California, it has never been surveyed, nor had a patent been issued for it under the decree of confirmation. The claim of defendants to the land is, therefore, not yet completed into a legal title. Its boundaries and quantity still remain uncertain and undefined.

The Sierra Morena may be sufficiently definite as the boundary of a state or kingdom, or of a valley, but is certainly a very vague and uncertain line for a survey of land. The eastern boundary called also for the *rancho* of Las Pulgas; this was also uncertain till the western line of Las Pulgas was correctly surveyed. Coppinger's grant calling for land outside of the Pulgas grant, and to be bounded by *it, could have no possible interference [*275 or claim to land within it. Hence, the defendants could resort to no other defense than to offer proof that the survey and patent of Las Pulgas were erroneous as regarded the location of the western line, because it embraces a portion of the level land in the cañada or valley Raymundo, which is the call of its western boundary.

It is the refusal of the court to admit testimony for that purpose which is now alleged as error.

The testimony offered might well have been rejected as irrelevant, for it does not follow that, if the western line of Las Pulgas, as run by the surveyor general, included level land in the valley, that it was at all incorrect. The western boundary line of Las Pulgas, as adjudged by the decree of this court, had two several points of description to fix its location; one uncertain and vague, the other admitting of mathematical certainty. The call of the Cañada Raymundo on the west is as vague as that for the Sierra Morena, a chain of mountains. But the breadth of one league from the estuary or bay was a certain and definite boundary on the east, and showed conclusively the precise location of the line. Las Pulgas could claim to extend but a league west, whether that reached to the hills on the east of the valley or not, and was entitled to have the league in breadth, whether it carried the western line over the hills or not. Coppinger's grant can claim only what is left after satisfying Las Pulgas, which calls for a certain quantity and a certain boundary. There was no offer to prove that the survey of Las Pulgas was extended beyond such limit.

The court below refused to admit the testimony, not for its irrelevancy, but its incompetency; because the defendants, claiming under a merely equitable title, having neither survey nor patent, were not in a condition to dispute in a court of law the correctness of the survey made by the public officer or resist the plaintiff's perfect legal title.

The fact and the conclusion of the court from it are undoubtedly correct. It is well settled that both plaintiff and defendant must produce a strictly legal title, whether it be in fee or as lessee for years.

276*] *The plaintiff had shown a complete legal title; the defendant had not, for the reasons already stated.

The act of 3d March, 1851, ch. 41, § 13 (9 Stat. at L. 631), makes it the duty of the surveyor general to cause all private claims which shall be confirmed, to be surveyed, and "to decide between the parties with regard to all such confirmed claims as may conflict or in any manner interfere." It is true this may not preclude a legal investigation of the subject by the proper judicial tribunal. In this case there can be no conflict of title as between Las Pulgas and the later grant to Coppinger, which calls for it as a boundary. The survey is conclusive evidence as to the precise location of the western line of Pulgas, as between these parties in this suit. If Coppinger and those claiming under him charge that this line has not been properly established, either by mistake or fraud, they might have had a remedy under the 13th section of the act, and may possibly yet have it by filing a bill in chancery. But in this action of ejectment, the defendants cannot call upon a jury at their discretion to alter a boundary line which has been legally established by the public officer specially intrusted with this duty.

The only other exception is to the following instruction of the court as to the form of the verdict: "That they should find a separate verdict against such of the defendants as were proved to have been in possession, at the commencement of the suit, of separate distinct parcels of the said land held in severalty, and that the jury might find a general verdict against all the other defendants who were proved or admitted to have been, at the commencement of the suit, in possession of some portion or portions of the premises in controversy, the limits or boundaries of whose possessions were not defined by the proof; and this, whether such possessions and occupation were joint or several."

We can perceive no error in this instruction. Although the circuit court may have adopted the mode of instituting the action of ejectment by petition and summons, instead of the old fiction of lease, entry and ouster, it is still governed by the principles of pleading and 277*] practice which have been established* by courts of common law. The hybrid mixture of civil and common law pleadings and practice introduced by state codes cannot be transplanted into the courts of the United States.

In the action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him they are all trespassers, and he cannot know how they claim, whether jointly or severally; or if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defense specially for such portion of the land as he claims, and by doing so he necessarily disclaims any title to the residue of the land described in the declaration; and if on the trial he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs unconnected with his separate litigation.

If he pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as taking defense for the whole. How can he call on the plaintiffs to prove how much he claims, or the jury to find a separate verdict as to his separate holding, when he will neither by his pleading nor evidence signify how much he claims? This was a fact known only to himself, and one with which the plaintiff had no concern and the jury no knowledge. If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain.

In the case of *McGarvey* v. *Little*, 15 Cal. 27, when the same objection was made to the charge of the court, the supreme court of California overruled it, and held "that *the [*278 defendants being in possession, and there being no proof of the particular portions which they severally occupied or claimed, there was no error in refusing to direct the jury to bring in a separate verdict as to each."

The judgment of the Circuit Court is, therefore, affirmed.

GEORGE B. BISSELL, David T. Robinson, and Calvin Day, *Plffs. in Err.*,

v.

THE CITY OF JEFFERSONVILLE.

(See S. C. 24 How. 287-300.)

City bonds—laws to obviate irregularities in their issue, are within legislative authority—recitals in bonds, evidence of facts authorising their issue—innocent holders may assume their verity—corporations must adhere to truth in dealings with other parties.

The common council of a city subscribed to the stock of a railroad company, and issued bonds in the name of the city, and delivered the same to the railroad company, in payment for the stock.

Plaintiffs became the holders for value of some of these bonds, in the usual course of their business, and brought suit on coupons for the interest.

Laws, to obviate mistakes and irregularities in the proceedings of municipal corporations when they do not impair any contract, or injuriously affect the rights of third persons, are within the competency of the legislative authority.

Authority on the part of the common council to subscribe for the stock, and to issue the bonds on the petition of three fourths of the legal voters of the city, is shown to have existed.

By the terms of an explanatory act they were authorized to ratify and affirm the subscription, if the obligation or liability incurred had been contracted on the petition of three fourths of the legal voters of the city.

NOTE.—*Statutes legalizing invalid municipal contracts*—see note to 27 L. R. A. 696.

Bona fide purchasers of municipal bonds—see note to 41 C. C. A. 6.

The board unanimously resolved to ratify and confirm the contract with the railroad company, and subsequently issued the bonds, reciting in each that it was issued by authority of the common council of the city, "three fourths of the legal voters of the city having petitioned for the same as required by the charter."

The record of the resolution ratifying and confirming the contract, and the recital in the bonds, furnish conclusive evidence in this case that the common council did readjudicate the question, whether the requisite number of the legal voters of the city had signed the petition.

When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value.

Where, in the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful authority, the railroad company and their assigns, under the circumstances of this case, had a right to assume that they imported verity.

The rule, that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the claims which their own conduct has superinduced, again stated.

Zabriskie v. The Cleveland Railroad Co. 23 How. 381, *ante*, 488.

Argued Jan. 31, 1861. Decided Feb. 11, 1861.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This was an action of assumpsit brought by Bissell and others, the present appellants, citizens of the state of Kentucky, in the court below, against the city of Jeffersonville, a municipal corporation of the state of Indiana, upon coupons of bonds made and issued by the city of Jeffersonville to the Fort Wayne & Southern Railroad Company of the same state, and by that company negotiated to the plaintiffs below. The defendants pleaded the general issue. There was a trial by jury which resulted in a verdict and judgment for the defendants. From this judgment the present writ of error was prosecuted.

The case further appears in the opinion of the court.

Messrs. **D. McDonald, Taft & Perry, J. Smith,** and **A. G. Porter,** for the plaintiffs in error:

The principal question of the case is: Was it competent for the city of Jeffersonville to go behind her own records, and give evidence to disprove them and show that they were not true? We unhesitatingly say that it was not competent. Whether or not three fourths of the legal voters of the city of Jeffersonville petitioned the common council to subscribe the stock to the railroad company and issue the bonds, was a question of fact. This question was evidently to be determined by the council at the time the petitions were presented, or as soon thereafter as it could conveniently be done. This was the understanding of the council as is shown by their action. They appointed a committee to ascertain the fact, and on the report of this committee, by a unanimous vote, solemnly determined that "more than three fourths of the legal voters of the city" had signed the petitions, and placed that determination of the fact upon their records.

Nearly two years afterward the council "confirmed and ratified" the subscription. Neither the council nor any citizen ever controverted the fact so determined, until it was done in this suit.

The bonds were issued by the council under the seal of the city, stating on their face that they were "issued by authority of the common council of the city of Jeffersonville, three fourths of the legal voters of said city having petitioned for the same as required by the charter." They are negotiable paper. They were delivered by authority of the council to the railroad company on the 8th of May, 1855, to be negotiated. The city, by its proper officers under its seal, certified that the city did subscribe the stock "upon the written petition of three fourths of the legal voters thereof (and largely exceeding this)." These were exhibited to the plaintiffs in error in Hartford, Connecticut, in the latter part of August, 1855, at the time the bonds were negotiated to them, and they took them on the faith of the facts so found recited, and certified to them by the city under its seal, no citizen of the city objecting or disputing the truth of them. These facts forever estop the city and all its citizens from averring, as against these appellants, that three fourths of the legal voters of the city did not petition the city council to make the subscription, and issue the bonds. They must be held to have told the truth when they say in so many different ways, and in manner so solemn, that three fourths of the legal voters of the city did petition the council to make the subscription and issue the bonds.

1 Greenl. Ev. § 22.

1. Because the city was the proper party to examine that question and determine that fact for itself and its citizens, and it did, at the proper time, examine and determine it, and declare upon its records that more than three fourths of the legal voters did petition.

2. Because, over its own seal in the bonds sued on, it averred that three fourths of the legal voters of the city had petitioned.

3. Because it averred to the appellants, over its seal and the signature of its clerk, that the subscription to the railroad company was made upon the petition of three fourths of the legal voters of the city and largely exceeding that number.

Ang. & Ames on Corp. 158; *Clark* v. *The Woolen Manf. Co.* 15 Wend. 256; *Carver* v. *Jackson*, 4 Pet. 83; *Crane* v. *Morris*, 6 Pet. 598; *Trimble* v. *The State*, 4 Blackf. 435; *Love* v. *Kidwell*, 4 Blackf. 553; *Beckett* v. *Bradley*, 7 Man. & Gr. 994; *Miller* v. *Elliott*, 1 Ind. 484.

4. Because, by those acts and words of its, it wilfully caused the appellants to believe that three fourths had petitioned and thereby induced them to part with their money on the security of these bonds.

Pickard v. *Sears*, 6 Adol. & E. 469; *Thompson* v. *Thompson*, 9 Ind. 334; 1 Greenl. Ev. §§ 22, 207; *Dezell* v. *Odell*, 3 Hill, 219.

5. Because it and its citizens have acquiesced in the decision on that question made by its council in August, 1853, from that time until the commencement of this suit, in 1856, and its citizens are still acquiescing, and it cannot volunteer a defense in their behalf.

Smead v. *Indianap. Pitts. & Cleve. R. Co.* 11 Ind. 104.

6. Because the appellants are bona fide holders of the bonds and coupons sued on, and were not parties to the fraud, if there was fraud in making the subscription and issuing the bonds.

The Roy. Brit. Bank v. *Turquand*, 32 Eng. L. & E. 273; 36 Eng. L. & E. 142; *Clapp* v. *The County of Cedar*, 5 Ia. 15.

It will be seen, therefore, that the defendants below were estopped by all of the three kinds of estoppel known to the law.

By record: for the proceedings of the council are made records by the charter of the city.

1 Ind. R. S. 207, § 20.

By deed: for the bonds, being under the seal of the city, are specialties.

15 Wend. 256; Ang. & Ames, Corp. 158, ch. 7, § 7.

By matter *in pais;* by the citizens standing by and not controverting the fact found by the council, that three fourths of the legal voters of the city had petitioned.

9 Adol. & E. 469; 9 Ind. 334; 3 Hill, 219; 21 Barb. 656; 11 Ind. 104; 9 Ind. 83.

See further, on the general question of estoppel, Story, Ag. 547, § 443; 563, § 452; 32 Eng. L. & E. 272; 33 Eng. L. & E. 21; 31 Eng. L. & Eq. 59, 53; 39 Eng. L. & E. 28; 4 Cow. & Hill, Notes, page 1237; 3 Cow. & Hill, Notes, p. 200; 14 Pa. 81; 3 Sand. 162; 16 Mass. 94; 23 How. 400; 21 How. 441; 5 Ohio St. 59; 6 Ohio St. 119; 7 Ohio St. 327; 8 Ohio St. 394.

The city of Jeffersonville was a corporation and bound to do what its charter required. It was, therefore, bound to ascertain and decide as to sufficiency of petitions before issuing bonds. An omission to ascertain, or a negligent performance of the duty, would make the city liable to individuals for any loss or injury caused by such omissions or negligence. The principle is thought by some judges to be better settled, which holds a city liable for an attempted performance of duty which misleads and injures, than for a total omission. In this case it was not omission, but the present defense is grounded on the idea that the city, by mistake or fraud, represented that it had performed the duty when it had not, and represented facts to have been ascertained which had not been ascertained. Powers conferred upon those who represent the corporate body are deemed to be conferred upon the corporation itself.

Weet v. *Brockport*, 16 N. Y. 170, note.

Municipal corporations are liable for injuries occasioned by negligence of officers as well as for mere misfeasance—mere omissions as well as wrong doing.

Conrad v. *Ithaca*, 16 N. Y. 158; 5 Bing. 91; 3 Barn. & Ad. 77; 1 Bing. N. C. 222; 3 Hill, 612; 3 N. Y. 464; 9 N. Y. 163; 17 N. Y. 104; 62 U. S. (21 How.) 210; 35 Pa. 298; 23 Ill. 335.

The defense in this case pressed the point that the act of the city council in question was the act of a tribunal of limited and special jurisdiction. But to make this defense available, they must necessarily ignore and exclude from it the leading feature of the case. They must deny what was the undeniable intent of the legislature, *viz.*, that this city council should itself inquire into and find the jurisdictional fact. The record shows that a bona fide petition was filed, numerously signed. In this class of cases, where facts are preliminarily to be proved as basis of the right to employ the process, if the proof has a legal tendency to make out the case required by the statute in a collateral action, the process will be deemed valid.

The decision may be erroneous, but it is not void.

Skinnion v. *Kelley*, 18 N. Y. 356; *Miller* v. *Brinkerhoff*, 4 Den. 118; *Van Alstyne* v. *Erwine*, 11 N. Y. 331; 4 Hill, 598; 17 Wend. 464; 12 Pick. 572; 19 Barb. 81; 6 Wend. 655; 5 Eng. C. L. 728; 21 Barb. 656; 4 Phil. Ev. vol. 1017, 1021; Cow. & Hill, Notes, index, notes IV. p. 1676, gives the true summary thus: "Jurisdiction—want of, may always be shown in answer to judgments, etc. Even in opposition to the record, when, etc." But "not in opposition to express adjudication on jurisdictional facts." Where the judicial tribunal has not general jurisdiction of the subject-matter, but may exercise it under a particular state of facts, those facts must be specially averred and established, and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding.

31 Barb. 661; 4 Den. 119; 4 Hill, 598; 10 Wheat. 192; 3 N. Y. 41; 1 Den. 537; 9 Johns. 130; 7 How. 172; 5 N. Y. 434; 6 Pet. 709; 2 How. 338.

The records of a corporation are the best evidence of its acts, and they exclude all evidence of a secondary grade in cases like this.

5 Wheat. 424; 1 Greenl. Ev. 157; 1 Stark. 69.

Messrs. **R. Crawford** and **R. Johnson**, for the defendants in error:

The fallacy of confounding the common council and the city as if they were the same, runs through much of the plaintiffs' argument; whereas, the council was merely the agent of the city.

Mech. Bank v. *N. Y. & N. H. R. Co.* 13 N. Y. 640.

And like any other principal, the city would be bound by the authorized, but not by the unauthorized, acts of its agent.

I. Was it error to permit the defendant to prove that three fourths had not petitioned? As the plaintiffs insisted that it was, and that the recital on the minutes was conclusive on that point, we submit they cannot escape from the inference that it was not the petition of three fourths of the voters, but the false statement on their minutes, that gave the common council the power to issue the bonds. They must also admit this practical consequence to follow, that if the common council should make the requisite recital on their minutes and issue bonds pursuant to it, the city would be utterly powerless to defend against any amount of debt they might choose to incur, no matter how few the petitioners might be, no matter if there was no petition at all, no matter how false in every particular the recital might be provided only the holders was not privy to its falsehood. The defendant on the other hand, contends that this is a case of entire want of power in the common council to issue bonds, that the requisite petition for their issue was a condition precedent not merely to the exercise,

but to the very existence of the power, and that in the absence of such petition, they could not bind the city by recital or in any other way—in short, that they had no jurisdiction of the matter. The distinction is most material between the acts of one who had no power at all in the premises, and the acts of one who had an admitted power to do them, but exercised it irregularly or abusively; the former being absolutely void, the latter either voidable only or absolutely valid. This distinction will help to reconcile many decisions which otherwise seem inconsistent.

The plaintiffs quote and rely on cases of the latter class.

1. It is always competent to show that a court has acted beyond its jurisdiction.

Williamson v. *Berry*, 8 How. 495; *Harrington* v. *People*, 6 Barb. 607; *Sharp* v. *Johnson*, 4 Hill, 92; *Denning* v. *Corwin*, 11 Wend. 647; *Suydam* v. *Keys*, 13 Johns. 144.

And *a fortiori* may the same be shown of a special tribunal like the common council, which has limited specific powers only; which is no court, and proceeds *ex parte*.

1 Sm. Lead. Cas. 816.

2. A corporation, when sued on an alleged contract, is never estopped to prove in defense her want of power to make the contract; much less is it estopped to prove its agent had no power to make it.

Halstead v. *New York*, 5 Barb. 218; 3 N. Y. 430; *Abbott* v. *Packet Company*, 1 Md. ch. 542; *Albert* v. *Bank*, 1 Md. ch. 407; 8 Gill & J. 248; *Pearce* v. *M. & I. R. Co.* 62 U. S. (21 How.) 442; *Bridgeport* v. *Housatonic R. Co.* 15 Conn. 493.

3. The recital by the council on its minutes that three fourths had petitioned, is at most but *prima facie* evidence of the fact. No court or officers can acquire jurisdiction by falsely alleging the existence of facts on which jurisdiction depends.

See *Harrington* v. *People*, 6 Barb. 610; *Noyes* v. *Butler*, 6 Barb. 616; *Rex* v. *Sutton*, 4 Maule & S. 532; *Bunbury* v. *Fuller*, 24 Eng. L. & E. 433.

To hold otherwise would be to make the jurisdiction depend, not on the facts, but on the naked assertion of those facts.

See *Welch* v. *Nash*, 8 East, 394; *People* v. *Cassels*, 5 Hill, 164; *Barbour* v. *Winslow*, 12 Wend. 104; *Doughty* v. *Hope*, 3 Den. 600; *Prettyman* v. *Supervisors*, 19 Ill. 414.

4. If such is the rule as to the records of the courts, much less conclusive should be the minutes of such tribunals as the common council, whose proceedings are *ex parte* and from which no appeal lies. Cases as to tax titles show how completely findings of such boards are open to inquiry collaterally, as to facts which confer jurisdiction.

See 4 Wheat. 77; 14 Pet. 322; 7 Cow. 88; 3 Den. 595; 4 Blackf. 70; *Sharp* v. *Speir*, 4 Hill, 87; *Graves* v. *Otis*, 2 Hill, 466.

The plaintiffs have argued that the doctrine of estoppel precludes our defense, and have quoted divers cases to support their argument. Now, it will not be pretended that the defendant can be estopped by the unauthorized acts of its agents. Then, with all due respect, we submit it is begging the question to say it is estopped by the acts of its agents, until it is first proved they were authorized to do the acts. When the plaintiffs have fairly established the authority to do the acts, their case is already made out, and they need not trouble themselves about the estoppel.

II. Was it error to charge the jury that if three fourths of the voters had not petitioned for the subscription to be made and the bonds to be issued, the bonds were void in the hands of the plaintiffs? In other words, if the bonds would be void in the hands of the railroad company, are they such negotiable paper, and the plaintiffs such holders of them, that they become valid in the plaintiffs' hands?

1. The bonds were transferable, but were not negotiable in the sense in which bills of exchange are negotiable.

Their negotiability depends entirely upon statute law, and it is perhaps immaterial whether that of Indiana or of New York governs them.

1 Ind. R. S. 1852, p. 378, §§ 1, 3, 6; 2 N. Y. R. S. 1828, p. 234, § 58, part 8.

These statutes expressly save to the maker of such paper, defenses against it in the hands of an assignee, which, before notice of the assignment, he had against it in the hands of the payee. No usage can grow up to take away that right.

Lewis v. *Wilson*, 5 Blackf. 370; *Clark* v. *Farmers' Man. Co.* 15 Wend. 256.

2. If these bonds were void in their origin, they could not be made valid by assignments.

"Negotiability can impart no vitality to an instrument executed under a power where the agent has exceeded his actual or presumptive authority. Whoever proposes to deal with a security of any kind appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry, he deals at his peril."

Mech. Bank v. *N. Y. & N. H. R. Co.* 13 N. Y. 631; see, also, *Stark* v. *Highgate Archway Co.* 1 Eng. C. L. 792; *Halstead* v. *New York*, 5 Barb. 218; *Smead* v. *I. P. & C. R. Co.* 11 Ind. 104; *Root* v. *Goddard*, 3 McL. 102.

A bill of lading is negotiable (*Lichbarrow* v. *Mason*, 2 T. R. 63; 5 T. R. 567); and the master of a ship has authority to give one for goods shipped on board, and thus bind the owner. But if he gives one for goods not on board, the owner is not responsible to the parties taking it.

Grant v. *Norway*, 2 Eng. L. & E. 337; *Hubbersty* v. *Ward*, 18 Eng. L. & E. 551; *Covill* v. *Hill*, 4 Den. 323.

So of warehouse receipts, etc.

Bank v. *Colt*, 15 Barb. 506; *Coleman* v. *Riches*, 29 Eng. L. & E. 323.

3. But it was proved that when these bonds were negotiated to plaintiffs, the certificate of the city clerk under the seal of the city was shown to them, which stated the subscription was on the written petition of more than three fourths of the voters, also the certificate of the mayor and clerk that the city bonds had been exchanged for certificates of railroad stock, and even the certificate of the secretary of the railroad company that the president was authorized to sell the city bonds. And it is supposed these subsequent acts should in some way estop

the city from making this defense. But the plaintiffs have omitted to show that any of those officers had the least authority to bind the city by such certificates.

The powers and duties of mayor and clerk are prescribed by the city charter, but making such certificates is not among them.

4. It is argued lastly, that the city or citizens might have had some remedy against the action of the common council if they had sought it promptly, but they have lost it by lying by till other rights have been acquired in opposition to them. But we emphatically ask, what remedy they ever had, except to defend against the bonds when sued. There was no appeal from the action of the common council. There was no one who could apply for injunction against the issue of the bonds. The city could not do it, for her officers, who alone could bring the action for her, were the very persons who committed the wrong. A citizen could not do it. No one of them was likely to be specially and peculiarly injured by the action, and in such case no private action can be maintained.

12 Pet. 91; 6 Met. 425; 7 Cush. 254; 14 Conn. 565; 17 Conn. 373; 18 N. Y. 155.

Mr. Justice **Clifford** delivered the opinion of the court:

This case comes before the court upon a writ of error to the circuit court of the United States for the district of Indiana. It was an action of *assumpsit*, and was instituted by the present plaintiffs against the corporation defendants, to recover two instalments of interest which had accrued upon certain bonds, purporting to have been duly issued in the name of the defendants for stock subscribed in their behalf by the common council of the city, to the Fort Wayne & Southern Railroad Company. Assuming to act in behalf of the city, the com- [*289 mon council subscribed $200,000 *to the stock of the railroad company, and on the 24th day of April, 1855, issued two hundred bonds, of $1,000 each, in the name of the city, and subsequently delivered the same to the railroad company, in payment for the stock previously subscribed. Interest on the whole amount of the loan was to be paid semi-annually in the city of New York, at the rate of six per cent, and coupons or warrants for the same, payable to bearer, were annexed to each separate bond. Plaintiffs became the holders, for value, and in the usual course of their business, of thirty-seven of these bonds; and the suit in this case was founded on thirty-seven of the coupons for the first instalment of interest, and thirty-six coupons for the second instalment. As amended, the declaration contained a count for money had and received, and a special count upon each of the seventy-three coupons. Defendants pleaded the general issue, and also filed a special plea, in bar of the cause of action set forth in the several special counts. More particular reference to the special plea is unnecessary, as it was subsequently held bad on general demurrer, and at the same time the parties went to trial on the general issue.

To maintain the issue, on their part, the plaintiffs, in the first place, introduced one of the original bonds, which is set forth at large in the record. Among other things, it recites, in effect, that it was issued by authority of the common council of the city, and that three fourths of the legal voters thereof "petitioned for the same, as required by the charter." They also gave in evidence, without objection, the several coupons described in the declaration. All of the coupons, as well as the bonds given in evidence, were signed by the mayor of the city, and were countersigned by the city clerk, and the defendants admitted their execution.

Presentment and protest of the coupons for nonpayment were also duly proved by the plaintiffs; and to show that the bonds were duly and legally issued, they introduced the records of the common council of the city, and the minutes of their proceedings upon that subject. From that record it appeared that on the 23d day of August, 1853, a *petition of cer- [*290 tain legal voters of the city was presented to the common council, representing that the construction of the before mentioned railroad would be of great benefit to the public generally, and especially to the commercial interests of the city, and praying that the board to which it was addressed would subscribe stock in the railroad to the amount of $200,000, and contract a loan for an equal amount, through the issue of city bonds, for the payment of the subscription. That petition purports on its face to have been signed by four hundred and sixty-seven persons, and it recites that they constituted at that time three fourths of the legal voters of the city. On the day of its presentation it was referred by vote of the common council to three members of the board, who reported, in effect, that they found, upon examination of the petition, and of the poll book of the last charter election, that the names of more than three fourths of the legal voters of the city were appended to the petition, and they also reported a preamble and resolution to carry into effect the prayer of the petitioners. Evidently the report of the committee was entirely satisfactory, as the record shows that the resolution was immediately adopted, without alteration or amendment, by the unanimous vote of the board.

Without reproducing the document, it will be sufficient to say, that the common council thereby resolved, in case the road came into the city, to subscribe $200,000 to the stock of the railroad company, and the preamble, which was adopted as a part of the resolution, expressly affirmed the fact reported by the committee, that more than three fourths of the legal voters of the city had petitioned for that object. Pursuant to that determination, the parties having met and arranged the terms and conditions of the proposed agreement, a contract was made with the railroad company, that the common council should make the subscription thus authorized, and execute and deliver the bonds of the city to the company for an equal amount in payment for the stock. Throughout the period when these proceedings took place, the parties to them, it seems, had acted upon the supposition that the 56th section of the general law of the state, for the *incorporation [*291 of cities, fully authorized the defendants, through their common council, to make the subscription and issue the bonds. Before the bonds

were issued, however, the supreme court of the state decided, in an analogous case, that no such authority was conferred upon cities by that section. 1 Rev. Stat. 215; *The City of Lafayette* v. *Cox*, 5 Ind. 38.

Some delay ensued in issuing the bonds; apparently in consequence of that decision; but on the 21st day of February, 1855, the legislature of the state passed an additional act to enable cities which had subscribed for stock in companies incorporated to construct works of public utility to ratify such subscriptions. By the 1st section of that act, the common council of any city which had contracted such obligations or liabilities upon the supposition that they were authorized so to do under the provisions of the former act might, "at any time after the passage of this act, ratify and affirm such subscription;" and upon such ratification it was expressly enacted, that "such subscription, and the obligation and liabilities, and the corporate bonds or obligations issued or to be issued therefor by such city, shall be valid." Sess. acts 1855, p. 132. To prove such ratification, the plaintiffs introduced the record of the subsequent proceedings of the common council of the city, showing that at their meeting held on the 6th day of April, 1855, it was resolved by the board, then in session, that the former contract between the city and the before mentioned railroad company, "for $200-000, be and the same is hereby confirmed and ratified."

In this connection, the plaintiffs also proved by the same record, that the common council, on the 13th day of April of the same year, authorized and directed the mayor of the city and the city clerk to procure and sign two hundred bonds, of $1,000 each, in the name of the city, and deliver the same to the railroad company, reciting in the resolution upon the subject that the proceeding was in accordance with the statute of the state, and the contract and arrangement previously made with the railroad company. Prior to the trial, the court, by the consent of parties, appointed a commissioner to take such evidence as either party 292*] might direct *to have taken, and to report both the evidence and his finding of the facts proved by it, subject to all exception as to the competency of the testimony, and the correctness of his finding. He reported that three fourths of the legal voters of the city had not signed the petition to the common council, which constituted the foundation of their action in making the subscription to the stock and issuing the bonds. This report was accompanied by the several depositions on which it was founded, and the transcript shows that certain portions of the testimony of the deponents tended to prove the fact reported by the commissioner. Defendants offered the report, with the several depositions, in evidence, to prove, among other things, that the petition in question was not signed by three fourths of the legal voters of the city. They also offered oral evidence to prove the same fact. To all such testimony the plaintiffs objected, and also moved the court to suppress all such portions of the depositions taken by the commissioner as tended to prove that a less number than three fourths of the legal voters had petitioned for the subscription to the stock and for the issuing of the bonds. But all of these objections of the plaintiffs were overruled by the court, and the report of the commissioner, with the depositions as taken by him, and the parol testimony, were admitted to the jury, and the plaintiffs excepted to the several rulings in that behalf. Further testimony was then given by the plaintiffs, showing that the bonds in question were negotiated to them for value by the agent of the railroad company; and that the agent, at the time they were received, exhibited to them the certificate of the city clerk, under the seal of the city, giving a condensed statement of the proceedings of the common council from the presentation of the petition to the delivery of the bonds, and affirming, in effect, that all those proceedings appeared of record in the office of the city clerk; and they further proved, that he also exhibited to them at the same time another certificate, signed by the mayor of the city and city clerk, showing that the bonds had been exchanged with the railroad company for an equal amount of their capital stock, and affirming that the exchange was authorized by the contract between the parties and the *res- [*293 olutions of the common council of the city. After the testimony was closed, the court instructed the jury to the effect that, if they found from the evidence that three fourths of the legal voters of the city had petitioned for the subscription to the stock, and for the issuing of the bonds. their verdict should be for the plaintiffs; but if they found that three fourths of the legal voters had not so petitioned, then their verdict should be for the defendants. Under the rulings and instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instructions.

1. On that state of the case the main question presented for decision is, whether it was competent for the defendants to introduce parol testimony to prove that three fourths of the legal voters of the city did not petition for the subscription to the stock and the issuing of the bonds. That question is raised, as well by the exceptions to the rulings of the court in admitting such testimony as by those taken to the instructions given to the jury.

Some further reference, however, to the law under which the common council acted, in making the subscription and in issuing the bonds, becomes necessary before we proceed to the examination of that question. It is conceded on both sides that the defendants had adopted the general law of the state, entitled "An Act for the Incorporation of Cities," before any of these proceedings were commenced. Prior to the adoption of that law by the corporation, the charter of the city authorized the common council to subscribe, in the name of the city, for any amount of stock in railroad or turnpike companies formed, or to be formed, for the purpose of constructing any railroad or turnpike from the city to any other point, provided the stock so held by the city did not, at any time, exceed $100,000; and with that view, they were authorized to borrow money or issue bonds to pay for such stock. But it is admitted by the plaintiffs that the corpora-

tion, at the date of the proceedings in question, was duly organized under the subsequent general law for the incorporation of cities, which provides, in effect, that the acceptance of that act by any incorporated city shall be 294*] deemed a surrender *by such city of its prior charter. By the 56th section of the last-named act it is also provided, that no incorporated city, under this act, shall have power to borrow money, or incur any debt or liability, unless three fourths of the legal voters shall petition the common council to contract such debt or loan. All of the proceedings in question which led to the contract for the subscription to the stock took place under that provision of the charter; and we have already adverted to the fact that the supreme court of the state decided, before the bonds were issued, that, by its true construction, it did not authorize a subscription to the stock of a railroad company. At the argument, the construction adopted by the state court was controverted by the counsel of the plaintiffs. But suppose it to be correct; still the limitation or restriction was one created by the legislature which granted the charter, and certainly it was competent for the same authority to repeal it altogether, or to substitute some other in its place.

Municipal corporations are created by the authority of the legislature, and Chancellor Kent says they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the state. 2 Kent's Com. p. 275.

Whatever may be the true construction of that section of the charter, it is nevertheless certain that it was under that provision that the petition for the subscription was presented to the common council, and it is equally certain that it was under the same provision that they heard and determined the question whether the petition actually contained the signatures of three fourths of the legal voters of the city. Bad faith is not imputed to the board, nor is it denied that they acted "upon the supposition" that they were authorized by that provision, on "the written petition of three fourths of the legal voters of the city," to subscribe for the stock and contract to issue the bonds. Having ascertained and determined that three fourths of the legal voters had petitioned, they adopted the resolution reported by the committee, and entered into the contract with the railroad company. Clearly, therefore, the 295*] *common council had contracted the obligation to take the stock; and in case of refusal, would have been liable in damages for a breach of the contract. Other cities in the state had contracted like obligations under similar circumstances; and to remedy the anticipated difficulty, and to remove the doubt first suggested by the decision of the supreme court of the state, the legislature passed the explanatory act of the 21st of February, 1855, to which reference has been made.

Sufficient has already been remarked to show that the circumstances of the case exhibited in the record bring it within the very terms of the act; and if so, then the common council might lawfully ratify and affirm the subscription; and upon such ratification it is expressly declared that the bonds issued or to be issued shall be valid.

Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority. Unlike what is sometimes exhibited in laws of this description, the legislature did not attempt to ratify the subscription, but left the matter entirely optional with the common council, as the representatives of the city, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription; and by so doing, gave the same effect to the contract to subscribe for the stock, and to all the proceedings that led to it, as if the authority to make it had been coeval with the presentation of the petition on which those proceedings were founded. No injustice will result from this conclusion, as it is obvious that the contract had been made in good faith, under the full belief that they were duly authorized to subscribe for the stock, and issue the bonds in the name of the city, so that the only operation of the confirmatory resolution was to give the very effect to the proceedings which they had intended, but which, from the defect in their authority, had not been accomplished. **Watson* v. *Mercer*, 8 Pet. 111; [*296 *Wilkinson* v. *Leland*, 2 Pet. 661.

Authority on the part of the common council to subscribe for the stock, and to issue the bonds on the petition of three fourths of the legal voters of the city is, therefore, shown to have existed, and must be assumed in the further consideration of the case. With this explanation as to the authority of the common council, we will proceed to the examination of the main question discussed at the bar.

2. It is insisted by the plaintiffs that the defendants had no right to disprove the verity of their own records, certificates and representations, concerning the facts necessary to give validity to the bonds. On the other hand, the defendants controvert that proposition and insist that it was competent for them, under the circumstances, to prove by parol testimony, that the records given in evidence did not speak the truth, and that, in point of fact, three fourths of the legal voters had not petitioned, as required by the charter. Unless three fourths of the legal voters had petitioned, it is clear that the bonds were issued without authority, as by the terms of the explanatory act it could only apply to a case where the common council of a city had contracted the obligation or liabilities therein specified upon the petition of three fourths of the legal voters of such city; and if no such petition had been presented, or if it was not signed by the requisite number of the legal voters, the law did not authorize the common council to ratify and affirm the subscription. That fact, however, had been previously ascertained and determined by the board to which the petition was originally addressed.

After the explanatory act was passed, the common council were fully authorized to revise the finding of the former board; and if it did

not appear, upon inquiry and proper investigation, that it was correct, it was their duty, as the representatives of the city, to have refused to ratify and affirm the contract for the subscription. Such an inquiry might have been made through the medium of a committee, as it had been when the petition was presented, or in any other mode, satisfactory to the board, which would enable them to ascertain the true 297*] state *of the case. By the terms of the explanatory act, they were authorized to ratify and affirm the subscription, if the obligation or liability incurred had been contracted on the petition of three fourths of the legal voters of the city; and of course, the necessary implication is, that they must be satisfied that the requisite number had petitioned. In making that investigation, however, it was not required that there should be a new petition, and the law is entirely silent as to the manner in which it was to be conducted. If the common council was composed of the same persons who had already passed upon the question, further investigation was unnecessary, provided they were satisfied with their former determination. Such of the members as knew the record of the fact to be correct might safely act upon their own personal knowledge, without further inquiry; and if there were any who had not been members of the board when the prior determination was made, they might ascertain the fact in any mode which was satisfactory to themselves and their associates. Nothing appears in the record to show whether further information upon the subject was necessary or desirable, or, if so, what means were adopted to obtain it; but it does appear that the board unanimously resolved to ratify and confirm the contract with the railroad company, and subsequently issued the bonds, reciting in each that it was issued by authority of the common council of the city, "three fourths of the legal voters of the city having petitioned for the same as required by the charter." Taken together, we think the record of the resolution ratifying and confirming the contract, and the recital in the bonds, furnish conclusive evidence in this case that the common council did readjudicate the question, whether the requisite number of the legal voters of the city had signed the petition. Fraud is not imputed in this case, and it does not appear that it was even suggested at the trial in the court below that the board neglected that duty at the time the contract was confirmed; but the defense was that the finding was erroneous, because the petition, as matter of fact, did not contain three fourths of the legal voters of the city.

3. It only remains to consider the effect of 298*] that determination *as between the defendants and the holders for value of the bonds, without notice of the supposed defect in the proceedings under which they were issued, and put into the market. Two hundred bonds, with twelve hundred interest warrants, or coupons, were issued in the name of the city, and the coupons, as well as the bonds, were payable to bearer. Interest was payable semi-annually, but the redemption of the principal was postponed for a period exceeding twenty-five years. Capitalists could not be expected to accept such paper, and advance money for it, unless the authority to issue it was put beyond dispute. They certainly would not pay value for such securities, with knowledge that the question under consideration would be open to litigation whenever payment, either of principal or interest, was demanded. Purchasers of such paper look at the form of the paper, the law which authorized it to be issued, and the recorded proceedings on which it is based. When the law was passed authorizing the common council to ratify and affirm the contract with the railroad company, it must have been understood by the legislature that the bonds were to be received by the company in payment for the stock, and used as a means for borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the act, it contemplated that the bonds should be issued before it was conclusively determined that the requisite number of the legal voters of the city had petitioned the common council. But a much stronger reason why that construction cannot be adopted is, that it would involve an absurdity, as it would render the law altogether inoperative, or else it would admit that the bonds might be issued without authority.

Whether three fourths of the legal voters had petitioned or not, was a question of fact; and if not ascertained and conclusively settled before the bonds were issued, it would remain open to future inquiry, and might be determined in the negative; and clearly the common council could not lawfully ratify and affirm the subscription, unless that proportion of the legal voters had petitioned; and without such ratification, the bonds *would be invalid. Beyond ques- [*299 tion, therefore, that construction must be rejected.

Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of *The Comrs. of Knox Co.* v. *Aspinwall*, 21 How. 544, we are of the opinion that "this board was one, from its organization and general duties, fit and competent to be the depositary of the trust confided to it." Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint.

When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and a for-

tiori it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value.

Duly certified copies of the record of the proceedings were exhibited to the plaintiffs at the time they received the bonds, showing to a demonstration that further examination upon the subject would have been useless; for, whether we look to the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful 300*] authority; and *we hold that the company and their assigns, under the circumstances of this case, had a right to assume that they imported verity.

Citation of authorities to this point is unnecessary, as the whole subject has recently been examined by this court, and the rule clearly laid down that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced. *Zabriskie* v. *Cleveland, etc., R. Co.* 23 How. 400.

For these reasons, we are of the opinion that the parol testimony was improperly admitted, and that the instructions given to the jury were erroneous.

The judgment of the Circuit Court is, therefore, reversed, with costs, and the cause remanded, with directions to issue a new venire.

WILLIAM S. McEWEN and Henry H. Wiley, *Plffs. in Err.*,
v.
JOHN DEN, Lessee of Charles Bulkley and Stuart Brown.

(See S. C. 24 How. 242-247.)

Tennessee law as to deeds—acknowledgment in another state—where deed not duly acknowledged, copy of record is not evidence—custom cannot change description.

By the laws of Tennessee the fee in land does not pass unless the conveyance is proved, or duly acknowledged and registered.

In 1839, a deed for land lying in Tennessee could not be acknowledged or proven in another state before the clerk of a court.

The Tennessee statute of 1856, which it is claimed validated this probate, is prospective.

The act of 1856 was an amendment of the act of 1839, and does not carry with it the provisions of the former law.

Where the deed offered in evidence was recorded without legal proof of its execution, a copy of the record cannot be evidence.

The lines of a grant must be governed by a legal rule, which a local custom cannot change.

Argued Jan. 23, 1861. Decided Feb. 13, 1861.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action of ejectment, commenced by the present defendant in error in the court below.

On the trial, the jury rendered a verdict for the plaintiff below, and the case was brought to this court by writ of error.

The case appears in the opinion of the court.

Messrs. **Joseph B. Heiskell** and **Horace Maynard** for the plaintiffs in error.

Messrs. **John Baxter** and **Thomas A. R. Nelson** for the defendants in error.

Mr. Justice **Catron** delivered the opinion of the court:

Bulkley sued McEwen and Wiley, in an action of ejectment, for 5,000 acres of land. At the trial, the plaintiff introduced a patent issued to Thomas B. Eastland, dated December 21st, 1838, No. 22,261. The plaintiff next offered to read the copy of a deed from Eastland to Bulkley for the tract granted (with other lands): to the reading of which objection was made, but court admitted the copy to be read; to the admission of which the defendants excepted.

By the laws of Tennessee, the fee in land does not pass unless the conveyance is proved, or duly acknowledged and registered. This deed purports to have been acknowledged by the grantor, Eastland, before the clerk of the court of common pleas for the city and county of New York, and is certified under his seal of office. And this was accompanied by a certificate of the judge of said court, that Joseph Hoxie, before whom the deed was acknowledged, was clerk, and that the court of which he was clerk was a court of record. On this evidence of its execution, the deed was registered in the county where the land lies; but at what time it was registered does not appear. The acknowledgement was taken October 25th, 1839. At that time a deed for lands lying in Tennessee could not be acknowledged or proven in another state before the clerk of a court.

In 1856, an act was passed (ch. 115), which it is insisted validates this probate. It provides, that deeds proved or acknowledged before the clerk of any court of record in any of the states of this Union, and certified by the clerk under his seal of office, and the chief magistrate of the court shall certify to the official character of the clerk, the probate or acknowledgment *shall be valid. And the 2d section de- [*244 clares, that all deeds proved or acknowledged and certified in manner aforesaid, may be registered in this state, and shall be good to pass title, etc.

It is insisted, that the act is retrospective as well as prospective in its operation, and covers the acknowledgment made in 1839, in New York.

We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit: that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears.

It is next insisted that the act of 1856, being an amendment of the act of 1839, carries with it the provisions of this law. The act of 1856 declares that the act of 1839 "be so amended" that all deeds, powers of attorney, etc., proved or acknowledged before a foreign clerk, may be registered, and have full effect. An additional mode of probate is provided; nor does the act go any further.

The deed offered in evidence was recorded without legal proof of its execution; and, therefore, a copy of the record could not be evi-

dence. The court erred in admitting the copy to go to the jury.

The plaintiff below described the land sued for in his declaration, which is required to be done by the laws of Tennessee. The declaration calls for the boundaries of grant No. 22,-261, made to Thomas B. Eastland, December 21st, 1838. The defendants then gave in evidence two other grants, for 5,000 acres each; one to Thomas B. Eastland, No. 22,267, being one of the tracts contained in the deed from Eastland to Bulkley; and another to Henry H. Wiley, one of the defendants, No. 26,086. The two junior patents covered the principal possession of the defendants, at a place known as Evans' coal bank. This fact was admitted; and it furthermore appeared, that the defendants had held seven years' adverse possession at the coal bank, under Wiley's grant. And it was insisted below, and is again here, that as Bulkley had shown himself to be the owner of **245***] both the tracts granted, and as the *operation of the act of limitations drew to Wiley's younger patent the title of Eastland's junior grant, and vested this title in the defendants, they were protected by the statute, because Bulkley had the right to sue at all times during the seven years, by virtue of grant No. 22,267. But the court instructed the jury to the reverse of this assumption, and, we think, correctly. From the facts stated, it is true that the right of action founded on the younger grant to Eastland was barred, to the extent that Wiley's grant interfered with No. 22,267; and assuming it to be true, that the defendants could avail themselves in defense, or affirmatively, of this title, still it could avail them nothing, as both No. 22,267 and No. 26,-086 were inferior to grant No. 22,261.

The main question in the cause turns on the fact, whether the possession at Evans' coal bank was within the boundary of the grant No. 22,261, described in the declaration, and alone relied on at the trial by the plaintiff. It calls to begin on the south bank of Coal creek, four poles below Bowling's mill; thence running south with the foot of Walden's ridge, 894 poles, to a stake at letter H, in Henderson & Co.'s Clinch river survey; then west, crossing Walden's ridge, 894 poles to a stake; then north 894 poles to a stake, then a direct line to the beginning.

It was proved at the trial, and is admitted here, that no line was originally run and marked but the first one; and that at H there is a marked poplar corner tree, which is a line mark of the grant. It being admitted that the first line is established, and that it is regarded as a north and south line, and that the other lines of the tract were not run or marked, it follows they must be ascertained by course and measurement. How they are to run is a matter of law; and on this assumption, the circuit court instructed the jury as follows: "To identify the land appropriated, the jury must look to the calls, locative and directory, the foot of the mountain, the creek, the coal bank, the marked trees, courses and distance, number of acres demanded and paid for, etc.; and they will look to the survey, full or partial; that assuming the correct mode of survey to have been by horizontal measurement, and that the surveyor *based his identification of the land [*246 entered on surface measure, in accordance with his custom and the custom of the mountain range of country in which he resided, this would not, of itself, defeat the location of the land, and the boundaries of the grant as indicated by the survey, calls, and other evidence, to all of which they would look in adjusting the boundaries of the plaintiff's grant." To this charge exception was taken. We think the instructions given were too vague and general to afford the jury any material aid in ascertaining the true boundaries of the land granted. The first line calls for two corners admitted to exist; this line must govern the three others. 1 Meig's Digest, 154. It falls short of the distance called for, being only about 800 poles long. Its course being found, the next line running west must be run at right angles to the first one. In ascertaining the southwest corner of the tract at 894 poles from the poplar corner, the mode of measuring will be to level the chain, as is usual with chain carriers when measuring up and down mountain sides, or over other steep acclivities or depressions, so as to approximate, to a reasonable extent, horizontal measurement, this being the general practice of surveying wild lands in Tennessee. The reasonable certainty of distance, and approximation to a horizontal line, is matter of fact for the jury to determine.

The third line running north, from the ascertained western termination of the second, must run parallel with the first line, and be continued to the distance of 894 poles, the chain being levelled as above stated. The fourth line will be run from the northern terminus of the third line to the beginning near Bowling's mill.

The surveyor who made the survey on which grant No. 26,261 is founded deposed at the trial "that no actual survey was made in 1838 of said land, except the first line from A to H. That the other three lines of the grant were not run, but merely platted. That the proper mode of making surveys was by horizontal measurement, but that he had not been in the habit of making them in that way; that in making the line from A to H, in this survey he had measured the surface; that the custom of the country was to adopt surface measure; *and that he had made the survey in ac- [*247 cordance with such custom."

The grantee was bound to abide by the marked line from A to H; but the other lines must be governed by a legal rule, which a local custom cannot change. Should this custom be recognized as law, governing surveys, it must prevail in private surveys, in cases of sales of land, when the purchaser who bought a certain number of acres might, by surface measure across a mountain, lose a large portion of the land he had paid for. And such would be the case of this grantee, were he restricted to surface measure; whereas, by the terms of his patent, the government granted to the extent of lines approximating to horizontal measurement. How far the act of limitations will affect the plaintiff's title, will depend on the fact whether Evans's coal bank falls within the boundary of the patent sued on, as it is not claimed that the other possession at a different

place on grant No. 22,261, and for which trespass the recovery was had, was seven years old when the suit was brought.

It is ordered that the judgment below be reversed, and the cause remanded for another trial to be had therein.

1*] *FRANKLIN MOORE, George Foot, and George F. Bagley, *Plffs. in Err.*,

v.

THE AMERICAN TRANSPORTATION COMPANY.

(See S. C. 24 How. 1-41.)

Construction of act of Congress of March 3, 1851—applies only to commerce between the states, and foreign commerce—commerce on the great lakes, between states, is on same footing as commerce on the ocean—commerce on lakes wholly within a state, not within the regulation of Congress.

In the words "any vessel of any description whatsoever, used in rivers or inland navigation," in the act of March 3, 1851, the word "used" means "employed," and was intended to refer to vessels solely employed in rivers or inland navigation.

But the business upon the great lakes lying upon our northern frontiers, carried on between the states, and with the foreign nation with which they are connected, deserves to be placed on the footing of commerce on the ocean; and Congress could not have classed it with the business upon rivers, or inland navigation.

If Congress intended to have excluded these lakes from the limitation of the liabilities of owners, it would have referred to them by a more specific designation.

The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to the navigation of these lakes as to that of the ocean.

Commerce upon lakes lying within the state, such as the Cayuga, Seneca, and all others similarly situated, is not within the regulation of Congress.

The act applies to vessels only which are engaged in foreign commerce, and commerce between the states. The purely internal commerce and navigation of a state is exclusively under state regulation.

Argued Jan. 28, 1861. Decided Feb. 18, 1861.

IN ERROR to the Supreme Court of the State of Michigan.

This was an action of *assumpsit*, originally commenced by the present plaintiffs in error in the circuit court for Wayne county, in the state of Michigan, against the defendants, a corporation created by the state of New York. At the first trial, in accordance with the direction of the court, the jury returned a verdict for the plaintiffs. The judgment entered on that verdict was reversed by the supreme court of Michigan and a new trial ordered.

See *American Transportation Co.* v. *Moore*, 5 Mich. 368.

The case was again tried, and the jury, under the direction of the court, rendered a verdict in favor of the Transportation Company, in accordance with the decision above referred to. The judgment entered upon this verdict was affirmed by the supreme court of Michigan, and the case was brought to this court by writ of error.

Several questions not passed upon by the court were discussed by counsel. The main question in the case arose under the 7th section of the act of March 3d, 1851 (9 Stat. at L. 635). The substance of this act, the facts of the case, and the questions involved, are stated by the court.

Messrs. **C. I. Walker** and **Alfred Russell**, for the plaintiffs in error:

The question in this case is, what construction is to be given to the phrase, "inland navigation?" Shall it be held to embrace navigation upon Lake Erie and our great lakes? That this is the obvious natural and popular meaning of the phrase, we think there can be no doubt. This is admitted by Judge Conkling, who suggests, however, different constructions. Conkl. Adm. 109.

It is now clearly settled, that in the construction of statutes the courts will give to the language used, its ordinary and obvious meaning, unless from the statute itself it is clearly apparent that some other meaning was intended. Sedg. Stat. L. 243, 260, 310, 382; *Tisdell* v. *Combe*, 7 Adol. & E. 788.

Lakes are from their very nature, inland, and must be so, and the navigation upon them must, therefore, be inland navigation.

NOTE.—*Liability of carrier by water, for loss or damage of goods.*

The common law charges the common carrier, whether by land or water, against all events but acts of God and of the King's enemies, so that a common carrier is an insurer against all perils or losses not within the exception. This rule is part of the common law of this country, and it is not a defense to the claim of an owner that carrier has done the best he could, or that the accident causing the loss was unavoidable. He must bring himself clearly within one of the two exceptions. Coggs v. Bernard, 2 Raym. 909; Trent Nav. Co. v. Wood, 3 Esp. 127; Riley v. Horne, 5 Bing. 217; The Maria, 4 Rob. Adm. 348; The Commander in Chief, 68 U. S. (1 Wall.) 43; Letchford v. The Golden Eagle, 7 La. Ann. 9; Friend v. Woods, 6 Gratt. 189; Orange Co. B'k v. Brown, 9 Wend. 85; Thurman v. Wells, 18 Barb. 500; Mershon v. Hobensack, 2 Zab. 372; Thomas v. Boston, etc. R. Co. 10 Met. 476; Crosby v. Fitch, 12 Conn. 419; Lewis v. Ludwick, 6 Cold. 368; Fish v. Chapman, 2 Kelly, 349; New Brunswick Co. v. Tiers, 24 N. J. 697; Swindler v. Hilliard, 2 Rich. 286; Kiff v. O. C. & C. R. Co. 117 Mass. 591; 19 Am. Rep. 429; Eagle v. White, 6 Whart. 517; Smyrl v. Niolon, 2 Bailey, 421; Hannibal R. Co. v. Swift, 79 U. S. (12 Wall.) 262; R. Co. v. Reeves, 77 U. S. (10 Wall.) 176; Powell v. Mills, 30 Miss. 231; Edwards v. White L. T. Co. 104 Mass. 159; 6 Am. Rep. 213; Morrison v. Davis, 20 Pa. St. 171; Central R. & B. Co. v. Hines, 19 Ga. 203; Daggett v. Shaw, 3 Mo. 264; Bohannan v. Hammond, 42 Cal. 227; Howe v. Oswego, etc. R. Co. 56 Barb. 121; Turner v. Wilson, 7 Yerg. 340; Emery v. Hersey, 4 Me. 411; Boyle v. McLaughlin, 4 Harr. & J. 291; Dunseth v. Wade, 2 Scam. 285.

The expression "act of God" denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents resulting from the negligence of man. "There is a nicety of distinction between the act of God and inevitable necessity." Trent Nav. Co. v. Wood, 2 Raym. 909; Forward v. Pittard, 1 Term. 27; Story, Bailments, §§ 511, 25; Williams v. Grant, 1 Conn. 487.

Carriers by water are liable in all the strictness and extent of the common law rule, unless the loss happens by one of the excepted perils. Story, Bailments, §§ 497, 510, and *notes*; Spencer v. Daggett, 2 Vt. 82; Elliott v. Russell, 10 Johns. 1; Kemp v. Coughtry, 11 Johns. 107; McArthur v. Sears, 21 Wend. 193.

This common-law liability is usually limited by the contract contained in the bill of lading. "Perils of the sea, "dangers of the seas," or "dangers of the rivers or of the lakes, or of water, or of navigation," which are held the same in effect, are usually excepted. Story, Bailments, § 512, *et seq.*; Hastings v. Pepper, 11 Pick. 41; Bell v. Reed, 4 Binn. 127; Hollingsworth v. Brodrick, 7 A. & E. 50; Jones v. Pitcher, 3 Stew. & P. 135; Gordon v. Buchanan, 5 Yerg. 71; Fairchild v. Slocum, 19 Wend. 329; 7 Hill, 292; Baxter v. Leland, 1 Abb. Adm. 348.

5 Am. Encyc. art. "Lake;" 4 Nat. Cyc. art. "Canada;" 5 Ed. Encyc. art. "Canada;" 7 Nat. Cyc. art. "Lake;" Mauder's Scientific Treas. art. "Lake;" Webster's Dict. arts. "Lake" and "Sea."

Thus, the Caspian, though sometimes called a sea is strictly a lake, being a large collection of water in an inland space.

15 Ed. Encyc. "Physical Geog." p. 608; 5 Am. Cyc. art. "Lake;" 7 Nat. Encyc. art. "Lake," Webster's Dict. art. "Sea."

The word "inland," as applied to navigation or bodies of water, is used as the correlative of ocean or tide-water.

Webster's Dict. "Inland."

We refer to a few only of the many instances in which the terms "inland seas," "inland waters," and "inland navigation," have been used by jurists and other writers in relation to, or so as necessarily to include, the great lakes.

"Inland Seas," Woodbury, J., 5 How. 495; "Interior Lakes," Webster, *Arguendo*, 6 How. 378; "Inland Seas," Taney, Ch. J., 12 How. 453; "Interior Waters," Daniel, J., 20 How. 314; "Inland Waters," Catron, J., 20 How. 401; "Inland Waters," Clifford, J., 21 How. 22; "Inland Navigation," Shaw, Ch. J., 11 Pick. 42; "Inland Navigation," 1 Newberry, Pref. 8; "Inland Seas," *Arguendo*, 1 Newberry, 545; "Inland Seas," Pratt, J., 3 Mich. 275; "Inland Navigation," 1 Conk. Adm. 5, 8, 17; "Inland Waters," 1 Conk. Adm. Pref. 8; "Inland Seas," Ed. Cyc. art. "Phys. Geog." 608; "Inland Seas," 1 Murray's Hist. of Canada, 22; "Inland Navigation," Summerville's Phys. Geog. 266; "Inland Seas," 3 Murray's Encyc. of Geog. 350; "Inland Seas," Webster in his Buffalo speech, 1833, and in his first speech in reply to Hayne; "Interior Trade," 3 Bancroft's Hist. of U. S. p. 111.

Indeed, it may well be said that the great lakes are but expansions of the rivers connecting them, and this is the position taken by eminent geographers, some of whom give the length of the St. Lawrence as commencing at the head of Lake Superior.

4 Nat. Cyc. art. "Canada;" 5 Ed. Encyc. art. "Canada;" 9 Am. Encyc. art. "Lake."

The term, "inland navigation" therefore, obviously and naturally includes lake navigation. It is too clearly apparent that the great lakes were to be included within the exception from the fact that all rivers—as well those connecting the great lakes as others—are expressly within it, and there could be no reason why the navigation upon the St. Clair, the Detroit, and the St. Lawrence should be governed by a different rule from that of the connecting lakes; the commerce is intimately, nay, indissolubly connected together, carried on by the same vessels in the same voyages, subject to similar perils and similar competition.

Nor can it be said that these rivers are but straits connecting lakes and, therefore, not embraced under the title "rivers."

Straits only connect ocean waters.

Maunder's Scientific Treas. art. "Straits;" Webster's Dict. art. "Straits;" 17 Am. Encyc. art. "Straits;" Rees's Encyc. art. "Straits."

While these connecting waters are strictly rivers, answering in every respect the description of rivers as given by lexicographers and geographers: "A river is a large stream of water flowing in a channel on land toward the ocean, a lake, or another river."

Webster's Dict. "River;" Maunder's Scientific Treas. "River;" 16 Amer. Encyc. "River;" 15 Ed. Encyc. "Phys. Geog." 599; 4 Nat. Cyc. "Canada;" *The Constitution* v. *The Young America*, 1 Newb. Ad. 106.

Nor will it do to say that navigation upon Lake Erie is not inland navigation because it is a great lake. The size cannot alter the question whether it is an inland body of water or not. No such distinction is anywhere recognized, and if any such distinction be attempted, where is the dividing line between a lake that is inland and one that is not? To which class does Lake Champlain, Lake St. Clair, or the Lake of The Woods belong? Inland in this connection means remote from the sea.

Neither does the immense importance of its commerce furnish any reason why lake navigation is not included in the term "inland navigation." The very same commerce traverses the St. Clair, the Detroit, and the St. Lawrence,

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"Perils of the sea" includes such losses only to goods on board, as are of an extraordinary nature, or arise from some irresistible force, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of skill and prudence. 3 Kent's Com. 299; Story, Bailments, § 512*a*; The Reeside, 2 Sumn. 567; Potter v. Suffolk Ins. Co. 2 Sumn. 197; Waters v. Louisville M. Ins. Co. 36 U. S. (11 Pet.) 213; Crosby v. Fitch, 12 Conn. 410, 419-422; Fairchild v. Slocum, 19 Wend. 329; Hazard v. N. E. Mar. Ins. Co. 1 Sumn. 218; 33 U. S. (8 Pet.) 557; Colt v. Mechen, 6 Johns. 160.

The distinction between "perils of the sea" and "act of God." McArthur v. Sears, 21 Wend. 190, 198; Dibble v. Morgan, 1 Woods, 407.

A loss occasioned by pirates falls within "perils of the sea." 3 Kent's Com. 216; Gage v. Tirrell, 9 Allen, 299, 310; Pickering v. Barclay, 2 Roll. Abr. 248; Style, 132; Barton v. Wolliford, Comb. 56.

Where the loss arises from collision; if his own vessel, or if both vessels are at fault, the carrier is liable; if the other vessel is wholly, or if either vessel is at all, at fault, it as a "peril of the sea," and carrier is liable unless exempted by contract. Converse v. Brainard, 27 Conn. 607; Grill v. Gen. I. S. Co. L. R. 1 C. P. 600; Jones v. Pitcher, 3 Stew. & P. 135; Whitesides v. Thurkill, 12 Sm. & M. 599; The New Jersey, Olcott, 444; Hays v. Kennedy, 41 Pa. St. 378; Marsh v. Blythe, 1 McCord, 360; Buller v. Fisher, 3 Esp. 67; Plaisted v. Boston St. Nav. Co. 27 Me. 132.

If goods are gnawed by rats or cockroaches, carrier is liable; or if rats gnaw hole in vessel causing it to leak. Aymar v. Astor, 6 Cow. 266; Kay v. Wheeler, L. R. 2 C. P. 302; Laveroni v. Drury, 8 Exch. 166; 16 Eng. L. & E. 510; Westray v. Miletus, 2 Int. Rev. Rec. 61; Dale v. Hall, 1 Wils. 281; Garriegues v. Coxe, 1 Binn. 592; Hunter v. Potts, 4 Camp. 203.

He must furnish a seaworthy vessel, well equipped and suitable for the purpose for which it is employed, and he is responsible for damages arising from failure to do so. Bell v. Reed, 4 Binn. 127; Clark v. Richards, 1 Conn. 54; Day v. Ridley, 16 Vt. 48; Kellogg v. Packet Co. 3 Biss. 496; The Northern Belle, 76 U. S. (9 Wall.) 526.

The carrier is not liable if damage to goods arises, without his fault, from the nature of the articles themselves, as decay of fruit or working of liquors that have a tendency to ferment or leak. Brown v. Clayton, 12 Ga. 564; Clark v. Barnwell, 53 U. S. (12 How.) 282; The Howard v. Wiseman, 59 U. S. (18 How.) 231; Lawrence v. Denbreens, 66 U. S. (1 Black.) 170; McKinlay v. Morrish, 62 U. S. (21 How.) 343.

A carrier who receives a cask of wine in good order to transport, and the cask reaches its destination empty, is liable for the loss, unless he shows exemption under his bill of lading. Arend v. Liv. etc. St. Co. 6 Lans. 457; S. C. 64 Barb. 118; aff'd, 53 N. Y. 606.

while the magnitude of lake commerce is rivaled by that of the Mississippi and the Hudson, and their commerce is expressly within the exception.

Nor does the fact that the commerce of the lakes is within admiralty jurisdiction furnish any reason why it should not be included within the term "inland navigation." The commerce of all the great rivers of the continent is equally within this jurisdiction, and it is expressly within the exception, and it is *inland* as well as *river* navigation.

The Genesee Chief v. *Fitzhugh*, 12 How. 443; *Fretz* v. *Bull*, 12 How. 466; *Jackson* v. *The Magnolia*, 61 U. S. (20 How.) 296; *The F. W. Backus*, 1 Newb. 1; *The Jenny Lind*, 1 Newb. 447.

The lakes and rivers, and the commerce and navigation of the lakes and rivers of the west are usually mentioned together, and it is hardly conceivable that different rules should be applied to each.

Woodbury, J., *Waring* v. *Clark*, 5 How. 495; Taney, Ch. J., *Genesee Chief Case*, 12 How. 451; Grier, J., *Magnolia Case*, 61 U. S. (20 How.) 302; also opinions of McLean, J., 303, Daniels, J., 315; and Campbell, J., 333.

The fact that Lake Erie is a border lake, and that through it runs the national boundary line, furnishes no reason why its navigation is not inland. The term "inland" can have no such meaning as "interior," within the country within the national boundary line. This rule will bring within the exception lakes Michigan and Champlain, and exclude from it lakes no larger, Erie and St. Clair. Rivers, too, form boundary lines, and upon any such construction are they within or without the exception?

We submit, then, that the locality of the water, whether within or without our territorial limits, does not determine the character of the navigation, whether inland or not; that it cannot be that Lake Champlain is "inland," and Sorel river "outland," Lake Michigan inland and Lake St. Clair not, the Mississippi inland and Pigeon river not.

It has been suggested that these great lakes are no more "inland" than the close and narrow seas, like the Baltic and the Mediterranean, and that the navigation of those seas is never termed "inland navigation."

But the analogy does not hold. The very term "inland" implies remote from the sea or tide-water, and while the lakes are great like close seas, they are still remote from tide-water and, therefore, inland; while the seas are a part of the great ocean, on its level or nearly so, swept by its tides, governed by its laws, and like the ocean itself, not subject to dominion but a pathway for all nations.

Wheaton's International Law, 150, 158; Vattel's Law of Nations, 187, 194; Campbell, J., *Jackson* v. *Magnolia*, 61 U. S. (20 How.) 340.

It has also been suggested that the reason why river and inland navigation was excepted from the operation of the act of 1851 was, that there was serious doubt as to the jurisdiction of Congress over such navigation, while in relation to the navigation upon the great lakes, no such doubt existed.

But it is well settled that Congress has the same jurisdiction over navigation upon rivers that it has over that upon the lakes, and that it has no jurisdiction over either, except as it extends between states or with foreign nations.

Fretz v. *Bull*, 12 How. 466; *Jackson* v. *Magnolia*, 61 U. S. (20 How.) 296; *Allen* v. *Newberry*, 62 U. S. (21 How.) 244; *Maguire* v. *Card*, 62 U. S. (21 How.) 248.

There are few authorities bearing directly upon the question involved.

See 1 Conk. Adm. 209; 1 Pars. Ship. 401.

The supreme court of the western district of New York at the February term, 1858, in the case of *Root* v. *Hart*, decided that lake navigation was included within the exception by the phrase "inland navigation."

The supreme court of the city of Buffalo made the same decision, after fully considering the opinion of the court below in this case.

Bresler v. *M. S. & N. I. R. Co.* December term, 1858. See, also, 61 U. S. (20 How.) 26.

An attempt to apply the term "inland navigation" in this country, as it exists in England, would be as difficult and impracticable as to apply here the English definition of navigable water.

Bowman v. *Wathen*, 2 McLean, 382; Ang. Wat. Courses', §§ 545, 550.

Or, as unreasonable as to adopt the English definition of admiralty jurisdiction, limiting it to the high seas outside the limits of any county. This rule was never adopted in this country.

The Jefferson, 10 Wheat. 428; *Peyroux* v. *Howard*, 7 Pet. 342; *United States* v. *Coombs*, 12 Pet. 72.

The supreme court of the state of Michigan referred to several English decisions, to show that when a specific class of vessels was named in a statute, followed by general words that the latter were to be construed to apply only to vessels of the same class of build or business, and the inference, that they suggest rather than state, is that the words "vessels of any description whatsover," are controlled by the vessel previously described, and must be held to apply only to vessels like barges, canal boats, and lighters, and used in the same way.

5 Mich. 384.

We submit that there is no such arbitrary rule of construction, and whether the general words are thus to be controlled and construed is a question of intent, to be drawn from the whole act.

Here it is apparent that there is no such intent. Canal boats, barges, and lighters, wherever and however used, are to be excluded from the benefits of the act, and the words "any vessel," etc., are not used at all to enlarge the number and kind of vessels thus excluded. The object of the remaining part of the exception is to exclude from the benefits of the act, vessels of every description, large or small, used in a certain way, *viz.*: in rivers or inland navigation, and to give the construction contended for would extend the benefit of the act to all large vessels however used, and thus defeat the obvious intent of the act of excepting from its benefit all vessels used in rivers and inland navigation.

In this respect the exception of the act of Congress requires a different construction from the exception in the stat. 53, § 3. There is but one class of vessels affected by this, other than unregistered ones.

But the English cases cited, so far from favoring the view suggested by the court, seem to us to have a directly contrary effect.

Hunter v. *McGown*, 1 Bligh, 574; *Morewood* v. *Pollock*, 18 Eng. L. & E. 343; 5 Mich. 384; *Blanford* v. *Morrison*, 15 Q. B. 724; *Regina* v. *Reed*, 28 Eng. L. & E. 133; *Reed* v. *Ingham*, 26 Eng. L. & E. 164; *Tisdell* v. *Combe*, 7 Adol. & E. 788.

We submit that none of these cases in the remotest degree authorize or favor the construction; that the words "any vessel of any description" are to be limited to vessels of the same kind or business as canal boats, barges, and lighters.

It is further suggested that the navigation of the lakes is not to be deemed inland, because lake vessels also navigate the ocean. This is equally true of vessels navigating the great rivers, and the question whether such vessels are used in ocean navigation or in inland, must be determined precisely as such questions have before been determined. The question will be: what is the navigation in which they are principally used?

See *The Coal Boat D. C. Salisbury*, Olcott's Adm. 74; *Buckley* v. *Brown*, Bright's Dig. U. S. Laws, 305; *McCormick* v. *Ives*, Abb. Adm. 418; *N. J. Steam Nav. Co.* v. *Merchants' Bk.* 6 How. 392; *Wallis* v. *Chesney*, 4 Am. Law Reg. 307.

Mr. **George B. Hibbard**, for defendant in error:

The steamboat, at the time of her being burned, was not "used in inland navigation," and, therefore, the defendant in error, though a common carrier, was not liable for the loss of the goods.

The act entitled "An Act to Limit the Liability of Ship Owners and for Other Purposes," exempts the defendant in error from that liability. 9 Stat. at L. 635.

The principle of the act, unqualified by the limiting clause in question, has been operative in all modern civilized nations possessing a national commerce, whenever the policy of such nations has been finally adapted to the exigencies of that commerce.

By the civil law itself, the owners of vessels were liable in matters *ex delicto*, according to the amount of their respective interests in the ship. This, however, was not the case in matters arising *ex contractu*.

2 Br. Civ. & Ad. L. 136, 138, 141; *The Rebecca*, 1 Ware, 194, 195.

The principle of this rule was adopted by nearly, if not quite all, the maritime powers of Europe, excepting England; though England soon adopted it by legislation, with the important qualification, however, that the extent of the liability, both in matters arising *ex contractu* and *ex delicto*, should be equal only to the amount of the interest of the owner sought to be charged in the ship itself.

Grotius de jure belli et pacia, Liv. 2, chap. 11, § 13; Marine Ordinance, Louis XIV. tit. 4; 2 Pet. Ad. Decis. Appendix, 16; Cleirac, Navigation des rivieres, art. 15, p. 502; Consulat de la Mer. ch. 34; *The Rebecca*, 1 Ware, 195, 196, 197.

The whole principle which led to the legislation in England (and which legislation was the source of our own act), was recognized in its application to ships; and that, too, be it observed, without limitation as to the waters upon which the ships were navigating.

Abb. Ship. 395; see, also, *Boucher* v. *Lawson*, Rep. *temp.* Hardwicke, 85; Abb. Ship. 395; *Sutton* v. *Mitchell*, 1 T. R. 18; *Forward* v. *Pittard*, 1 T. R. 27.

These decisions were followed (in the enlightened policy of promoting so much of commerce as was really national) by the acts of 26 Geo. III., ch. 86, in 1786; and this by 53 Geo. III. ch. 159, in 1813.

The courts have recognized the whole objects of this legislation to be "to encourage persons to become the owners of ships."

Gale v. *Laurie*, 5 Barn. & C. 156.

The acts of Geo. III. are the sources and almost the exact originals of the act of Congress of 1851.

The common-law rule, unqualified by legislation, became the law of this country. The case of *The Lexington* was decided in 1848 (*The N. J. S. N. Co.* v. *The Merchants' Bank*, 6 How. 344), and was followed by the act of 1851.

The causes which led to the passage of the act of 1851 were, therefore, precisely similar to those which led to the English legislation. The acts of both countries are essentially the same. The commercial policy of both countries and the objects to be subserved by the legislation of each in this particular in each case are alike. The authorities of either country bearing directly upon either of the acts of kindred legislation, must aid in the construction sought for.

Approaching the immediate question, the defendant in error claims directly that the navigation of Lake Erie and the great western lakes is not "inland."

The meaning of the words "inland navigation," as thus employed, does not include the navigation of such waters.

The question is not what is the geographical meaning of the word "inland," used in distinguishing seas from oceans, or the waters within the body of a continent from the high seas. The question is as to the meaning of the phrase "inland navigation," employed in reference to a commercial business and to promoting commercial objects. In this view, the meaning of the same words, or equivalent phrases in the same connection, are the true governing authorities, so far as mere definition is concerned.

The exact definition of the word "inland," as well as the phrase "inland navigation," shows that such navigation is not the navigation of the great western lakes.

Webster's Dict. "Inland;" Worcester's Dict. "Inland;" Rees, Encyclopedia, "Inland Navigation;" Encyc. Brit. "Navigation Inland."

The word "inland" thus used is opposed in meaning to the word "foreign." Burrell's Law Dict. "Foreign;" Story, Bills, §§ 22, 23; Conk. Adm. 57.

The consideration of some decisions may further illustrate this view. The statute of limitations of the state of Georgia provided that in certain cases it should not apply to parties "beyond seas." It was held that the phrase meant beyond the limits of the state, irrespective of the question whether or not the party was in fact beyond any sea or other water.

Murray v. *Baker*, 3 Wheat. 541; *Shelby* v. *Guy*, 11 Wheat. 361.

Beyond the jurisdiction of the state of Georgia, the party was "beyond seas"—beyond the control of the jurisprudence of that state, and necessarily, therefore, not "inland."

Upon the actual meaning, therefore, of the word "inland" so used, it must be determined that the words "inland navigation" in the statute signify only a navigation carried on within the body of the country; and doubtless ((particularly when considered, as the question must be, and is hereinafter, under the power of Congress over commerce), when applied to lake navigation, a navigation conducted beneath the jurisprudence of a single state. It means a navigation which, when carried on on the lakes, is not the coasting trade.

The navigation "to be inland" must be on waters themselves "inland." The great western lakes are not such inland waters.

This is a question of commerce and of law, not of geography. Other waters exist upon the face of the globe the precise parallel of the western lakes in commercial and legal view, which certainly are not "inland;" therefore the western lakes are not "inland."

The case of *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, which will be hereafter adverted to in a more important view, established the principle that the business of the western lakes and their national position determined their commercial and legal character, and that the distinctions convenient in England of the rise and fall of the tide and of the saltness of the water, had nothing to do with thus fixing that character. Excluding, therefore, once for all, these immaterial tests, the great western lakes, when viewed in comparison with other waters, not only are not "inland," but are commercial and legal seas.

Waters, over which extended the body of admiralty law which never was applicable to an "inland trade, certainly never were "inland."

The *Twee Gebroeders*, 3 C. Rob. 336.

Our waters, their very parallel in every physical, commercial, and legal feature, and over which the same body of laws as was decided in *The Genesee Chief Case* from the very character of the waters, extends to day, equally are not inland.

But as has been said, these waters are commercial and legal seas and, therefore, their navigation cannot be "inland." They are *extra fauces terræ*.

The Harriet. 1 Story, 251, 259.

They are waters where, to adopt the language of Sir Matthew Hale, "a man may not discern from shore to shore."

De port Maris Harg. Tracts, ch. 4, p. 10; Hawkins Pl. C. b. 2, ch. 9, § 14; *U. S.* v. *Grush*, 5 Mas. 290, 298.

They are not within the boundary of any county; and within the definition of Lord Coke himself, are not, therefore, inland.

4 Inst. 140, ch. 22; 2 East, P. C. ch. 17, § 10; Com. Dig. Adm. E, 7; *De Lovio* v. *Boit*, 2 Gall. 398, 426, 427; *Waring* v. *Clarke*, 5 How. 441, 462.

They are bordered not only by the states constituting the United States, but by the province of a foreign nation. Their navigation is subject to all the hazards that attend that of the ocean. "Hostile fleets," to use the language of Chief Justice Taney in *The Genesee Chief*, "have encountered upon them and prizes have been made there." The same system of admiralty law applies to them as to the commerce of the remoter oceans. That commerce is equally extensive with that of our foreign commerce itself.

It is repeated, there is not a characteristic (excluding the immaterial ones of the ebb and flow of the tide and the saltness of the water) excluded by *The Genesee Chief*, and which in this view always would have been excluded (2 Pet. Ad. Decis. LXXI. Spellman, subj. Adm. Juris. 226; 2 Hale, P. C. 16) belonging to the "high seas"—the "main sea" of Coke and Hale and Seldon and Blackstone, which does not belong to the western lakes. How, then, can their navigation be termed inland? Would the navigation of such waters be termed inland within the meaning of the statutes of Geo. II. and Geo. III.? Would the navigation of the waters of the "four seas" (Hargrave & Butler's Notes to Co. Litt. l. 2, ch. 6, § 157; Chit. Com. L. 88-102), including St. George's Channel or the Irish Sea, be deemed "inland" by an English court, construing the language in question as used in the statutes of Geo. III.?

Some minor considerations will show in this connection that such navigation cannot be called inland.

By the law of nations, exclusive national jurisdiction for certain purposes is established over at least a marine league from the coast.

1 Kent's Com. 27, 28. The whole of Delaware Bay has been determined to be within national jurisdiction.

Opinion of Edmund Randolph, Atty. Gen. U. S. 1; Opinion, Atty. Gen. 13.

The navigation of none of these waters would be termed "inland," yet it should be if the western lakes are "inland."

The object of the law determines the fact that the navigation of the lakes is not "inland" within the meaning of the act.

In ascertaining the object of the law, the court cannot in the language of Chief Justice Taney, in any degree be influenced by the construction placed upon it by individual members of Congress in the debates which took place on its passage. We must gather the intention of Congress from the language used in the law, comparing it where ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

Aldridge v. *Williams*, 3 How. 1-24; *Bank of Penn.* v. *The Commonwealth*, 19 Pa. 144; *Southwark Bank* v. *Commonwealth*, 26 Pa. 446.

The value of the property annually carried in the transactions of lake commerce exceeds $600,000,000 (exceeding the total value of property exported and imported in the United States in its foreign trade). It is conducted in more than sixteen hundred vessels, with an aggregate burden exceeding 400,000 tons.

Report of Com. of Commerce to H. of R. 1826, vol. III., No. 316, pp. 9, 10, 11; Report of Hon. I. T. Hatch, Commissioner, etc., to H. of R., June 18, 1860.

The strictly foreign trade with Canada alone on the lakes exceeds $30,000,000 in amount annually, making our strictly foreign commerce with Canada a third in actual value and first in the amount of tonnage employed, compared

with our commerce with all the foreign countries with which we have any trade.

Considering, therefore, the undoubted objects of the act, the immediate cause which led to the passage of the act—the loss of The Lexington, running in the coasting trade like the vessels on the western lakes, the extent of the waters on which the commerce is conducted, the extent and national importance of that commerce itself, it certainly must be apparent that the promotion of such a commerce must have been within the objects of the act.

Our whole system of statutory law, in reference to the coasting trade, establishes the fact that such a trade has never been regarded as "inland in its character."

2 Kent's Com. 596, 600; *Elliott* v. *Rossell*, 10 Johns. 10, 11.

The whole spirit of express legislation on these subjects shows such to be the fact.

Ordinance 1787, 1 Stat. at L. 52, note.

The act of 1793 in respect to the enrolment of vessels (1 Stat. at L. 307); the act of 1831, conferring enlarged privileges upon enrolled vessels on the northwestern frontier (4 Stat. at L. 487); the Steamboat Inspection Acts of 1838 (5 Stat. at L. 305), and of 1852 (10 Stat. at L. 62); the act of 1850 requiring transfers of vessels to be recorded (9 Stat. at L. 440); the act of 1845 giving the district courts jurisdiction of admiralty cases (5 Stat. at L. 726), all evidently regard the coasting trade of the lakes as the same in character with that of the seaboard.

Watson v. *Marks*, 2 Am. Law Reg. 157, U. S. Dist. Court, E. Dist. Penn.; *Champlain & St. L. R. Co.* v. *Valentine*, 19 Barb. 484.

Admiralty jurisdiction, it was held in *The Genesee Chief*, extends over the Western lakes. They cannot, therefore, be "inland."

The Genesee Chief v. *Fitzhugh*, 12 How. 443; *The Chas. Mears*, 1 Newberry, 197; Woolrych, Law of Waters (Law Library), 62.

Admiralty jurisdiction was never held; and, regarding the remedies administered under it, never could have been held, to extend over inland navigation.

1 Curtis, Juris. Courts. U. S. 34, 48; *De Lovio* v. *Boit*, 2 Gall. 398, 436, 468, and authorities cited.

This may especially be said under the recent decisions, that admiralty jurisdiction does not include matters relating to transactions taking place within the limits of a single state.

Allen v. *Newberry*, 62 U. S. (21 How.) 244; *Maguire* v. *Card*, 62 U. S. (21 How.) 248.

Congress intended by the phrase "inland navigation" simply to exclude from the operation of the act only such places as it could not, under the Constitution, exercise such power over.

Congress has no power under the Constitution to legislate as to commerce carried on within the bounds of any one state.

Gibbons v. *Ogden*, 9 Wheat. 1, 195; *Steamboat Co.* v. *Livingston*, 3 Cow. 713, 755.

Congress has the constitutional power to exercise legislation over the western lakes.

The Genesee Chief v. *Fitzhugh*, 12 How. 443;

Had it been the intent of the act that it should not apply to any of the lakes, the words "rivers and lakes" would have been used. As it is, it uses the term "inland navigation," and so uses it in the meaning given it by the courts—the navigation of waters within the bounds of a single state over which Congress has no control.

Steamboat Co. v. *Livingston*, 3 Cow. 755; *Gibbons* v. *Ogden*, 9 Wheat. 194; *The James Morrison*, 1 Newberry's Adm. 241, 246; *Sewell* v. *Jones*, 9 Pick. 412, 414.

In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as the reasons thereof.

The U. S. v. *Dickson*, 15 Pet. 141, 165.

II. The steamer in question was not, within the meaning of the act, a "canal boat, barge, or lighter, or vessel of any description whatsoever," and therefore the act in question applies to her owner, and exempts the defendant in error from liability.

The body of the act should be construed liberally, and the excepting clause strictly. The whole object of the act sustains the position here taken, that under familiar rules of construction, the quoted words do not include steamboats of the class of the Spaulding. Canal boats, barges, lighters, and other vessels of the same general kind, are not exposed to the hazards of the more important vessels, and the owners, therefore, do not need the same protection.

General words, such as the word "vessel" used in connection with particular words, such as canal boat, barge, and lighter, can only be construed to mean something of the same kind and of no larger consequence than the things particularly named.

Dwar. St. 704, 706, 707; Broom, Leg. Max. 455.

This rule, about which there can be no doubt as applied to very similar words, is plainly shown in various cases.

In *Regina* v. *Reed*, it was expressly decided that a steam tug did not come within the meaning of the language, "Whereby, lighter or other craft," for the reason, as expressed by Lord Campbell, that "a steam tug is not a vessel *ejusdem generis*," as "wherry and lighter."

Reg. v. *Reed*, 29 Eng. L. & E. 133, 135.

The same question is again fully considered and further illustrated in *Reed* v. *Ingham*, 26 Eng. L. & E. 164; *Sandiman* v. *Beach*, 7 Barn. & C. 96 (14 Eng. C. L. 22), and *Cashier* v. *Holmes*, 2 B. & Ad. 592 (22 Eng. C. L. 146).

Similar rules govern the construction of contracts, and indeed the principle is undoubted.

2 Pars. Cont. 15, note (R), and 262 A, note (H. C.), and the very many cases cited.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Michigan.

The suit was brought by the plaintiffs in the court below against the defendants, a company incorporated under the laws of New York, and owners of the steam propeller M. B. Spaulding.

The goods in question were put on board of the propeller at Buffalo, on the 30th October, 1856, for transportation to Detroit, and on the next day they took fire, and vessel and goods were entirely consumed, without any default or negligence of the master or crew, or any knowledge of the defendants, their officers or

agents. The propeller was of more than twenty tons burden, and was enrolled and licensed for the coasting trade, and engaged in navigation 35*] and commerce, as a *common carrier, between ports and places in different states upon the lakes, and navigable waters connecting the same.

The defendants relied, in their defense, upon the act of Congress, passed March 3d, 1851 (9 Stat. at L. 635), entitled "An Act to Limit the Liability of Ship Owners, and for Other Purposes."

The 1st section provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner, with a proviso that the parties may make such contract between themselves on the subject as they please.

The 2d section provides against any liability of the owner of the vessel, in case of precious metals, etc., unless notice and entry on the bill of lading.

The 3d section provides against liability of the owner, in cases of embezzlement or loss, etc., by the master, officers, etc., of any property shipped on board, or for any loss by collision, etc., without the privity or knowledge of the owner, exceeding the value of his interest in the ship and freight.

The 4th section provides for an apportionment of the proceeds, in case of the sale of the vessel, among the several freighters or owners of the goods, if these and the freight should not be sufficient to pay each loss.

The 6th section saves the remedy against the master and hands, in case of embezzlement or loss, or for any negligence or malversation by these persons.

The 7th section, after providing a penalty for shipping oil of vitriol, and such dangerous materials, without notice to the master, is as follows: "This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

It is insisted, on the part of the plaintiffs, that the navigation of Lake Erie, and also of all the other lakes in connection therewith, is within the exception to this act, as falling within the words "inland navigation." The question 36*] thus raised is *not without difficulty, as we have no clear or certain guide to lead us to the true meaning, attached to these words, by Congress. Looking at them in a very general sense, and without much regard to the reasons or policy of the law, it may, with some plausibility be urged, as has been, on behalf of the plaintiffs, that the phrase "inland navigation" was used as contradistinguished from navigation upon the ocean; and that all vessels navigating waters within headlands, and after they have passed out of the ocean, come within the designation. But a construction thus broad can hardly be maintained, for it would be unreasonable to suppose that Congress intended to apply one rule of responsibility to the owner in respect to the same vessel upon the ocean, and another upon the bays or rivers, in the course of the same voyage. Besides the absence of any good reason for such a distinction as to the rule of responsibility, it would have seriously embarrassed all parties engaged in commerce of this description in respect to their securities against accidents, and losses by means of insurance, bills of lading, charter parties, etc.

The connection in which this term "inland navigation" is used in the act, we think, may throw some light upon the intent of the lawmakers.

It is declared that the act shall not apply to the owner of any canal boat, barge, or lighter, or to any vessel of any description used in rivers or inland navigation. It will be seen that certain craft is excepted from the act *eo nomine*, and then a class of vessels without any designation, other than by a reference to the waters or locality in which used. But the character of the craft enumerated may well serve to indicate to some extent, and with some reason, the class of vessels in the mind of the law makers, which are designated by the place where employed. This class may well be regarded *ejusdem generis*, and thus aid us in interpreting the true meaning of the words of the act, namely: vessels "used in rivers or inland navigation."

Many of the provisions of this act were taken from the 53 Geo. III. ch. 159, as also the exception to the enacting clause. The exception in the English act is as follows: That nothing *in this act shall extend to the owner of [*37 any "lighter, barge, boat, or vessel of any description whatsoever, used solely in rivers or inland navigation."

The language of this exception is more specific than that used in ours; but the meaning intended to be conveyed, we think substantially the same. The words in ours are, "any vessel of any description whatsoever, used in rivers or inland navigation." This word "used" means, in the connection found, "employed," and doubtless, in the mind of Congress, was intended to refer to vessels solely employed in rivers or inland navigation. It was this species of navigation—that is, on rivers and inland—which was intended to be withdrawn from the limitation of the liability of the owner; and the addition of the term "inland navigation," as an alternative to rivers, was, doubtless, designed, speaking in a general sense, to embrace all internal waters, either connected with rivers, but which did not, in a geographical or popular sense, fall under that name, or which might not be connected with rivers, but fell within the reason or policy of the exception, such as bays, inlets, straits, etc. Vessels, whatever may be their class or description, solely employed upon these waters, are usually employed in the trade and traffic of the localities, carried on chiefly by persons residing upon their borders, and connected with the local business, and without the formalities and precautions observed in regular commercial pursuits, with a view to guard against accidents and losses, such as insurance, bills of lading, etc. It was fit and proper, therefore, in this description of trade and traffic, that the common law liabilities of the carrier should remain unaltered.

But the business upon the great lakes lying upon our northern frontiers, carried on between the states, and with the foreign nation

with which they are connected (and this is the only business which Congress can regulate, or with which we are dealing), is of a very different character. They form a boundary between this foreign country and the United States for a distance of some twelve hundred miles, and are of an average width of at least one hundred miles; and this, without including Lake Michigan, of itself three hundred and fifty 38*] *miles in length and ninety in breadth, which lies wholly within the United States. The aggregate length of these lakes is over fifteen hundred miles, and the area covered by their waters is said to be some ninety thousand square miles. The commerce upon them corresponds with their magnitude.

According to the best official statistics, the value of the property annually, the subject of this commerce, exceeds $600,000,000, employing more than sixteen hundred vessels, with an aggregate tonnage exceeding four hundred thousand tons. These vessels are duly licensed for the foreign trade, as well as for that carried on coastwise. This commerce, from its magnitude, and the well known perils incident to the lake navigation, deserves to be placed on the footing of commerce on the ocean; and we think, in view of it, Congress could not have classed it with the business upon rivers, or inland navigation, in the sense in which we understand these terms.

These lakes are usually designated by public men and jurists, when speaking of them, as great inland waters, inland seas, or great lakes; and if Congress intended to have excluded them from the limitation of the liabilities of owners, it would have been most natural and reasonable, and, indeed, almost a matter of course, to have referred to them by a more specific designation.

The decision in the case of *The Lexington*, which was burned upon Long Island Sound, led to this act of 1851. That case was decided in 1848, subjecting the carrier in case of a loss by fire. 6 How. 344.

The sound is but one hundred and ten miles in length, and from two to twenty in breadth.

The waters of these lakes, in the aggregate, exceed those of the Baltic, the Caspian, or the Black Sea, and approach in magnitude those of the Mediterranean. They exceed those of the Red Sea, the North Sea, or German Ocean, the Sea of Marmora, and of Azoff. And, like the lakes, all of these seas, with the exception of the North Sea, are tideless. The marine disasters upon these lakes, in consequence of the few natural harbors for the shelter of vessels, and the consequent losses of life and property, 39*] are immense. According to the *report of a committee in the House of Representatives in 1856, the destruction of property upon Lake Michigan in the year 1855 exceeded $1,000,000. The appalling destruction of life in the loss of the Erie upon Lake Erie, and of the Superior and Lady Elgin upon Michigan, are still fresh in the recollections of the country. The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to this navigation as to that of the ocean. The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers, etc., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight.

It has been suggested that our construction of the act may embrace within the limitation of the liability of the owners western lakes lying within a state, such as the Cayuga, Seneca, and the like. But the answer is, that commerce upon these lakes, and all others similarily situated, is not within the regulation of Congress. The act can apply to vessels only which are engaged in foreign commerce, and commerce between the states. The purely internal commerce and navigation of a state is exclusively under state regulation.

We think the court below was right, and that the judgment should be affirmed.

Mr. Justice **Catron**, dissenting:

By the common law of England ship owners were common carriers, and insurers against loss, of the goods shipped, without limitation as to the waters upon which the ships were navigated. Abbott on Shipping, 395. In the United States the same law governed. 2 Kent's Com. 599; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 234. In parts of continental Europe the law was different. The preamble of the British *act of 7 Geo. III. [*40 declares "that it was of the greatest consequence and importance to the kingdom to promote and increase the number of ships and vessels, and to prevent any discouragement to merchants, and others, from being interested and concerned therein." The object of the British legislation was "to encourage persons to become owners of ships." By the act of Geo. II. and others, the Parliament exempted ship owners from liability in several cases of loss, and among them, loss by fire. That these laws applied to commerce on the ocean, is not controverted. Nor are they in force on the great lakes, partly belonging to Great Britain, on this continent.

Our act of Congress of March 3, 1851 (9 Stat. at L. 635), was passed to put our commercial marine on an equal footing with that of Great Britain, so that the increase of the number of ships, and the navigation of them, might be equally encouraged. That competition with British shipping was the object of Congress, is manifest to my mind from the fact that the provisions of our statute correspond to British statutes. As there was no competition on our lakes, great or small, there was no reason for exempting owners of vessels from liability; and especially, for the reason that a vessel navigating a lake from one port to another, in the same state, is not within the act; as Congress could only legislate by force of the commercial power, and regulate commerce among the states. The act of 1851 does not in terms, nor by any fair intendment, as I think, attempt to regulate such internal commerce. Fearing, however, that it might be held to apply to actual navigation, an excep-

tion was appended to the act, declaring that it should not apply to owners of canal boats, nor to lighters or barges. This description of vessels were brought into, or used, in harbors and bays; and these being arms of the sea, might be held as coming within the provisions of the act of Congress, the commerce they were engaged in being connected with that on the ocean. The commerce on the Chesapeake, through the tide-water canal, into the Delaware, by vessels propelled by steam, and the commerce carried on through the Hudson, into New York harbor, by canal boats and barges, 41*] shows the *reason why the exception was made, as respects this class of vessels.

And then comes the exception of vessels that had no connection with commerce on the ocean, which declares, that the act shall not apply to any vessel, of any description whatsoever, used in rivers, or used in inland navigation. Why should navigation on the Mississippi and the St. Lawrence be governed by one law, and the great lakes, Green Bay, Lake Champlain, Great Salt Lake, Utah Lake, and many others, by another rule of liability? Congress has made no such distinction; but on the contrary, every section and clause of the act of 1851 refer to losses happening on, or to vessels navigating, the ocean. The 3d section is especially significant of this conclusion.

What the expression "inland navigation," means, must be ascertained from the geography of our own country, and the commerce carried on by vessels on its waters. Lake Erie is inland, and a voyage from Buffalo to Detroit is, in my judgment, "inland navigation." I am, therefore, of the opinion that the judgment should be reversed.

THE POWHATAN STEAMBOAT COMPANY,
Plff. in Err.,
v.
THE APPOMATOX RAILROAD COMPANY.

(See S. C. 24 How. 247-257.)

Liability of one of several carriers forming continuous line—liability for loss by fire—Sunday law does not prevent recovery, or release carrier.

Plaintiff was the owner of a line of steamers, employed in the transportation of goods between Baltimore and Richmond.

Its steamboats were accustomed to stop at City Point, for the purpose of landing goods to be sent to Petersburg.

Defendant was a railroad company, and was engaged in the transportation of goods over its railroad from City Point to Petersburg.

A contract existing between the parties, whereby goods and merchandise destined for transportation to Petersburg were to be received by the plaintiff in Baltimore, carried in its steamers to City Point, and there delivered to the defendant, to be by it transported over its railroad to the place of destination.

One of the steamboats of the plaintiff left Baltimore every Saturday afternoon, arrived at City Point on Sunday, and there such of her cargo as was destined for Petersburg, was landed and deposited in the warehouse of the defendant and remained in the warehouse until the following day.

After the goods in question had been so deposited, and on the same day the warehouse and all the goods were destroyed by fire, suit was brought against the plaintiff by the shipper of the goods, and payment was recovered against it.

All labor at any trade or calling on a Sabbath day, except in household or other work of necessity or charity, is prohibited in the state of Virginia by the 16th section of the code.

Plaintiff made the contract with the shippers in its own name, collected the entire freight money, and paid over to the defendant such portion of it as belonged to it under the arrangement.

To take care of the goods on the "Sabbath day," and safely and securely keep them, after the goods were received, was a work of necessity and, therefore, was not unlawful.

There is no authority in any court to declare the goods forfeited, even admitting that the acts of landing and depositing the goods, and of opening and closing the warehouse on Sunday were within the prohibition of the statute.

Subsequent custody of the goods was certainly not within that prohibition; and if not, then the law imposed the obligation upon the defendant to keep the goods safely and securely until the following morning, and afterwards to transport them over the railroad to the place of destination, and deliver them to the consignees.

As the subsequent custody of the goods was not unlawful, the obligation of the defendant, under the circumstances of this case, was not varied by the fact that the goods were deposited in its warehouse by its consent on "a Sabbath day."

Argued Feb. 5, 1861. *Decided Feb. 18, 1861.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

This action was commenced by the present plaintiff in error, in the court below. The trial resulted in a verdict and judgment for the defendant, and the plaintiff brought the case to this court by writ of error.

The case further appears in the opinion of the court.

NOTE.—*Sunday labor*—see note to 14 L. R. A. 192.

Sunday as dies non juridicus—see note to 12 C. C. A. 462.

Sunday, when begins and ends; contracts made on; not a court day; injuries incurred in traveling on; work done on; sales on.

If property is exposed to imminent danger it is not a violation of the statute prohibiting labor on the Sabbath, to preserve it. Parmalee v. Wilks, 22 Barb., 540; 1 Hill, 76.

In some states Sunday begins at sunset on Saturday and ends at sunset next day; but generally, it commences at midnight between Saturday and Sunday and ends in 24 hours thereafter. Kilgour v. Miles, 6 Gill & J., 268; Bacon's Abr., Heresy, D; 1 Salk. 78; 1 Sellon, Pr., 12; Pulling v. People, 8 Barb., 384; Finn v. Donahue, 35 Conn., 216; Huidekoper v. Cotton, 3 Watts, 56.

By statute in some states contracts made on Sunday are void; generally, however, they are binding if valid in other respects. They are valid at common law. Kepner v. Keefer, 6 Watts, 231; Leigh, *N. P.*, 14; 5 B. & C. 406; 4 Bing., 84; 1 Crompt. & Jer., 130; Chitty, Bills, 59; Wright, 764; 10 Mass. 312; Delamater v. Miller, 1 Cow., 76, n.; Cowp., 640; 1 W. Bl. 409; 1 Str. 702; Drury v. Defontaine, 1 Taunt. 135; Fax v. Mensch, 3 Watts & S. 444; Bloom v. Richards, 2 Ohio St. 387; Horacek v. Keebler, 5 Neb. 355; Adams v. Gay, 19 Vt. 365.

History of doctrine that Sunday is *dies non juridicus.* Story v. Elliott, 8 Cow. 27; see, also, Nabors v. State, 6 Ala. 200; Swann v. Browne, 3 Burr. 1595. This is so at common law for award or return of process. Van Vechten v. Paddock, 12 Johns. 178; Gould v. Spencer, 5 Paige, 541. The court may, however, permit an amendment (Boyd v. Vandekemp, 1 Barb. Ch. 273, 289); or defendant may, by his acts, waive the defect. Wright v. Jeffrey, 5 Cow. 15. A demand on Sunday is nugatory. Delamater v. Miller, 1 Cow. 75. Compromise of a suit on Sunday is good. Shank v. Shoemaker, 18 N. Y. 489; Morris v. Crane, 4 Ch. Sent. 6. An injunction may be issued on Sunday when necessary to prevent an irreparable injury. Langabler v. Fairbury, etc. R. Co. 64 Ill. 243; 16 Am. R. 550.

Labor on Sunday cannot be recovered for, where such labor is against the statute (Watts v. Van

Messrs. **William P. Joynes and William Sehley,** for the plaintiff in error:

The court below erred in regard to the foundation of the present action. It is not founded on the contract for the delivery and reception of the goods on Sunday. That contract was fully executed on both sides. The action is founded on a breach of duty alleged to have arisen on the delivery of the goods to the defendant—the duty to take care of them. This was a duty which was lawful to perform on Sunday. It was not imposed or regulated by the contract, but was the legal consequence of the possession of the goods.

Granting that an action could not have been maintained on the contract if either party had refused to perform, yet it is only in that sense that such a contract is void.

Smith v. *Bean,* 15 N. H. 577; *Williams* v. *Paul,* 6 Bing. 653; *Adams* v. *Gay,* 19 Vt. 358; *Sumner* v. *Jones,* 24 Vt. 317; *Clough* v. *Davis,* 9 N. H. 500.

When such a contract is executed, legal rights and obligations arise out of it as in other cases.

P. W. & B. R. Co. v. *P. & H. Towboat Co.* 64 U. S. (23 How.) 209; *Scarfe* v. *Morgan,* 4 Mees. & W. 270.

When, therefore, the defendant received the goods into its possession, it became liable to take care of and account for them, and could not excuse itself by setting up the illegality of the contract under which it received them and which it had carried into execution.

Sharp v. *Taylor,* 2 Phil. Ch. 801; *McBlair* v. *Gibbes,* 58 U. S. (17 How.) 232; *Woodman* v. *Hubbard,* 5 Fost. N. H. 67. See, also, *Richardson* v. *Goddard,* 64 U. S. (23 How.) 28.

Mr. **C. Robinson,** for defendant in error:

The contract between plaintiff and defendant, made in contemplation of illegal employment in labor or other business on a Sabbath day, furnishes no legal foundation for the plaintiff's action.

The defense is complete when, as in the present case, it appears that there was, on the part of the plaintiff, an unlawful act which has caused or concurred in causing, the damage complained of.

Bosworth v. *Inhab. of Swansey,* 10 Met. 365; *Robeson* v. *French,* 12 Met. 24.

If the plaintiff insists that its demand is collateral to the contract, it is decisive against it that its claim is so mixed with the illegal transaction in which it and the defendant were jointly engaged, that it cannot be established without going into the proof of that transaction.

Ex parte Bell, 1 Maule & S. 751; *Simpson* v. *Bloss,* 6 Taunt. 246; *Fivas* v. *Nicholls,* 2 Man. Gr. & S. 512; *Gregg* v. *Wyman,* 4 Cush. 322.

Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the eastern district of Virginia. All of the questions presented for decision in this case arise upon the instructions given by the court to the jury, but a brief reference to the pleadings and evidence will be necessary, in order that the precise nature of those questions may be clearly and fully understood.

It was an action on the case, and the declaration contained three counts, which are set forth at large in the transcript. Among other things, the plaintiffs alleged, in the first count, that the defendants were common carriers for hire; that they, the plaintiffs, at the special instance and request of the defendants, on the 26th day of June, 1853, at City Point, in the state of Virginia, caused certain goods and merchandise to be delivered to the defendants, as such carriers, to be by them transported from the place of delivery to Petersburg, in the same state; and that the defendants, in consideration thereof, and of certain hire and reward to be paid them therefor, undertook and promised safely and securely to carry and convey the goods and merchandise to the place of destination, and there to deliver the same; and the complaint is, that the defendants, not regarding their promise and undertaking in that behalf, so conducted themselves, as such carriers, that the goods and merchandise, through their negligence and carelessness, were wholly lost to the plaintiffs. To the whole declaration the defendants pleaded that they never undertook *and promised, as the plaintiffs had [*250 thereof alleged against them, and upon that issue the parties went to trial.

From the evidence in the case, it substantially appears that the plaintiffs were the owners of a weekly line of steamers, employed in the regular and stated transportation of goods and merchandise between the city of Baltimore, in the state of Maryland, and the city of Richmond, in the state of Virginia. Their steamboats, on the trip each way, were accustomed to stop at the intermediate place called City Point, on James river, for the purpose of land-

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Ness, 1 Hill, 76; Palmer v. Mayor, etc. of N. Y. 2 Sand. 318); but labor on Sunday is not *ipso facto* illegal. Sun Ass'n v. Tribune Ass'n, 44 N. Y. Supp. (12 J. & S.) 136.

Any business but judicial proceedings may at common law be done on Sunday. Boynton v. Page, 13 Wend. 425; 1 Taunt. 131; Miller v. Roessler, 4 E. D. Smith, 234.

It is no defense, to an action for injuring or destroying a thing hired or loaned, that it was hired or loaned on Sunday. Harrison v. Marshall, 4 E. D. Smith, 271; Bertholf v. O'Reilly, 8 Hun, 16; aff'd, 74 N. Y. 509; 18 Alb. L. J. 388; 30 Am. R. 323; Nodine v. Doherty, 29 N. Y. 115; Carroll v. Staten Island R. Co. 58 N. Y. 126; Stewart v. Davis, 31 Ark. 518; 25 Am. R. 576; *contra,* Parker v. Latner, 60 Me. 528.

A carrier owes the same duty to a person traveling on Sunday, in violation of a statute, as if he were lawfully traveling, and incurs the same responsibility as to injuries, from negligence. Carroll v. Staten Isl. R. Co. 65 Barb. 32; aff'd, 58 N. Y. 126; 17 Am. R. 221; Mohney v. Cook, 26 Pa. 342; Doyle v. Lynn, etc. R. Co. 118 Mass. 195; 19 Am. R. 431.

A person traveling on Sunday in violation of a statute, cannot maintain an action for injuries received by insufficiency of the highway. Cratty v. City of Bangor, 57 Me. 423; 2 Am. R. 56; Johnson v. Town of Irasburgh, 47 Vt. 28; 19 Am. R. 111; Jones v. Andover, 10 Allen, 18; Lyons v. Disotelle, 124 Mass. 387. Walking for exercise is not traveling. O'Connell v. City of Lewiston, 65 Me. 34; 20 Am. R. 673. It was held that plaintiff could recover for injuries to his cattle being driven to market, in violation of statute, on Sunday, which injuries were occasioned by breaking of a defective bridge defendant was bound to maintain. Sutton v. Town of Wauwatosa, 29 Wis. 21; 9 Am. R. 534.

Where statute makes all labor unlawful on Sunday, and makes no exception in favor of works of necessity, no damages can be recovered for breach of a contract to perform such labor, as the contract is invalid. Bernard v. Luffing, 32 Mo. 341; Slade v. Arnold, 14 B. Mon. 232. So where statute forbids

ing goods to be sent to Petersburg, and also for the purpose of receiving other goods arriving from the same place to be transported to either terminus of the steamboat route. Defendants were a railroad company, and were also engaged in the transportation of goods and merchandise over their railroad, extending from City Point to Petersburg, in the same state. For many years there had been an arrangement and contract between the parties, whereby goods and merchandise destined for transportation to the latter place were to be received by the plaintiffs in Baltimore, carried in their steamers to City Point, and there delivered to the defendants, to be by them transported over their railroad to the place of destination. Receipts for the goods were given by the plaintiffs in Baltimore, promising to deliver the same to the consignees at Petersburg, where the plaintiffs had an agent, who collected the entire freight money, and paid over one fourth part of the amount to the defendants. When the steamers arrived at City Point, the goods were landed, and deposited in the warehouse of the defendants, which was situated on the wharf adjacent to the railroad.

According to the regular course of the transportation, one of the steamboats of the plaintiffs left Baltimore every Saturday afternoon, arrived at City Point about noon on Sunday, and there such of her cargo as was destined for Petersburg was landed and deposited in the warehouse of the defendants, and the steamer on the same day proceeded on her voyage to the place of her destination. Goods so landed and deposited remained in the warehouse until the following day, because the defendants ran no merchandise train on Sundays. Usually **251*]** *the warehouse was opened on the occasion, and afterwards closed by the agent of the defendants; but the whole labor of landing and depositing the goods, except the opening and closing of the warehouse, was performed by the plaintiffs.

Pursuant to the regular course of the transportation, one of the steamers of the plaintiffs arrived at City Point on Sunday, the 26th day of June, 1853, about noon, with the goods in controversy on board. On the arrival of the steamer at the wharf, the goods, being destined for Petersburg, were landed and deposited in the warehouse, and the evidence shows that the whole labor of landing and depositing them was performed by the plaintiffs, except that the agent of the defendants unlocked and opened the warehouse for that purpose, and afterwards closed it, as he had been accustomed to do on former occasions. After the goods had been so deposited, the steamer proceeded on her voyage up the river, and on the same day the warehouse and all the goods were destroyed by fire. Suit was brought against these plaintiffs by the shipper of the goods, and payment was recovered against them for a sum exceeding $12,000, which they had to pay. Evidence was then introduced by the defendants, tending to show that the goods were deposited in their warehouse for the convenience and accommodation of the plaintiffs, upon the agreement and understanding that the goods should remain there until the following morning, and be at the risk of the plaintiffs. Under the instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instruction. It is to the concluding portion only of the instruction that the plaintiffs now object, and for that reason the preceding part of it is omitted. Having assumed that state of the case in the introductory part of the instruction—which the evidence adduced by the plaintiffs tended to prove, and which, if found to be true, and the goods had been deposited on an ordinary working day, would have entitled the plaintiffs to recover—the jury were substantially told by the presiding justice, in the concluding portion of the instruction, that notwithstanding the facts so assumed, still, if they found from the evidence that the goods were delivered *on a Sunday, under a [***252** contract between the parties, express or implied, that they might be received and accepted on that day, and were destroyed by fire on the day on which they were delivered and received, to wit: on Sunday the 26th day of June, 1853, then their verdict should be for the defendants. Had the goods arrived and been deposited in the warehouse on an ordinary working day, the preceding part of the instruction assumed that the evidence in the case would authorize a finding in favor of the plaintiffs, and the principal

certain kinds of labor contracts for labor in violation of the statute are void. Fennell v. Ridler, 5 Barn. & C. 406; Allen v. Gardner, 7 R. I. 22; Hazard v. Day, 14 Allen, 187; Tucker v. West, 29 Ark. 386; Cranson v. Goss, 107 Mass. 439.

Works of necessity and charity are generally excepted from the statute; any work, labor or business which is morally fit and proper to be done on that day is a work of necessity within the statute. The necessity must be real and not exist only in the mind of the party, nor does convenience constitute it, nor avoidance of delay. The following decisions have been made as to "works of necessity." Flagg v. Millbury, 4 Cush. 243; Johnson v. Irasburgh, 47 Vt. 28; 19 Am. R. 111; McGrath v. Merwin, 112 Mass. 467; 17 Am. R. 119; Smith v. Boston, etc. R. Co. 120 Mass. 490; 21 Am. R. 538; Conolly v. City of Boston, 117 Mass. 64; 19 Am. R. 396; Tillock v. Webb, 56 Me. 100; Feital v. Middlesex R. Co. 109 Mass. 398; 12 Am. R. 720; Pate v. Wright, 30 Ind. 476; McGatrick v. Wason, 4 Ohio St. 566; State v. Goff, 20 Ark. 289; Jones v. Andover, 10 Allen, 18.

Acts of charity are those proceeding from sense of moral duty, or kindness and humanity, or for relief or comfort of another, and not for ones own benefit or pleasure. Doyle v. Lynn, etc. R. Co. 118 Mass. 195; 19 Am. R. 431; Gorman v. Lowell, 117 Mass. 65; McClary v. Lowell, 44 Vt. 116; Bennett v. Brooks, 9 Allen, 118; Com. v. Sampson, 97 Mass. 407; Rex v. Cox, 2 Burr. 787; Rex v. Younger, 5 Term, 449; Feital v. Middlesex R. Co. 109 Mass. 398; 12 Am. R. 720.

Where the statute merely prohibits unnecessary labor, a recovery may be had for necessary work. Plaintiff must show it was necessary. Whitcomb v. Gilman, 35 Vt. 297; Sayre v. Wheeler, 32 Iowa, 559.

A new promise made on Sunday has been held sufficient to remove the bar of statute of limitations. Lea v. Hopkins, 7 Pa. St. 492; Thomas v. Hunter, 29 Md. 406; Ayres v. Bane, 39 Iowa, 518, *contra*, Bumgardner v. Taylor, 28 Ala. 687; Haydock v. Tracy, 3 Watts & S. 507. Also held, that part payment or Sunday will not take debt out of statute. Clapp v. Hale, 112 Mass. 368; 17 Am. R. 111.

Money paid on Sunday and retained, discharges the debt. Johnson v. Willis, 7 Gray, 164.

Admission, on Sunday, of a part payment is admissible. Beardsley v. Hall, 36 Conn. 270, 4 Am. R. 74.

At common law, a sale made on Sunday is not void; it is by statute in England and most, if not all, of the States. Drury v. Defontaine, 1 Taunt. 131; Batsford v. Every, 44 Barb. 618; Bloxsome v. Williams, 3 B. & C. 232; Smith v. Sparrow, 4 Bing. 84; Pate v. Wright, 30 Ind. 476; Allen v. Gardiner, 7 R. I. 22; Cranson v. Goss, 107 Mass. 439; Sayre v. Wheeler, 32 Iowa, 559; Finley v. Quirk, 9 Minn. 194.

question is, whether the rights of the parties were varied by the fact that the goods were landed and deposited on a Sunday. It is insisted by the defendants that it does vary their rights, especially as the goods were destroyed accidentally on the day they were delivered and received. To support that theory, they refer, in the first place, to the 16th and 17th sections of the Code of Virginia. By the 16th section it is provided, among other things, that "if a free person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices, servants, or slaves, in labor or other business, except in household or other work of necessity or charity, he shall forfeit $10 for each offense;" and by the 17th section it is provided, that no forfeiture shall be incurred under the preceding section for the transporting, on Sunday, of the mail or of passengers and their baggage. Most of the states have laws forbidding any worldly labor or business within their jurisdiction on the Lord's day, commonly called Sunday, except works of necessity or charity. Those laws were borrowed substantially from similar regulations in the parent country, and in some of the states were adopted at a very early period in the history of the colonial governments. Statutes of the description mentioned usually contain an express prohibition against such labor; but we are inclined to adopt the early rule upon the subject, that where the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the legislature intended that a penalty should be inflicted for a lawful act. Adopting that rule of construction, it must be assumed that all labor "at any 253*] *trade or calling on a Sabbath day, except in household or other work of necessity or charity," is prohibited in the state of Virginia by the 16th section of the code already cited. But the defendants do not attempt to maintain that the contract between the plaintiffs and the shipper of the goods, for the transportation of the same from Baltimore to Petersburg, falls within that implied prohibition, or that the voyage of the steamer from Baltimore to Richmond was illegal. As the evidence shows, the steamer left Baltimore on Saturday, the day previous to the fire which consumed the warehouse and the goods, and it is very properly conceded by the defendants that she might lawfully, under the circumstances, proceed on her voyage to her place of destination, notwithstanding the fact that, in so doing, she had to sail on "a Sabbath day;" and if so, it clearly follows that she might stop at any intermediate place on the route. Transportation of the goods, therefore, so far as they were carried in the steamer, was a lawful act, and, in effect, it is conceded to have been so by the defendants. Merchandise trains were not run by the defendants on Sundays; and, of course, neither the contract of the shipper nor the arrangement between these parties contemplated that the goods would be carried over the railroad on that day. Shippers made their contracts with the plaintiffs for the transportation of the goods over the whole route from the place of departure to the place of destination, wholly irrespective of the circumstances which might afterwards attend the transfer of the goods from the steamer to the defendants, and without any knowledge, so far as appears, whether it would be accomplished on a Sunday, or on an ordinary working day.

When the shipper had delivered the goods to the plaintiffs, the contract between him and them was completed, and it is self-evident that it was one to which the Sunday laws of Virginia had no application whatever. All such contracts were made by the plaintiffs, but they were made for the separate benefit of the defendants, as well as themselves, and the arrangement between these parties had respect to the apportionment of the service to be performed in carrying out the contract made with the shipper, and the division of the freight *money to be received for the entire [*254 service. Each party worked for himself, and not for the other, and the compensation for that service was to be derived from the shipper of the goods. Neither party promised to pay the other anything, but each was to receive a proportion of the freight money equal to the proportion of the service the arrangement between the parties required him to perform. Plaintiffs made the contract with the shippers in their own name, received the goods at Baltimore, transported them to City Point, and on the arrival of the steamer there, landed the goods and deposited them in the warehouse of the defendants. On the other hand, the defendants furnished the warehouse, opened and closed it on the occasion, took the custody of the goods until the following morning, and then transported them over the railroad to the place of destination, and delivered them to the consignees. After the goods were delivered to the consignees, the agent of the plaintiffs collected the entire freight money, and paid over to the defendants such portion of it as belonged to them under the arrangement. Merchants sending goods knew only the plaintiffs in the entire transportation; but as between these parties, each performed a separate service for himself, and had no other claim for compensation than his proportion of freight money. Had the goods been lost at sea through the negligence of the plaintiffs, it is clear that the defendants would not have been answerable either to the shippers or to the plaintiffs, because the defendants had no interest in the steamer, and the arrangement between the parties did not contemplate that they should be responsible for her navigation. Shippers, however, had a right to proceed against the plaintiffs, although the loss had occurred while the goods were in the custody of the defendants, because their contract with the plaintiffs covered the whole route; and as between them and the defendants, the latter were but the agents of the plaintiffs. Accordingly, the shippers recovered judgment against the plaintiffs, and clearly the defendants are answerable over, unless it is shown that the case is one where courts of justice will not interfere to enforce the contract. It is insisted by the plaintiffs that the labor of landing and depositing *the goods was a work of [*255 necessity, within the meaning of the exception contained in the statute; but in the view we have taken of the case, it will not be necessary to decide that question at the present time.

Suppose it be admitted that the plaintiffs

violated the Sunday law in landing the goods and depositing them, and that defendants also violated the same law in opening and closing the warehouse on the occasion; still the admission will not benefit the defendants, for the reason that the cause of action in this case is not founded upon any executory promise between the parties, touching either the landing and depositing of the goods or the opening and closing of the warehouse, but it is based upon the nonperformance of the duty which arose after those acts had been performed. If the action was one to recover a compensation for the labor of landing and depositing the goods, or to recover damages for a refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply. Granting, however, for the sake of the argument, that those acts of labor fall within the prohibition of the statute, still their performance did not have the effect to transfer the general property in the goods to the defendants, nor to release or discharge them from the subsequent obligations, which devolved upon them as common carriers for hire. Safe custody is as much the duty of the carrier as due transport and right delivery; and although the defendants were forbidden to transport the goods over the railroad, or to deliver the same on "a Sabbath day," yet they might safely and securely keep such as were in their custody, and it was their duty so to do. Irrespective of the Sunday Law, the plaintiffs could maintain no action against the defendants for the service they had performed in landing and depositing the goods, for the best of all reasons, that in performing it they had worked for themselves, and not for the defendants. Nothing, therefore, can be more certain than the fact that the claim in this case is not founded upon any executory promise necessarily connected with those supposed illegal acts. On the contrary, the real claim is grounded on the ob-
256*] ligations which the law imposed *on the defendants safely and securely to keep, convey, and deliver the goods, and upon their subsequent negligence and carelessness, whereby the goods were lost. To take care of the goods on "a Sabbath day," and safely and securely keep them, after the goods were received, was a work of necessity and, therefore, was not unlawful, even on the theory assumed by the defendants, and the defendants were not expected to convey or deliver the goods until the following day. On the theory assumed, the defendants might have refused to open the warehouse, or allow the goods to be deposited; and if they had done so, no action could have been maintained against them for the refusal. But they elected to do otherwise, and suffered the plaintiffs to deposit the goods; and when the warehouse was closed, all the supposed illegal acts were fully performed.

Whatever contract or arrangement existed between the parties upon that subject had then been fully executed, and those who had been employed in landing and depositing the goods, as well as the agent of the defendants, who had opened and closed the warehouse, if the acts were illegal, had respectively become liable to the penalty which the law inflicts for such a violation of its mandate. That penalty is a fine of $10; but there is no authority in any court to declare the goods forfeited, nor do we perceive any just ground for holding that the general property in the goods was thereby changed. Unless the goods be considered as forfeited, or it be held that the property became vested in the defendants, it is difficult to see any reason why the plaintiffs ought not to recover in this suit, even admitting that the acts of landing and depositing the goods, and of opening and closing the warehouse, were within the prohibition of the statute.

Subsequent custody of the goods was certainly not within that prohibition; and if not, then the law imposed the obligation upon the defendants to keep the goods safely and securely until the following morning, and afterwards to transport them over the railroad to the place of destination, and deliver them to the consignees. To assume the contrary would be to admit that a carrier, accepting goods *to be transported *on an ordinary working [*257 day, may set off the fact that the labor of depositing the goods in his warehouse was performed on "a Sabbath day," against all the subsequent obligations which the law would otherwise impose upon him with respect to the goods. Such a rule of law, if acknowledged by courts of justice, and carried into effect, would amount to a forfeiture of the goods, so far as the shipper is concerned, as its practical operation would be to allow the carrier, if he saw fit, voluntarily to destroy the goods, or to appropriate them to this own use.

Upon a careful examination of the numerous authorities bearing upon the question, the better opinion, we think, is that, inasmuch as the subsequent custody of the goods was not unlawful, that the obligations of the defendants, under the circumstances of this case, were not varied by the fact that the goods were deposited in their warehouse by their consent on "a Sabbath day." Great injustice would result from any different rule, and although the precise question has seldom or never been presented for decision, yet we think the analogies of the law fully sustain the rule here laid down. For these reasons we are of the opinion that the instruction given to the jury was erroneous.

The judgment of the circuit court is, therefore, reversed, and the cause remanded, with directions to issue a new venire.

THE CLEVELAND INSURANCE COMPANY, *Appt.*,

v.

GEORGE REED, Juliet S. Reed, James H. Rogers and The Milwaukee and Mississippi Railroad Company.

(See S. C. 24 How. 284-287.)

Wisconsin act of limitations as to mortgage foreclosure—deed of assignee in bankruptcy —effect of.

The act of limitations of Wisconsin provides that "bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after that time."

Where a mortgagor was declared to be bankrupt, and his property and rights of property were vested in an assignee appointed by the court, and the assignee conveyed by deed, it vested in the purchaser such title as the bankrupt had at the time of

his bankruptcy, which was the date of the decree declaring him a bankrupt.

Where the bill prays that the equity of redemption be foreclosed, or that an undivided interest in the quarter section alleged to be covered by the mortgage be sold, and the proceeds appropriated towards paying the debts secured, as neither of these modes of release are cognizable at law, and the only remedy is in equity, it is barred by the limitation named in the act.

Argued Feb. 7, 1861. Decided Feb. 18, 1861.

APPEAL from the District Court of the United States for the District of Wisconsin.

The present appellants filed their bill in the court below, to foreclose a certain mortgage.

The district court dismissed the bill, and the case was brought to this court on appeal:

The case further appears in the opinion of the court.

Mr. **J. R. Doolittle**, for appellants:

As to the statute of limitations we maintain:

1. By the statutes of Michigan in force when the notes became due and the right to foreclose accrued, no limitation existed in equity. By analogy to ejectment, it was 20 years.

See Mich. Laws, 1833, 570, § 6.

If the notes as well as the mortgage were under seal, no period of limitation less than 20 years would attach at law or in equity. It is true the notes were unsealed, and an action at law upon them barred by the statute; but barring the action at law upon the notes, does not affect the plaintiffs' right to foreclose under the mortgage.

See *Heyer* v. *Pruyn*, 7 Paige, 465; 5 Smedes & M. 678; 4 Met. 164; 11 Conn. 160.

Discharge of the personal liability in bankruptcy did not affect the interest of the mortgagee in the land.

Barb. Ch. 613; 9 Mees. & W. 434.

The bankrupt act expressly saves the lien of mortgages.

See 5 U. S. Stat. p. 442. § 2.

Messrs. **James S. Brown**, and **W. P. Lynde**, for the appellees:

The suit was barred by the statute of limitations.

The mortgage and notes bear date Feb. 10, 1837. The suit was commenced Feb. 12. 1856. The first note became due Feb. 10, 1838.

The notes, as such, were barred in six years after they became due, and the only one personally bound, George Reed, was discharged by decree of the court under the bankrupt act. Rogers, the real defendant, had been in possession 19 years, and all this time he had resided in Wisconsin and been liable to process. There was no remedy against him personally; the remedy by ejectment had been taken away from the mortgagee by statutes.

Rev. Stat. of territory, 1839, 257, par. 53; Rev. Stat. of state, 1849, p. 569, § 53; sec. also, Rev. Stat. of 1837, p. 263, par. 40; of 1839, p. 263, par. 37-39; Rev. Stat. of 1849, p. 644, §§ 24-27; also, *Parker* v. *Kane*, 4 Wis. 1; *Fullerton* v. *Spring*, 3 Wis. 667.

285*] *Mr. Justice **Catron** delivered the opinion of the court:

The bill seeks to enforce a lien secured by mortgage on twenty acres of land, in what is denominated Finch's addition to Milwaukee. The mortgage debt became due in February, 1839. It is difficult to say, that were the bill standing on demurrer, that a sufficient description of the land claimed as bound for the debt could be established to justify an affirmative decree. But the view we take of the case renders this question immaterial.

In 1837, George Reed executed the mortgage to the Cleveland Insurance Company for $22,000, including the greater portion of a quarter section of land, part of which was covered by previous mortgages to others. These were acquired and foreclosed, and the title vested in James H. Rogers, the purchaser, and only material respondent to this suit. He took possession of the quarter section in 1838, claiming it as his own under previous mortgages of which he was assignee, and which he foreclosed, and became the purchaser of the equity of redemption, and he also claimed title under five tax sales and deeds founded on them.

In his answer, Rogers relies on the act of limitations of Wisconsin, passed in 1839, which provides that "bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after that time."

To establish the fact of adverse possession, and to negative the conclusion that Rogers did not recognize the trust, the parties agreed "that for the purpose of bringing the above entitled suit to a hearing at the present term, it shall and may be taken as true and proved for all the purposes of this case, that the defendant, Rogers, has been in actual and continual possession and occupancy of the southeast quarter section 37, township 7, range 22 east, described in the bill of complaint in this suit, since sometime in the year 1838, and up to this time; and during all that time has openly controlled the same, and improved some portion of the premises."

To onerate Rogers with the obligation of a mortgagor and trustee, the complainant introduced a record from the bankrupt court held in Wisconsin, showing the proceedings against George Reed as a voluntary bankrupt under the act of Congress of 1841. The proceeding was admitted on the hearing to be in all respects regular. On the 23d of July, 1842, Reed was declared to be a bankrupt, and his property and rights of property were vested in an assignee appointed by the court. He advertised Reed's interest in the property in controversy to be sold, and on the 3d day of May, 1843, it was sold, and purchased by Rogers, he being the best bidder, for the sum of $6, who took a regular deed for the same on the 6th day of July, 1846, in conformity to the 15th section of the bankrupt law. [*286

The object of introducing this evidence by the complainant was, to avoid the operation of the act of limitations, by showing that, by his purchase Rogers stood on the same footing of mortgagor that George Reed had stood before his bankruptcy, and that the assignee's deed to Rogers was not ten years old when this suit was brought.

The assignee came in as trustee by force of the decree declaring Reed a bankrupt; he held the land as Reed had done, and by the deed Rogers assumed the same position, because, by the proviso to the 2d section of the bankrupt law,

the lien secured by the mortgage was excepted. The main question as regards the effect of this deed is, to what time does the title acquired by Rogers relate. It vested in him by its terms such title as the bankrupt had at the time of his bankruptcy, which was the date of the decree declaring him a bankrupt. To this effect is the 15th section of the act.

This suit was brought in 1856, and the order declaring Reed a bankrupt was made in 1842, so that Rogers held the relation of mortgagor to the complainant more than ten years before this suit was brought.

But we deem this proceeding in bankruptcy altogether immaterial. Rogers claimed to own the quarter section in fee, and held it in actual adverse possession in 1839, when the ten years' act of limitations was passed. The act then began to run, and ran on so as to complete the bar in 1849.

287*] *We do not doubt that the act applies to this suit. The bill prays that the equity of redemption be foreclosed, or that the undivided interest, to the extent of twenty acres in the quarter section alleged to be covered by the mortgage, be sold, and the proceeds appropriated towards paying the debts secured. As neither of these modes of relief are cognizable at law, and the only remedy is in equity, it is manifestly barred by the terms of the act.

By a previous provision of the act of 1839, (§ 37), where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred; and what we mean to say is, that the remedies demanded to be enforced by the bill have no corresponding remedy at law, and therefore fall within the 40th section of the act.

As respects the other defendants to the bill, no relief can be had against them. By his purchase of the bankrupt's title, Rogers took the equity of redemption, and cut off all claims to the land the defendants had, assuming the statements in the bill to be true.

We forbear to express any opinion on the defense relied on by Rogers in his answer, namely: that he had purchased and had deeds for the said quarter section from several tax collectors, which he alleges are valid; and if not valid, that they are confirmed by adverse possession and the operation of the three years' act of limitations.

It is ordered that the decree of the circuit court, dismissing the bill, be affirmed.

WM. WIGGINS, James M. Jones, and John B. Weller, *Compts.*,

v.

JOHN B. GRAY and Knowles Taylor.

(See S. C. 24 How. 303-307.)

Question of practice in discretion of inferior court, not reviewable on certificate of division, or appeal.

The act of 1802, ch. 32, which authorizes a certificate of division, evidently did not intend to give this court jurisdiction, in that mode of proceeding, of any question of common law or equity, that would not be open to revision here upon writ of error or appeal.

It has repeatedly been held, that a decision of the inferior court, upon a question depending upon the exercise of a sound judicial discretion in a matter of practice as to the mere form of proceeding, is not open to revision in this court.

This discretion is a matter of practice resting exclusively with the inferior court, and no appeal will lie from its decision, made in the exercise of this discretionary power.

This court will not assume jurisdiction and exercise appellate powers over such questions when they come before it on a certificate of division.

The act of 1802 contemplates a suit in court, in which plaintiff and defendant have both appeared; but where there is no party but the one in whose behalf the motion is made, and no defendant is named, and no process prayed for, the legality of this proceeding cannot be certified to this court for its opinion.

Argued Feb. 6, 1861. Decided Feb. 18, 1861.

ON a certificate of division of opinion between the Judges of the Circuit Court of the United States for the Northern District of California.

The case is stated by the court.

Messrs. **James A. Bayard** and **John A. Collier** for complainants.

Messrs. **Caleb Cushing, R. J. Walker, Louis Janin, Robert J. Brent, and Henry May** for defendants.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case comes before the court upon a certificate of division of opinion between the judges of the circuit court for the district of California sitting as a court of equity.

In stating the facts upon which the question certified arose, the court gives a history of the case, and it appears that a bill was filed in a state court of California, and was afterwards removed to the district court of the United States, by order of the court, pursuant to an agreement made by the counsel for the respective parties, that before it was transferred from the state court, one of the complainants and one of the defendants died; and the representatives of neither of them were afterwards made parties, either in the state court before the removal, or the district court of the United States, after the case was transferred to that court. And in this condition of the case, and without these parties, a final decree was rendered in the last mentioned court. These proceedings were transferred to the circuit court of the United States, under the act of Congress of April 30, 1856 (11 Stat. at L. 6); and a bill was afterwards filed in that court to set aside and vacate the final decree which had been rendered as above mentioned; but in that proceeding the circuit court held that it had not jurisdiction, because the parties made defendants resided in New York, where the process of the court could not lawfully be served upon them. The dates of these several proceedings in the different courts, and the motions and agreements of counsel, are particularly *set forth in the statement; [*305 but they are not material to the decision of this court, and need not, therefore, be repeated here.

The circuit court further certify, that after all these proceedings were had, and the bill filed against the citizens of New York dismissed, a motion was made "to vacate the final decree rendered, and to remand the case to the state

NOTE.—*Cases certified on division of circuit court. Jurisdiction of U. S. Supreme Court in. On what division should be*—see note to Webster v. Cooper, 13 L. ed. U. S. 325.

Error. The Supreme Court will not review the discretionary action of the court below—see note to Barrow v. Hill, 14 L. ed. U. S. 48.

court, in which it originated; and that the motion was predicated on the ground that the whole proceedings, from the time the case was transferred thence, including the decree, were null and void, and not merely voidable, and, therefore, might be set aside on motion."

Upon this motion the judges divided in opinion, as they certify, upon the following question: "whether, under the circumstances detailed, this court (the circuit court) has authority to vacate summarily, on motion, the decree of the district court of the United States for northern district of California, and remand the case to the third judicial district of the state."

It will be observed that the grounds, upon which the decree of the district court is alleged to be void or voidable, are not stated; nor the questions which arose in the state court, or the courts of United States; nor does it appear what errors are supposed to have been committed, which it is proposed to bring for revision before the circuit court, and to correct by a summary proceeding on this motion.

The only question certified by the circuit court is, whether, under the circumstances of the case, as detailed in the statement, it could proceed summarily on motion to vacate and declare void the decree. The inquiry obviously relates altogether to the practice of the court as a court of equity. And this question often depends upon the sound judicial discretion of the court, regulated by the rules prescribed by this court, and the general principles and established usages which govern proceedings in a court of chancery; and whether it will proceed in a summary manner on motion, or require plenary proceedings by bill and answer, must depend upon 306*] the particular *circumstances of the case before it, and the object sought to be attained.

The act of April 29th, 1802, ch. 32 (2 Stat. at L. 156), which authorizes the certificate of division, evidently did not intend to give this court jurisdiction, in that mode of proceeding, upon any question of common law or equity, that would not be open to revision here upon writ of error or appeal. It was so decided in *Davis* v. *Braden*, 10 Pet. 288, and in *Packer* v. *Nixon*, 10 Pet. 410. And it has repeatedly been held that the decision of the inferior court, upon a question depending upon the exercise of a sound judicial discretion in a matter of practice as to the mere form of proceeding, is not open to revision in this court.

If the judges had united in refusing the summary proceedings on motion, it is very clear that the decision could not have been revised in this court upon appeal, although this tribunal might be of opinion that the relief sought might have been legitimately granted in that mode of proceeding; for this discretion in a matter of practice, resting exclusively with the inferior court, it has the right to determine for itself whether it will proceed in a summary way, or refuse to do so whenever it thinks the purposes of justice will be better accomplished in a plenary proceeding by bill and answer; and consequently no appeal will lie from its decision, made in the exercise of this discretionary power. In the case before us, by the division of opinion between the judges, the motion was as legally and effectually refused as if both had concurred in the refusal. And as the decision in the latter case could not have been reviewed here upon appeal, for want of appellate jurisdiction over such questions, we should hardly be justified in assuming jurisdiction, and exercising appellate powers over the same questions when they come before us on a certificate of division.

Besides, the act of April 29th, 1802 (2 Stat. at L. 156), obviously contemplates a suit in court, in which plaintiff and defendant have both appeared, for it directs the point to be certified at the request of either party. But here there is no party but the one in whose behalf the motion is made. No defendant is named, and no process prayed for. And if, in this stage of the case, the legality of *this proceeding [*307 can be certified to this court for its opinion, the same thing may be done at the commencement of any other equity proceeding and this court called on to decide in advance, before any process is issued or any party brought into court, whether a motion, or an original bill, or any other of the many description of bills known in equity practice, was the proper and appropriate remedy in the case which a party was about to bring before the circuit court. No one will suppose that such a practice was intended to be established by the act of 1802.

The court order and adjudge that this opinion be certified to the circuit court, and that the cause be remanded.

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*JOHN T. MARTIN, Andrew Proudfit, [*315 and John Keefe, *Plffs. in Err.*,

v.

WM. H. THOMAS and Robert A. Baker, Administrators of Major J. Thomas, Deceased, use of George T. Rogers.

(See S. C. 24 How. 315-317.)

Surety—discharged by erasure of principal's name from bond—his liability not to be extended by implication—any change, in contract, even if beneficial, discharges him.

Bond of sureties in replevin held void, because after the same was executed by defendants as sureties, their principal, without their knowledge or consent, and with the consent of the marshal, erased his name from the bond.

The liability of the surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in the obligation, he is bound, and no further.

It is not sufficient that he may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration of it is made, it is fatal.

After the execution of the bond by the defendants, to be delivered to the marshal, it was refused and disagreed to by him, and it thereby became void. Any subsequent alteration would require a new deed or positive assent to the same, to make it valid against the defendants.

Argued Feb. 4, 1861. Decided Feb. 18, 1861.

IN ERROR to the District Court of the United States for the District of Wisconsin.

This was an action on a bond commenced by the present defendant in error in the court

NOTE.—*Discharge of surety*—see notes, 35 L. ed. U. S. 486, 679; 52 C. C. A. 427.

below. Judgment was rendered there for the plaintiff, and the defendants brought the case to this court by writ of error.

The case is further stated by the court.

Messrs. **J. R. Doolittle** and **T. Ewing** for plaintiffs in error.

Messrs. **J. C. Hopkins** and **Reverdy Johnson**, for defendants in error:

The alterations of the bond are immaterial, and did not affect its legality.

15 Johns. 293; 1 Wend. 659; 10 Conn. 192; 18 Pick. 172; 5 Mass. 538; 2 Barb. Ch. 119; 16 N. Y. 439; 3 Coms. 188; 1 Greenl. Me.; *Hale* v. *Russ*, 1 Code Rep. 60.

Mr. Justice **McLean** delivered the opinion of the court:

This is a writ of error to the district court of the United States for the district of Wisconsin:

The action was replevin; the pleadings being filed, a jury was called, who rendered a verdict in damages for $9,708.96, with costs.

In the course of the trial a bill of exceptions was filed, on which the questions of law were raised. Be it remembered, that at the trial of the above entitled action, the plaintiff produced an instrument in writing, in the words and figures, and with interlineations and erasures following, to wit:

Know all men by these presents, that we and John T. Martin, and John Keefe, and Andrew Proudfit, are held and firmly bound unto Major J. Thomas, Marshal of the United States for the Wisconsin district, in the sum of $20,000, to be paid, etc.

Whereas the defendants have required the return of property replevied by the marshal, at the suit of *George T. Rogers* v. *Henry M. Remington and John T. Martin, Jr.*; now, **317*]** *the condition of this obligation is such, that if the said defendants in said suit shall deliver to the marshal said property, if such delivery be adjudged, and shall pay to him such sum as may for any cause be recovered against the defendants, then this obligation to be void.

1. The bond upon which judgment was recovered was void, as against the defendants, because, after the same was executed by them as sureties, Remington, their principal, without their knowledge or consent, and with the consent of the marshal, erased his name from the bond.

In *Miller* v. *Stewart*, 9 Wheat. 702, Mr. Justice Story said, nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration of it is made, it is fatal.

Hunt v. *Adams*, 6 Mass. 521.

2. After the execution of the bond by the defendants, to be delivered to the marshal, it was refused and disagreed to by him, and it thereby became void. Any subsequent alteration would require a new deed or positive assent to the same, to make it valid against the defendants.

Shep. Touch. 70, 394.

The judgment is reversed.

JOHN M. FACKLER, *Appt.*,
v.
JOHN R. FORD *et al.*

(See S. C. 24 How. 322-333.)

Specific performance—contract not void—combinations to prevent bidding—public sale of lands—frauds at.

In a bill for specific performance of a contract, the contract held not void under the 4th and 5th sections of the act of Congress of 31st of March, 1830, entitled "An Act for the Relief of Purchasers of Public Lands, and for the Suppression of Fraudulent Practices at the Public Sales of the Lands of the United States."

The 4th section is intended to protect the government and punish all persons who enter into combinations or conspiracies to prevent others from bidding at the sales, either by agreement not to do so, or by intimidation, threats, or violence.

There is nothing to be found on the face of this contract which can be construed as an agreement not to bid, or to hinder, intimidate, or prevent others from doing so.

The 5th section is intended for the protection of those who propose to purchase lands at the public sales from the extortions of those who have formed the combinations made penal by the 4th section.

It is no part of the policy of this section to encourage frauds, by releasing the fraudulent party from the obligation of his contract.

Argued Feb. 1, 1861. Decided Feb. 18, 1861.

APPEAL from the Supreme Court of the State of Kansas.

John R. Ford and others, the present appellees, filed a bill in the first judicial district of Kansas, against the appellant, one Madison Mills, to enforce the specific execution of a contract, an abstract of which appears in the opinion of the court.

The district court rendered a decree in favor of the complainants. The defendant appealed to the supreme court of the territory, by which court the decree of the district court was affirmed. From this decree of affirmance the present appeal is prosecuted.

Messrs. **Badger** and **Carlisle**, for the appellant:

It is insisted by the appellant:

1st. That this agreement was in violation of the laws of the United States and their policy in respect to the sale of the lands. These Delaware lands were ceded to the United States by the treaty of May 6, 1854.

10 Stat. at L., 1048.

These lands were agreed to be sold, and were sold, in every respect as other lands of the United States, although they were held in trust for the Indians, and the beneficial interest was not in the United States as the legal title was.

We insist that the contract on which this bill is filed is in conflict with the provisions of sections 4 and 5, act March 31, 1830 (4 Stat. 392), and tends immediately to defeat or obstruct the purpose of Congress. That purpose in both sections is to secure free and open contest at the sales of the public lands by auction. The 4th section prohibits any contract or agreement to

induce or prevent anyone from bidding at such sales. Here the plain result and effect of this contract was to prevent the appellees from bidding for land which the contract shows that they desired to possess; and this was directly within the scope of the agreement and purpose of the parties. And the agreement to pay the appellant $10,000 beyond the price to be paid to the United States, showed that the land to be bought was known to be worth many times that price. It was, therefore, a plain, direct purpose of the contract to prevent the land from bringing a fair value by stifling a contest and excluding the only party besides the appellant, desiring the land, from bidding. And further, this understanding was so much a part of the contract that the appellees could not have bid without violating the agreement on their part and discharging the appellant from his part thereof.

The same section makes it an offense by any "combination or unfair management" to hinder or prevent, or attempt to hinder or prevent, any person from bidding; and though this primarily refers to the hindering of persons from bidding who are not parties to the combination or management, yet in this case, upon this contract, the combination or management with each other to procure the land at a less price, by preventing one of the parties, is seen to be within the mischief which the statute was intended to prevent.

The 5th section prohibits any and every contract or secret understanding made by one or more persons with another who proposes to purchase any such lands, to pay or give to such purchaser for such land a sum of money or article of property over and "above the price at which the land may or shall be bid off," and declares every such contract, etc., and "every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of the same," to be utterly null and void, and authorizes any party to such contract, etc., who may pay any such sum of money, etc., to sue for and recover back the same. The parties came to an understanding for what the statute prohibited, and then entered into a written contract, which is void. The whole scope and intent of the contract is in violation of the spirit of the law, which is to secure a fair competition at the public sales. This is sought by both sections, and the contract in our case embraces both the modes of evading the enactment and accomplishing the mischief against which the statute was directed.

The courts act upon the principle of giving no relief to parties to an unlawful contract.

This case, we submit, falls within this principle.

To establish this, we call the attention of the court to a few out of the many authorities which support it.

Kennett v. *Chambers*, 14 How. 38; *Hannay* v. *Eve*, 3 Cranch, 242; *Armstrong* v. *Toler*, 11 Wheat. 258; *Craig* v. *Missouri*, 4 Pet. 410.

These decisions include our case, within their ruling, and decide it.

The contract was a bargain to prevent one party from bidding, and a combination to that effect, upon a mutual understanding that the land would be bought for greatly less than its true value, as known to the parties, for their profit and to the injury of the United States, or those for whom the United States sold and, therefore, is within the 4th section of the act. Then, under the 5th section, it was an agreement on the part of the appellants to convey, upon the payment by the other party of a sum of money expressly forbidden to be promised.

Our defense rests not on any merits of our own, but on this: that the parties were engaged in an unlawful purpose, unlawful as in violation of a public law, and unlawful as in violation of the policy of Congress, in selling the public lands at auction, and especially in this sale for the benefit of the Indians, in which the government was bound by the highest obligations of honor and integrity to promote a sale at the highest price which competition of bidders might produce, and therefore, whatever the demerits of the appellants may be, the appellees have no right to assistance.

Mr. Justice **Grier** delivered the opinion of the court:

Ford and others are complainants in a bill for specific performance of a contract made by them with Fackler & Mills.

The bill charges, that on and before the 22d of November, 1856, Fackler claimed, as actual settler thereon, a fractional section of land containing sixty acres, and Mills the east half of a quarter section, containing eighty acres, in Leavenworth county, Kansas territory, being parts of the land purchased by the government of the United States of the Delaware Indians.

These lands had been appraised at $8 an acre, and advertised for sale pursuant to law. That prior to that date, Fackler & Mills surveyed and laid off said tracts of land so claimed and held by them, into blocks, lots, public grounds, streets, alleys, etc., for a town to be known as "Fackler's addition" to Leavenworth City; that they made a plat of it and divided the whole into eighty shares of six lots each, executing certificates, on the back of each of which they indorsed the lots assigned; that they also represented themselves to be owners of a ferry right from the south part of Fackler's addition to and including a landing on the opposite side of the Missouri river, and a lease of a fractional section in Platte county, in Missouri, containing thirty-four acres; that Fackler & Mills were anxious to sell and dispose of the undivided half of the ferry; together with an equal and divided half in lots of the 140 acres, being forty shares, containing in the aggregate 240 lots; that on the 22d of November, 1856, they entered into covenant, under seal, to sell to complainants 40 shares, being one half of 140 acres in Fackler's addition to Leavenworth City, which shares were divided and agreed to be the following lots, *viz.*: 23, etc., etc., etc.; that the complainants have paid the sum of $10,000 as a consideration, and agreed to furnish one half the purchase money to be paid at the Delaware sales; that Fackler & Mills agreed to make a quitclaim deed to the vendees when they have obtained a title for the lands, and as *part consideration of said [*329 payment, a deed for the undivided half of the ferry right and lease of grounds on the Missouri side should also be executed.

At the bottom of this agreement, of the same date, is a receipt by Fackler for $560, "being one half of the appraised value of the lands de-

scribed in the within contract, which we are to use in paying for the said lands at Delaware sales, held at Leavenworth this day."

The bill further charges, that Fackler & Mills did obtain a title for said land, and now refuse to convey to complainant either the land or the moiety of the ferry right, and prays for a decree for specific performance.

The respondents demurred to this bill, and afterwards withdrew their demurrer and filed an answer. The answer admits the contract and receipt of the money, and purchase of the lands, but charges that the government of the United States was trustee of the Delaware Indians, of these lands, and that the act of the officers of the government in fixing the value of the land, and in restricting the purchase thereof to settlers thereon, to such valuation, was a "fraud on the Indians," and that the plaintiffs were cognizant of such fraud; that the lands were appraised far below their true value: that respondents have not put the plat of their town on record; that, therefore, the description of the land is so vague and uncertain that a court cannot decree a specific performance; that a statute of Kansas requires all town plats to be recorded; that besides the money paid to the respondents, there was a parol representation made by complainants; that by their capital and influence they had built up other towns in the West, and would do the same with this if they could get a large interest at low rates; and that not having performed this part of their contract, respondent refused to make them a title; and lastly, the answer concludes with the following defense and apology:

"And this defendant says, that inasmuch as the plaintiffs have endeavored to avail themselves of a supposed technical legal advantage to aid them in a noncompliance with their contract, and have failed to comply with the same, defendant in turn claims that he is justified 330*] in charging, and does charge *and insist, that said contract was made before the relinquishment of the title of the Delaware Indians to said lands, and in violation of the said treaty with said Indians; and that said agreement, settlement, survey and *platts* of said land were each in violation thereof, and in violation of the laws of the United States, and in violation of the statutes of the territory of Kansas, and in violation of the public policy of the United States, and void."

Afterwards, on motion of complainants, the court ordered to be expunged from the answer each one of the charges, a summary of which we have just given. This left in the answer nothing but an admission of the charges in complainant's bill.

A bill of exceptions (according to the practice of that court) was taken to this order of the court, and the case was then heard on the bill, answer and exhibits, and a decree was entered for complainants, which was confirmed on appeal to the supreme court of the territory.

The allegation that the United States defrauded the Indians, and that the lands were sold below their value and, consequently, that Fackler, having got his title by a fraud, was bound to commit the further fraud of keeping the complainants' money and the land too, might well have been expunged from the answer as "impertinent" in every sense of the term. The plea of vagueness of description in the contract, and that defendant had not put his town plat on record before he got a title from the United States, partake largely of the same quality.

The plea that plaintiffs had not used their influence to bring emigrants and make improvements in the intended addition to the city, and thus add value to the land which the respondent would not convey to them, was surely irrelevant, if not impertinent; and finally, the sweeping charge in the conclusion of the answer, that the whole transaction was in violation of the treaty with the Indians, and in violation of the laws of the United States, and of the statutes of Kansas, does not indicate whether respondent intends to charge the complainants with fraud, or rely upon his own. It alleges no facts, and is *followed by no [*331 proof. It is in fact a return to the demurrer to the bill, and as such has been argued in this court.

The question to be decided is, whether there is anything on the face of this contract which shows it to be void by any law of the United States. How the treaty or the laws of Kansas can affect it has not been shown, and need not be further noticed. It was time enough to record the plat of the intended city when the respondents had obtained a title, and as it concerned the complainants, they could not be in default until they got a title and were offering their lots for sale. The enumeration of the lots in the contract was a mode of specifying how the land should be divided, and the plat of the intended town could be referred to for description and certainty just as any other private survey or draft.

The laws of the United States, which it is alleged invalidate this contract, are the 4th and 5th sections of the act of Congress of 31st of March, 1830 (4 Stat. at L. 390), entitled "An Act for the Relief of Purchasers of Public Lands, and for the Suppression of Fraudulent Practices at the Public Sales of the Lands of the United States." These sections are in these words:

"Sec. 4. That if any person or persons shall, before or at the time of the public sale of any lands of the United States, bargain, contract, or agree, or attempt to bargain, contract, or agree, with any other person or persons, that the last-named person or persons shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or shall by intimidation, combination, or unfair management, hinder or prevent, or attempt to hinder or prevent, any person or persons from bidding upon or purchasing any tract or tracts of land so offered for sale, every such offender, his, her, or their aiders and abettors, being thereof duly convicted, shall, for every such offense, be fined, not exceeding one thousand dollars, or imprisoned not exceeding two years, or both, in the discretion of the court.

"Sec. 5. That if any person or persons shall, before or at the time of the public sale of any of the lands of the United States, enter into any contract, bargain, agreement, or secret understanding with any other person or persons, proposing to purchase such land, or pay or give such purchasers for such *land a sum of money, [*332 or other article of property, over and above the

price at which the land may or shall be bid off by such purchasers, every such contract, bargain, agreement or secret understanding, and every bond, obligation or writing of any kind whatsoever, founded upon or growing out of the same, shall be utterly null and void. And any person or persons being a party to such contract, bargain, agreement, or secret understanding, who shall or may pay to such purchasers any sum of money or other article of property, as aforesaid, over and above the purchase money of such land, may sue for and recover such excess from such purchasers in any court having jurisdiction of the same. And if the party aggrieved have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess aforesaid, he may, by bill in equity, compel such purchaser to make discovery thereof; and if in such case the complainant shall ask for relief, the court in which the bill is pending may proceed to final decree between the parties to the same: Provided, every such suit, either in law or equity, shall be commenced within six years next after the sale of said land by the United States."

The 4th section is intended to protect the government and punish all persons who enter into combinations or conspiracies to prevent others from bidding at the sales, either by agreement not to do so, or by intimidation, threats, or violence.

There is nothing to be found on the face of this contract which can be construed as an agreement not to bid, or to hinder, intimidate or prevent others from doing so.

The 5th section is evidently intended for the protection of those who propose to purchase lands at the public sales from the extortions of those who have formed the combinations made penal by the 5th section. The complainants stand in the character of the "party aggrieved" by the fraud, if there be any in the case. If Fackler had made his conveyance according to his contract, and the complainants were now seeking to recover back the $10,000 paid to him, this section of the statute might have been invoked by them, on proof of such a combination, and that Fackler was a party to 333*] it, as he *now acknowledges. But it is no part of the policy of this section to encourage frauds by releasing the fraudulent party from the obligation of his contract. The allegation of the answer that the contract was in violation of the treaty with the Indians, and of the acts of Congress, may be a confession of the respondent's own fraud, but it can give no right to commit another.

The answer filed in this case is by Fackler alone; the record shows the agreement of counsel that the bill be dismissed as to Mills.

The court below were, therefore, right in decreeing a specific performance of the contract, but erred in that part of the decree which orders a conveyance of the undivided moiety of the 140 acres. The contract is for a specified and divided moiety of the land, and an undivided moiety of the ferry privilege; and *that portion of the decree, which orders a conveyance according to the contract, is affirmed, with costs, and record remitted, with instructions to the court below to reform their decree in accordance with this opinion.*

CHARLES TATE *et al.*, *Plffs. in Err.*, *v.* JOHN G. CARNEY *et al.*

(See S. C. 24 How. 357-362.)

Decision of land office between claimants not binding on courts—land office cannot reverse its prior decision followed by possession and claims of bona fide purchasers.

The decision of the register and receiver of the land office, in favor of one of two claimants of government land, is not conclusive of the controversy.

The register and receiver are empowered to decide on the true location of grants or confirmations, but not on the legal and often complicated questions of title.

The decisions of the register and receiver do not preclude a legal investigation and decision, by the proper judicial tribunals, between the parties to interfering claims.

They had no authority in this case to overthrow the decision of a prior register and receiver, made more than twenty years before, and which had been followed by possession, and as to which there had intervened the claims of bona fide purchasers.

Argued Jan. 8, 1861. Decided Feb. 18, 1861.

IN ERROR to the Supreme Court of the State of Louisiana holding sessions for the Eastern District of Louisiana.

Carney, the defendants in error, instituted suit in the eighth judicial district of Louisiana against Charles Tate, Jr., claiming the tract of land in controversy.

Tate disclaimed title otherwise than as one of the heirs of Nancy Tate, whose succession was then under administration. The heirs of Nancy Tate intervened and claimed title by inheritance from their ancestor, the said Nancy. The issue was joined on this intervention by the original plaintiff. Both parties claimed title under the United States.

On the trial in the district court, judgment was entered in favor of the heirs of Nancy Tate. On appeal to the supreme court of Louisiana, the judgment of the lower court was reversed.

The heirs of Nancy Tate brought writ of error from this judgment of the supreme court of Louisiana, rejecting their title, claimed under the laws of the United States.

The case further appears in the opinion of the court.

Messrs. **J. P. Benjamin** and **Robt. Gillet**, for plaintiffs in error:

1. The decision of the register and receiver, ascertaining the location of the land confirmed to Nancy Tate, is final and conclusive, and the courts of justice cannot reverse that.

The supreme court of Louisiana erred in so doing.

Cousin v. *Blanc*, 60 U. S. (19 How.) 202.

II. But if that decision could be reversed, the result would be the same, the decision being clearly right.

Mr. **Miles Taylor** for defendant in error.

Mr. Justice **Campbell** delivered the opinion of the court:

This cause comes before this court by a writ of error to the supreme court of the state of Louisiana, under the 25th section of the judiciary act of September, 1789. The defendant in error (Carney) commenced a suit in the district court of the eighth judicial district of Louisiana, in which he asserted that he had

purchased, in the year 1844, at the probate sale of the succession of Sarah Cohern, deceased, five hundred and sixty acres of land on Cool Creek, in that district, and that Charles Tate had disturbed his possession and denied this title. He summoned Charles Tate to exhibit his claim to the land, and required the representatives of Sarah Cohern, deceased, to maintain the title they had warranted to him, or to refund the purchase money he had paid. The result of various proceedings in the district court was the forming of an issue between the defendants in error and the plaintiffs in error relative to their respective rights in the said parcel of land. It is situated in the section of country east of the Mississippi river and the Island of New Orleans, and west of the Perdido river, which was claimed by the United States under the treaty of Paris of 1803 (8 Stat. at L. 200), for the cession of Louisiana, and which was adversely claimed and possessed by Spain as a portion of West Florida until 1812–13. The act of Congress for ascertaining the titles and claims to lands in that part of Louisiana which lies east of the Mississippi river and Island of New Orleans, approved 25th April, 1812 (2 Stat. at L. 713), is the first of the series of acts that apply to this district. The 8th section requires the commissioners to be appointed under the act to collect and report to Congress, at their next session, a list of all the actual settlers on land in said districts, respectively, who have no **359*]** *claims to land derived either from the French, British, or Spanish governments, and the time at which such settlements were made. The reports made by the commissioners appointed under the act of 1812 were submitted to Congress, and are the subject of the act of the 3d March, 1819 (3 Stat. at L. 528), for adjusting the claims to land, and establishing land offices in the district east of the Island of New Orleans.

The 3d section of this act provides, that every person whose claim is comprised in the lists or register of claims reported by the said commissioners, and the persons embraced in the list of actual settlers not having any written evidence of claim reported as aforesaid, shall, when it appears by the said reports or by the said lists that the land claimed or settled on had been actually inhabited or cultivated by such person or persons in whose right he claims, on or before the 15th of April, 1813, be entitled to a grant for the land so claimed or settled on as a donation; provided that not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres. By the 9th section of this act, the register and receiver of the land offices in that district were authorized to make additions to the list of settlers, noting the time of their settlement, and to report the same to Congress. These, with other reports, were disposed of in the supplementary act for adjusting land claims in that district, adopted 8th May, 1822. (3 Stat. at L. 707.) The 3d section of the act of 1822 is in the same language as the corresponding section in the act of 1819 before cited. The 6th section of this act requires the register and receiver to grant a certificate to every person who shall appear to be entitled to a tract of land under the 3d section of the act, setting forth the nature of the claim and the quantity allowed. In 1820, Robert Yair made proof in the land office that in the year 1805 he had settled upon a parcel of land in the district, and had occupied and cultivated it from that time until the date of his application and proof. His claim was reported to Congress, and in 1824 a certificate issued to him for that land, which is the land in controversy. Robert Yair continued to occupy the land until his death, in 1825 or 1826, when it passed* [***360** to his widow and heirs. The defendant in error (Carney) traces his title to these heirs. The claim of the plaintiffs in error is traced to Nancy Tate, their ancestress, who made a settlement in the same district in 1811, and whose claim was reported under the act of 1812, before cited.

In the year 1847 her heirs applied to the register and receiver of the land office in that district for an order of survey, in which application they represented that Nancy Tate was entitled to a section of land under the act of Congress aforesaid; that she had settled upon public land in an adjoining section, forty-one; that John Tate was settled upon the same section; and that both could not have their complement of land, from their proximity, out of land contiguous to their settlement. But that there was vacant land to the east and northeast, not claimed by any person, sufficient to make up the quantity she had been entitled to, and prayed for the order, as one that could not injure any other person. The register and receiver caused a notice to be served on the defendant in error, to show cause why the order should not be granted. There is no evidence that he appeared on this notice.

In February, 1848, the register and receiver made a decision, in which they declared that Nancy Tate had settled upon this land; that they were satisfied that Robert Yair, at the time of the confirmation to him, was the holder of another donation for one thousand arpents, and that he was not entitled to this under the act of 1822 (3 Stat. at L. 707), for that reason. They annulled the certificate that had been issued to him, and granted the order of survey as applied for. The survey was made to include this land, and a patent was issued in favor of the representatives of Nancy Tate in 1853. This patent describes the land as covered by the claim of Robert Yair, and releases the land, subject to any valid right, if such exists, in virtue of the confirmed claim of Robert Yair, or of any other person claiming from the United States, the French, British, or Spanish governments. The supreme court of Louisiana have found from the testimony that Nancy Tate was not an occupant of this land, and that the settlement of Robert Yair and his representatives had been continuous for some forty years. The *question for the consideration of this [***361** court is, whether the decision of the register and receiver of the land office in favor of the plaintiffs in error is conclusive of the controversy. The supreme court decided that it was not, and we concur in that opinion.

In *Barbarie* v. *Eslava*, 9 How. 421, the defendant, in error relied upon a decision of the register and receiver of a land office in the same district, with the same powers as were confirmed upon these, as conclusive in his favor. This court answered: "We do not consider that the

act of May 8th, 1822 (3 Stat. at L. 707), and that of the same date, which is connected with it, and referred to as *in pari materia*, for a guide, meant to confer the adjudication of titles of land on registers and receivers. Sometimes, as in the case of pre-emptioners, they are authorized to decide on the fact of cultivation or not; and here, from the words used, no less than their character, they must be considered as empowered to decide on the true location of grants or confirmations, but not on the legal and often complicated questions of title, involving, also, the whole interests of the parties, and yet allowing no appeal or revision elsewhere. The power given to them is, to decide only how the lands confirmed shall be located and surveyed. The further power to decide on conflicting and interfering claims should apply only to the location and survey of such claims, which are the subject-matter of their cognizance; and on resorting to the reference made to the second act of Congress, that act appears also to relate to decisions on intrusions upon possessions and other kindred matters."

The case of *Cousin* v. *Blanc*, 19 How. 203, involved a question of the effect and binding operation of a decision of the register and receiver of the land office upon a location and survey of a claim confirmed under the act of 1822, and refers to the act of the 3d March, 1831 (4 Stat. at L. 492), as showing that the decisions of the register and receiver were not to be considered as precluding a legal investigation and decision by the proper judicial tribunals between the parties to interfering claims.

It furnishes no support of the argument that 362*] the decision *of the register and receiver in such a case as this is conclusive of the title. There is no dispute in this case upon the subject of the location of the claim of Yair. The whole case shows that it had been identified and was actually possessed by Yair and his heirs. The patent of the defendants in error acknowledges that its location had been made, and that the new survey for the claim of Mrs. Tate covered this location. The decision of the register and receiver does not proceed upon any assumption of a conflict of location, but of a denial of the right of Yair. They had no authority to overthrow the decision of the register and receiver that had been made more than twenty years before, which had been followed by possession, and as to which there had intervened the claims of bona fide purchasers. It further appears that Mrs. Tate did not settle upon this parcel of land, and that the decision of the register and receiver in her favor is not supported by testimony.

The judgment of the Supreme Court of Louisiana does not contain any error within the scope of the revising jurisdiction of this court, and it is, consequently, affirmed.

JOHN D. CLEMENTS, *Appt.*,

v.

JONATHAN R. WARNER.

(See S. C. 24 How. 394-398.)

Pre-emption rights—applicable to alternate sections of lands granted to railroads.

The reserved sections of public lands along the lines of all the railroads, wherever public lands have been granted by acts of Congress, after the restoration to market of such lands, lose their character as reserved lands, and will then be subject to the privileges of pre-emption in favor of settlers.

The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person.

No act of Congress has defined the meaning of the term "reserve" as applied to lands in the various acts granting lands to a railroad, nor determined explicitly when these alternate sections lose their character as reserves.

No reason of public policy exists to exclude this class of public lands from the operation of the pre-emption laws.

Submitted Jan. 25, 1861. Decided Feb. 18, 1861.

APPEAL from the Circuit Court of the United States from the Southern District of Illinois.

The bill in this case was filed in the court below, by the present appellee, to quiet title to land. The defendant demurred, and the demurrer was overruled, and the defendant electing to abide by his demurrer, judgment was entered for the plaintiff, and the defendant appealed to this court.

The case is further stated in the opinion.

Mr. **A. B. Ives** for appellant.

Mr. **R. E. Williams** for appellee.

Mr. Justice **Campbell** delivered the opinion of the court:

The appellee filed this bill in chancery in the circuit court to quiet his title to a portion of section 33, in township 17 north, of range 8 east, of the third principal meridian, in the county of Champaigne, Illinois. By the act of Congress of the 20th September, 1850 (9 Stat. at Large, 466), for granting the right of way and making a grant of land to the states of Illinois, Mississippi, and Alabama, in aid of the construction of a railroad from Chicago to Mobile, there was granted to the state of Illinois, for the purpose of making the railroad described in the title of the act, every alternate section of land designated by even numbers, for six sections in width on each side of the road and in case any of these sections had been sold, or were subject to a pre-emption claim, then the state was authorized to select from the lands of the United States, contiguous to the tier of sections before mentioned, so much land in sections and parts of sections as should make up the full complement of land included in the concessions in the act. The act further provided, that the sections and parts of sections of lands, which, by the grant, might remain to the United States within six miles on each side of the road, should not be sold for less than double the minimum price of the public lands, when sold. To comply with the requirements of this act, the commissioner of the General Land Office withdrew from entry or sale the land on either side of the track of the road, until the state of Illinois could make the selections that were authorized by it. These *were completed in 1852, and during that [*396 year the President of the United States, by a proclamation, directed the sale of those sections and parts of sections along the line of the road that had remained to the United States, after the satisfaction of the grant to Illinois. Such of the sections as were not sold became subject to

NOTE.—*Pre-emption rights*—see note to U. S. v. Fitzgerald, 10 L. ed. U. S. 785.

private entry. The section of land described in the plaintiff's bill, a portion of which forms the subject of this suit, was one of these, and was purchased at private sale at the Land Office, in November, 1855, by a person under whom the plaintiff derives his claim, and who has the usual receipt given by the receiver of the Land Office.

The conflicting claim against which the appellee seeks relief originates in an entry by the appellant in November, 1856, as having a pre-emption right under a settlement begun in October, 1855, before the date of the entry on which the title of the appellee is founded. A patent issued to the appellant as having the superior claim. The object of the bill is to reverse the decision of the officers of the Land Office, and to obtain a relinquishment of the legal title evinced by this patent, and the only question presented is, whether the land was the subject of a pre-emption right in November, 1855.

The 10th section of the act of the 4th September, 1841 (5 Stat. at L. 453), confers upon the beneficiaries of that act, "who shall make a settlement in person on the public lands to which the Indian title has been extinguished, and which shall have been surveyed prior thereto, and who shall improve and inhabit the same, as specified in the act, a right of pre-emption to one quarter section of land." Among the exceptions in the act to the exercise of this right of pre-emption, is one that includes "sections of lands reserved to the United States, alternate to other sections granted to any of the states for the construction of any canal, railroad or other public improvement." 5 Stat. at L. 466.

Subsequent acts of Congress extend the pre-emption privilege to lands not surveyed at the time of the settlement, and confer privileges upon settlers on school lands, and on lands reserved for private claims. Mar. 3, 1843; 5 Stat. at L. 620, §§ 3, 9.

397*] *In 1853 the pre-emption laws, as they now exist, were extended to the reserved sections of public lands along the lines of all the railroads, wherever public lands have been granted by acts of Congress, in cases where the settlement and improvements had been made prior to the final allotment of the alternate sections to such railroads by the General Land Office. Mar. 3, 1853; 10 Stat. at L. 244.

In the administration of these laws, the Executive Department of the government has decided, that after the restoration to market of the lands embraced in the exception we have quoted from the act of 1841, and when they have become subject to entry at private sale, they lose their character as reserved lands, and will then be subject to the privileges of pre-emption in favor of settlers. The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity, to become the purchasers of a limited extent of land comprehending their improvements, over that of any other person.

By the act of 1841 (5 Stat. at L. 453), the pre-emption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers. No act of Congress has defined the meaning of the term "reserve," as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands fitted for agricultural purposes, after they had been offered at public sale, are affected by the privilege of the actual settler to have the preference of entry. No reason of public policy exists to exclude this class of public lands from the operation of the same law, under the same conditions. No violence is done to the language of the act by limiting the exception to the temporary withdrawal of the lands from the market, and the liberal policy of Congress in favor of the actual settler is better accomplished by a restrictive rather than extensive *interpretation of the excep- [*398 tional clause in the act. We, therefore, sanction the construction adopted in the Land Office.

The circuit court overruled the demurrer of the defendant to the bill, and made a decree in conformity to the prayer of the bill. This is error.

The decree of the circuit court is reversed, and the cause is remanded to the circuit court with directions to dismiss the bill, with costs.

JOSEPH H. ADLER, Lewis Schiff, Solomon Adler and Lobe Rindskoff, *Plffs. in Err.*,
v.
AARON D. FENTON, Oliver H. Lee, Wm. H. Davis and Merritt T. Cole.

(See S. C. 24 How. 407–413.)

Insolvent debtor may alienate his property pending suits against him—general creditor cannot bring action to set aside deed as fraudulent to creditors.

Chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it.

A creditor acquires a lien upon the lands of his debtor by a judgment; and upon the personal goods of the debtor, by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor.

Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser.

The rights of the debtor and those of a creditor, are defined by positive rules, and cannot be contravened or varied by any interposition of equity.

A general creditor cannot bring an action on the case against his debtor or against those combining and colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors.

Argued Feb. 5, 1861. Decided Feb. 18, 1861.

IN ERROR to the District Court of the United States for the District of Wisconsin.

NOTE.—*Fraud in avoidance of deeds*—see note to Harding v. Handy, 6 L. ed. U. S. 429.

This was an action on the case brought by the present defendants in error in the court below.

Upon the trial below, the jury, under the charge of the court, rendered a judgment for the plaintiffs. The defendants brought the case to this court upon various exceptions.

The case fully appears in the opinion of the court.

Messrs. **James S. Brown** and **J. R. Doolittle**, for the plaintiffs in error:

We contend that a creditor, as such, having neither judgment nor writ, has no interest in his debtor's fraud.

Wiggins v. *Armstrong*, 2 Johns. Ch., 144; *Tate* v. *Liggat*, 2 Leigh, 84; *Beck* v. *Burdett*, 1 *Paige*, 305; 9 Wend. 565.

If this be conceded, it follows that he can be legally affected by no conspiracy which relates merely to the removal or destruction of that property, whatever be the motive of the act. Even should it result in the ruin of his debtor and the final loss of the debt, it becomes *damnum absque injuria.*

See, also, *Williams* v. *Brown*, 4 Johns. Ch. 682.

Mr. **William P. Linde**, for defendants in error:

Whenever there is fraud or deceit by the one party and injury to the other, or *damnum cum injuria*, then an action will lie.

Jones v. *Parker*, 1 Cow. 446; *Tappan* v. *Powers*, 2 Hall, 77; 3 Bl. Com. 122; 3 Rob. Pr. 423; *Adams* v. *Page*, 7 Pick. 542; *Hopkins* v. *Bebee*, 26 Pa. 86; *Upton* v. *Vail*, 6 Johns. 182; *Meredith* v. *Johns*, 1 Hen. & M. 585; *Cotterell* v. *Jones*, 11 C. B. 717; *Smith* v. *Tonstall*, Carthew, 3.

A creditor without judgment or execution, and even before his debt is due, may sue parties at law in an action on the case, who conspire to defeat the right of collection, by fraudulently concealing and converting the debtor's goods.

Kelsey v. *Murphy*, 26 Pa. 84; *Mott* v. *Danforth*, 6 Watts, 304; *Morrison* v. *Witherill*, 8 Serg. & R. 502.

The action is for a wrong, independent of contract. The amount of the indebtedness is shown in ascertaining the damages. It is not universally true that when, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act in question has arrived.

See *Hochster* v. *De La Tour*, 2 El. & B. 678; *Short* v. *Stone*, 8 Q. B. 358; *Ford* v. *Tiley*, 6 Barn. & C. 325; *Lovelock* v. *Franklyn*, 8 Q. B. 371; *Bowdell* v. *Parsons*, 10 East, 359.

Mr. Justice **Campbell** delivered the opinion of the court:

This action was instituted by the defendants in error to the district court, as creditors of two of the plaintiffs in error, Adler & Schiff, upon the complaint that this firm had combined and conspired with their codefendants in the court below to dispose of their property fraudulently, so as to hinder and defeat their creditors in the collection of their lawful demands, by means of which fraudulent acts they affirm they suffered vexation and expense, and finally incurred the loss of their debt.

The defendants pleaded the general issue. Upon the trial *the plaintiffs proved [*409 that Adler & Schiff were traders in Milwaukee, and to carry on their business, in August, 1857, purchased of the plaintiffs, and other merchants in New York, upon credit, a large quantity of merchandise, which, with their other property, shortly after its delivery at Milwaukee, was assigned to one of their codefendants, for the ostensible purpose of paying their debts, but really with the purpose of more effectually concealing it from the pursuit of their creditors.

There was testimony conducing to convict all the defendants of a common design to accomplish this purpose. The plaintiffs had extended a credit to Adler & Schiff of two, four and six months. They caused an attachment to issue against this firm upon all their debt which had become due at the time these transactions occurred, which was levied upon sufficient property to satisfy it, and afterwards, and before the maturity of their remaining demand, this suit was commenced. At the time of the trial, this demand was their only claim against Adler & Schiff.

The defendants requested the court to instruct the jury, "that a creditor at large, as such, has no legal interest in the goods of his debtor, and cannot maintain an action for any damages done to such property; and that if the defendants had been guilty of a conspiracy to remove the property of a debtor, and thereby to defraud his creditors, a creditor at large, not having a present right of action against such debtor, has not such an interest in the subject of the fraud as to enable him to maintain an action for damages against the defendants, and that the declaration discloses no cause of action against the defendants." The court declined to give this instruction, but charged the jury "that the plaintiffs sold their goods to Adler & Schiff on credit; they had no interest in the goods sold, or in the other property of these defendants, but an interest in the debt owing for the goods so sold on credit. And if the defendants have been guilty of a conspiracy to remove the property of Adler & Schiff, and they did so remove their property, with intent to defraud the plaintiffs in the collection of their debt when it should become payable, even though it was not payable when such removal was effected, the plaintiffs have *a cause of action after [*410 the debt became payable." To enable the plaintiffs to sustain an action on the case like the present, it must be shown that the defendants have done some wrong, that is, have violated some right of theirs, and that damage has resulted as a direct and proximate consequence from the commission of that wrong. The action cannot be sustained, because there has been a conspiracy or combination to do injurious acts. In *Savile* v. *Roberts*, 1 Ld. Raym. 374, Lord Holt said, "it was objected at the bar against these old cases, that they were grounded upon a conspiracy, which is of an odious nature and, therefore, sufficient ground for an action by itself. But to this objection he answered, that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable if nothing be put in execution." There are cases of injurious acts for which a suit will not lie

unless there be fraud or malice concurring to characterize and distinguish them. But in these cases the act must be tortious, and there must be consequent damage. An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it. It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive. In *Hutchins* v. *Hutchins*, 7 Hill (N. Y.), 104, the defendants had successfully conspired to induce a testator by fraudulent representations to alter a will he had made in favor of the plaintiff.

The court said, "for injuries to health, liberty, and reputation, or to rights of property, personal or real, the law has furnished appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie." And because the plaintiff had a mere possibility of benefit, and was deprived only of hopes and expectations, it was decided **411*]** *that the action in that case would not lie. In *Stevenson* v. *Newnham*, 13 C. B. 285, it was determined, that when the act complained of is not unlawful *per se*, the characterizing it as malicious and wrongful will not be sufficient to sustain the action. In the present suit, the plaintiffs do not allege that they were defrauded in the contract of sale of their merchandise, although there is abundant testimony to show that the purchases were made by Adler & Schiff, with the intention of defrauding their vendors. But the plaintiffs, by electing to sue for the price, have waived that fraud and confirmed the sale. Adler & Schiff were the lawful owners of the property at the time this suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; none, unless there be a right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demand.

The authorities are clear, that chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it. In *Moran* v. *Dawes*, Hopkins Ch. 365, the court says: "Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment, and upon the personal goods of the debtor by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor, and those of a creditor, are thus defined by positive rules; and the points at which the power of the debtor ceases and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any *interposition of equity. There are cases [*412 in which the violation of the rights of a creditor, within these limits, has formed the subject of an action at law against third persons. *Smith* v. *Tonstall*, Carth. 3; *Penrod* v. *Mitchell*, 8 Serg. & R. 522; *Kelsy* v. *Murphy*, 26 Pa. St. 78; *Yates* v. *Joyce*, 11 Johns. 136. But the analogies of the law, and the doctrine of adjudged cases, will not allow of an extension, by the courts, of the remedy employed in those cases in favor of a general creditor. This subject was discussed much at large in *Lamb* v. *Stone*, 11 Pick. 527.

"The plaintiff complained of the fraud of the defendant in purchasing the property of his absconding debtor, in order to aid and abet him in the fraudulent purpose of evading the payment of his debts. The court ask, what damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien, for he had none. No attachment had been defeated, for none had been made. He has not lost the custody of his debtor's body, for he had not arrested him. He has not been prevented from attaching the property, or arresting the body of his debtor; for he had never procured any writ of attachment against him. He has lost no claim upon, or interest in the property, for he never acquired either. The most that can be said is, that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. . . . On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite and contingent to be the ground of an action." The same court reaffirmed this doctrine in *Wellington* v. *Small*, 3 Cush. 146.

Unquestionably, the claims of morality and justice, as well as the legitimate interests of creditors, require there should be protection against those acts of an insolvent or dishonest debtor that are contrary to the prescriptions of law, and are unfaithful and injurious. But the legislature must determine upon the remedies appropriate for this end; and the difficulty of the subject is evinced by the diversity in the systems of different states for adjusting the relations of creditor and *debtor, con- [*413 sistently with equity and humanity. Bankrupt and insolvent laws, laws allowing of attachment and sequestration of the debtor's estate, and for the revocation of fraudulent conveyances, creditor's bills and criminal prosecutions for fraud or conspiracy, are some of the modes that have been adopted for the purpose. In the absence of special legislation, we may safely affirm that a general creditor cannot bring an action on the case against his debtor, or against those combining or colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors.

The charge of the district judge is erroneous, and the judgment of that court is reversed, and the cause remanded for further proceedings.

THE UNION STEAMSHIP COMPANY OF PHILADELPHIA, Claimant and Owner of the Steamship Pennsylvania, her Tackle, etc.
Appts.
v.
THE NEW YORK & VIRGINIA STEAMSHIP COMPANY.

(See S. C. 24 How. 307-315.)

Collision by inevitable accident—where damages must fall—where one or both parties in fault, who liable for damages—what is inevitable accident—negligence, what is—starboarding the helm—insufficient excuse.

Collision between two steamboats where it is conceded that the collision was not occasioned by any fault on the part of those in charge of the injured vessel, but it is insisted that the colliding steamer was also without fault, and that the collision was the result of inevitable accident.

Where a collision occurs exclusively from natural causes, and without any negligence or fault either on the part of the owners of the respective vessels, or of those intrusted with their control and management, the rule of law is, that the loss must rest where it fell; on the principle that no one is responsible for such an accident, if it was produced by causes over which human agency could exercise no control.

But that rule has no application, whatever, to a case where negligence or fault is shown to have been committed on either side.

If the fault was one committed by the libelant alone, proof of that fact is of itself a sufficient defense; or if the respondent alone committed the fault, then the libelant is entitled to recover; and if both were in fault, then the damages must be equally apportioned between them.

It is only when the disaster happens from natural causes, and without negligence or fault on either side, that the defense of accident can be admitted.

Inevitable accident, as applied to cases of this description, must be understood to mean a "collision which occurs when both parties have endeavored by every means in their power, with care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident."

It is not inevitable accident where a master proceeds carelessly on his voyage, and afterwards circumstances arise, when it is too late for him to do what is fit and proper to be done.

He must show that he acted seasonably, and that he "did everything which an experienced mariner could do, adopting ordinary caution," and that the collision ensued in spite of such exertions.

Where it was so dark that the lights of the approaching steamer could not be seen, it was negligence in the master, while his steamer was proceeding at the rate of six miles an hour, to remain in the saloon, wholly inattentive to the peculiar dangers incident to the character of the night.

If it was not unusually dark, then it is clear that there was gross negligence on the part of those in charge of the deck.

The great fault committed, was that of putting the helm to starboard, instead of keeping the course or porting it, when it became known that the other steamer was approaching.

The excuse given for it by the pilot, that he supposed his own steamer was backing, only adds to the magnitude of the error, as it shows that the order was given without knowing what its effect would be.

Argued Feb. 13, 1861. Decided Feb. 25, 1861.

APPEAL from the Circuit Court of the United States for the Eastern District of Virginia.

This was a case growing out of a collision. The libel was filed by the present appellees in the district court of the United States for the eastern district of Virginia. The court decreed in favor of the libelants; and the claimants, the present appellants, appealed to the circuit court, by which court the decree of the district court was affirmed. The claimants appealed to this court.

The case is further stated in the opinion.

Messrs. **Robert P. Kane** and **A. A. Smith** for the appellant.

Mr. **William F. Watson** for the appellees.

Mr. Justice **Clifford** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the eastern district of Virginia, sitting in admiralty. The libel was filed in the district court by the appellees, on the 13th day of June, 1855. It was a proceeding *in rem* against the steamship Pennsylvania, and was instituted to recover compensation for certain damage done to the steamship Jamestown, by means of a collision which occurred between those steamers in Elizabeth river, on the night of the 7th of January, 1855, some five or six miles below the port of Norfolk, in the state of Virginia. At the time of the collision, The Jamestown was on her regular weekly trip from the port of Norfolk to Richmond, in the same state, and The Pennsylvania was proceeding up the river to Norfolk, in the prosecution of her regular semi-monthly trip from Philadelphia to her place of destination. Libelants allege that The Jamestown was pursuing her usual and proper course down the river, and that the collision occurred in consequence of *the improper and unskilful management of those in [*309 charge of the other steamer. Process was duly served, and the respondents appeared and answered to the suit. They admitted the collision but alleged, in effect, that it occurred in consequence of the intense darkness of the night, occasioned by a dense fog, without any such negligence or fault as alleged in the libel, and in spite of every possible precaution on the part of those in charge of their steamer to prevent it. A decree was entered for the libelants in the district court, which was affirmed, on appeal, in the circuit court, and thereupon the respondents appealed to this court. It is now conceded by the respondents that the collision was not occasioned by any fault on the part of those in charge of the injured vessel, but it is insisted in their behalf that the colliding steamer was also without fault, and that the collision was the result of inevitable accident. To establish that defense, they rely entirely upon the character of the night, as shown by the evidence, and the circumstances attending the disaster. From the evidence, it appears that The Jamestown left the wharf at Norfolk on the 7th of January, 1855, about eleven or half past eleven o'clock at night, as alleged in the libel. When she started, there was a thick fog in the harbor, but she met with no difficulty in passing out, and it so far cleared away in about half an hour that those in charge of her deck, as she proceeded down the river, could see the lights and even the hulls of vessels ahead, and the land on the eastern shore. Several witnesses also testify that the moon had risen, and that stars were occasionally visible, though they admit that it was still quite foggy, and that

NOTE.—*Collision; rules for avoiding. Steamer meeting steamer*—see notes to 14 L. ed. U. S. 68; 35 L. ed. U. S. 453; 28 C. C. A. 532; 30 C. C. A. 630.

there was a heavy mist on the water. Two competent lookouts were accordingly stationed at the usual place in the forecastle, and the signal lights of the steamer were properly displayed. Those precautions had been taken at the time the steamer left the wharf, but about the time she passed the naval hospital, the master, as he had been accustomed to do on similar occasions, left the quarter deck, and took a position in the rigging of the steamer, some ten feet above the hurricane deck. Leaving the lookouts properly stationed in the forecastle to perform their usual duties, he 310*] *doubtless chose that more elevated situation to get a less obstructed view of distant objects, and he testifies that he could then see a mile and a half ahead, and the evidence furnishes no good reason to doubt the truth of his statement.

Intending to take the eastern side of the channel, another precaution also became necessary, so as not to incur the hazard of running the steamer aground; and to guard against any such danger, he directed the mate to heave the lead at short intervals, and to report to him the soundings; and the order was faithfully obeyed. Having taken these precautions, he continued to prosecute the voyage at a moderate rate of speed, sometimes stopping the engine when the fog shut in, and occasionally ringing the bell and sounding the whistle; and the steamer, pursuing her regular course, rounded Lambert's Point in perfect safety, passing so near to the buoy located there that it was seen by the master from his position in the rigging, and particularly noticed. On arriving there, it was necessary to change the course of the steamer; and inasmuch as he had noticed the buoy, he was enabled to perform that duty without danger of mistake. Orders were accordingly given to the wheelsman to set the course north one fourth east, and to run by the compass. During all this time the master remained in the rigging, and he testifies that after the steamer rounded the point, he could see from the buoy to Craney Island light ship, which, according to his estimate, is a mile and a half. Presently, however, as the steamer advanced, he saw another light, on the larboard bow of the steamer, and finding upon inquiry that the wheelsman had not seen it, he called his attention to the fact that there were two lights, expressing the opinion, at the same time, that the one last discovered was the light of The Pennsylvania coming up the river. His own steamer at that time was heading north, half east, and he directed the wheelsman to port the helm, so as to keep both lights well on the larboard bow, which had the effect gradually to sheer the steamer still closer to the eastern side of the channel. She had previously been running in about four fathoms of water, but the mate soon reported that the soundings showed only three, 311*] and as she *advanced, he informed the master that there was but two and a half fathoms, and cautioned him that there was danger of running aground. At this time the master saw the signal lights and hull of The Pennsylvania, as she passed the light ship, on the western side of the channel. Immediate orders were then given to ring the bell and sound the whistle, and the master testifies that the signals were answered from the approaching steamer. Shortly afterwards, the mate reported that the soundings showed but ten feet of water, and immediately upon receiving that information he gave the necessary orders to stop the machinery, and reverse the engine. Both orders were promptly obeyed, and it was then the master first discovered that the approaching steamer had altered her course, and was heading diagonally across the channel towards The Jamestown. They were then less than a quarter of a mile apart, and seeing that a collision was almost inevitable, he instantly directed the alarm bell to be rung, and the whistle of the steamer to be sounded; and as there was nothing more that he could do to avoid the danger, he gave warning to the men in the forecastle, and left the rigging, and returned to the quarter deck. Further reference to the circumstances preceding the collision, so far as respects the injured steamer, is unnecessary at this stage of the investigation. According to the evidence, it seems that The Pennsylvania arrived off Cape Henry at an early hour in the evening of the day of the collision, but in consequence of the fog and the difficulties of the navigation, she did not enter the river till after eleven o'clock at night. She proceeded up the river at the rate of about six miles an hour, and the mate, who was the acting pilot after she entered the river, and had charge of her deck, admits that she ran very close to the before-mentioned light ship, and that her course at that time was south, half east, and it is not possible to doubt that if she had continued on that course a short time longer, all danger would have been avoided. Such, however, was not the fact, as is clearly shown by the pilot himself, and we refer to his testimony in preference to that of the master, because the latter remained in the *saloon [*312 until just before the collision occurred. Among other things, the pilot admits, that shortly after his steamer passed the light ship, he gave the order to starboard the helm; and what seems even more remarkable, in cases of this description, he acknowledges that he gave the order after he knew that another steamer was approaching, though he denies that he had seen her lights. His theory is, and he accordingly testifies, that he first gave the order to stop and back; and inasmuch as that order had been executed, and the steamer had actually commenced to back, that putting the helm a-starboard had the same effect as porting the helm would have produced if the steamer had been going ahead. But it is a sufficient answer to that theory, as applied to this case, to say that the evidence shows, beyond the reach of doubt, that the steamer was still advancing at the rate at least of three or four miles an hour, so that, upon his own theory, he committed an error, and according to his own testimony he committed it with a knowledge of the approaching danger. Three or four witnesses, including the master of the colliding steamer, testify that she was advancing three or four miles an hour when the collision occurred, and the damage done to the injured steamer proves to a demonstration that her headway must have been very considerable. On the contrary, the injured steamer had nearly stopped, and being already as close to the eastern side of the channel as

the means of navigation would allow, she was almost as powerless to prevent the collision as if she had been lashed to the wharf from which she started. It was under these circumstances that the two steamers came together, and the evidence shows that the colliding steamer struck the other on the port bow near the forward gangway, some thirty or forty feet abaft the stem. As described by the witnesses, it was a full blow at right angles, and had the effect to force the stem of the colliding steamer some six feet into the hull of the other, tearing up the deck of the forecastle a third part of the way across the vessel, and breaking into two pieces six or eight of the largest timbers. Looking at the whole circumstances of the collision, it is vain for the respondents to suppose that 313*] *this court can hold that it was the result of inevitable accident. Where the collision occurs exclusively from natural causes, and without any negligence or fault either on the part of the owners of the respective vessels, or of those intrusted with their control and management, the rule of law is, that the loss must rest where it fell; on the principle that no one is responsible for such an accident, if it was produced by causes over which human agency could exercise no control. *Stainback* v. *Rae*, 14 How. 533; 1 Pars. M. L. 187. But that rule can have no application whatever to a case where negligence or fault is shown to have been committed on either side; for if the fault was one committed by the libelant alone, proof of that fact is of itself a sufficient defense; or if the respondent alone committed the fault, then the libelant is entitled to recover; and clearly, if both were in fault, then the damages must be equally apportioned between them. Plainly, therefore, it is only when the disaster happens from natural causes, and without negligence or fault on either side, that the defense set up in this case can be admitted. Inevitable accident, as applied to cases of this description, must be understood to mean "a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. *The Lochlibo*, 3 W. Rob. 318; *The James Gray* v. *The John Frazer*, 21 How. 184. It is not inevitable accident, as was well remarked by the learned judge in the case of *The Juliet Erskine*, 6 Notes of Cases, 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise, when it is too late for him to do what is fit and proper to be done." He must show that he acted seasonably, and that he "did everything which an experienced mariner could do, adopting ordinary caution," and that the collision ensued in spite of such exertions. The Rose, 7 Jur. 381. Unless the rule were so, it would follow that the master might neglect the special precautions which are often necessary in a dark night, and when a collision had occurred in consequence of such neglect, he might successfully defend himself upon 314*] *the ground that the disaster had happened from the character of the night, and not from any want of exertion on his part to prevent it. *The Batavier*, 40 Eng. L. & Eq. 25; *The Europa*, 2 Eng. L. & Eq. 564; *The Mellona*, 5 Notes of Cases, 558. Applying these principles to the present case, it is obvious that the defense set up by the respondents cannot be sustained. They not only fail to show that the steamer was without fault, but the testimony of those in charge of her incontestably proves that they were guilty of negligence in more than one particular. Both steamers were in the prosecution of their regular and stated trips and, of course, those in charge of them knew, or ought to have known, that they were liable to meet each other on the route; and if it was so dark that the lights of an approaching steamer could not be seen, it was negligence in the master, while his steamer was proceeding at the rate of six miles an hour, to remain in the saloon, wholly inattentive to the peculiar dangers incident to the character of the night; and if it was not unusually dark, then it is clear that there was gross negligence on the part of those in charge of the deck. It is shown by the evidence that the colliding steamer had two lookouts; but it is not shown what, if any, duty they performed in the emergency, or that any inquiries were made of them, either when the course of the steamer was changed near the light ship, or when the pilot heard the noise made by the wheels of the approaching steamer. But the great fault committed on the occasion was that of putting the helm to starboard, instead of keeping the course or porting it when it became known that the other steamer was approaching; and the excuse given for it by the pilot, that he supposed his own steamer was backing, only adds to the magnitude of the error, as it shows that the order was given without knowing what its effect would be, which could only have happened from indifference or inattention to duty.

For these reasons, we are of the opinion that the decision of the circuit court was correct, and the decree is, accordingly, affirmed, with costs.

CHARLES McMICKEN PERIN, Clyde Perin, and Mary E. Perin, Infants, by their Father and Next Friend, Franklin Perin, *Appts.*,

v.

FREEMAN G. CAREY, Wm. Crossman, Wm. M. T. Hewson, The City of Cincinnati, Elizabeth Randall, David P. Stille and Elizabeth, His Wife, and Andrew McMicken.

(See S. C. 24 How. 465-508.)

Will, conveying property to a city for charitable uses, is valid—city corporation may take devises and bequests in trust for charitable uses—preference of particular classes of persons as beneficiaries, is valid—what devises are charities—Ohio legislature.

Where a testator devised to the city of Cincinnati, and its successors, real and personal estate, in trust, for the purpose of building and maintaining two colleges for the education of boys and girls, the surplus to be applied to education and support of poor orphans, preference to be

NOTE.—*What is a charity, and bequests valid for charitable purposes and those not*—see note to Vidal v. Girard's Exrs. 11 L. ed. U. S. 205. *Devise to trustees for charitable uses and to unincorporated associations. Validity of particular devises and bequests. Validity of charitable endowments not governed by statute 43 Eliz. ch. 4*—see note to Inglis v. Trustees Sailor's Snug Harbor, 7 L. ed. U. S. 617. *Municipal corporation as trustee of charity*—see note, 14 L. R. A. 69.

given to his relations and descendants; held, that the doctrines founded upon the statute of 43 Eliz. ch. 4, in relation to charitable trusts to corporations, either municipal or private, have been adopted by the courts of equity in Ohio, but not by express legislation; nor was that necessary to give courts of equity in Ohio that jurisdiction.

The English statutes of Mortmain were never in force in the English colonies; and if they were ever considered to be so in the state of Ohio, they were repealed by the state act in 1806.

The city of Cincinnati, as a corporation, is capable of taking, in trust, devises and bequests for charitable uses, and can take and administer the devises and bequests in the will.

Those devises and bequests named are charities, in a legal sense; and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the state of Ohio.

The direction in the will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

There is no uncertainty in the devises and bequests as to the beneficiaries of testator's intention; and his preference of particular persons, as to who should be pupils in the colleges which he meant to found, was a lawful exercise of his rightful power to make the devises and bequests.

The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.

Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

Argued Jan. 30, 1861. Decided Feb. 25, 1861.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

This was a bill in equity filed by the complainants, the present appellants, collateral heirs at law of one Charles McMicken, in the court below, for the purpose of invalidating the last will and testament of the said Charles McMicken.

The provisions of the will in question appear in the opinion of the court. The objections to the will set out in the bill are as follows:

1st. "Said city of Cincinnati was formerly a municipal corporation, created and having certain powers conferred upon it by an act of incorporation of the legislature of the state of Ohio, but it now exists only as a political division of a state under a general law having a uniform operation throughout the state, and is without any power or authority to accept said devises or bequests, to acquire or hold the title to the said property mentioned in the said devises or bequests for the purposes therein expressed, or to execute the trusts or any of them therein set forth and declared.

2d. "Said Charles McMicken, deceased, has undertaken, by said alleged devises and bequests, to render a large amount of real estate above described, situate in said city of Cincinnati in said state of Ohio, and an indefinite amount of real estate to be hereafter purchased in said city of Cincinnati, forever unalienable, contrary to the law and public policy of said state.

3d. "There are no persons mentioned or referred to as beneficiaries under the trust attempted to be created by said will, who are so described that they are entitled to and can claim the benefit to said trusts or any of them, and the same are, therefore, void for uncertainty.

4th. "By the terms of said will, the establishment of the regulations necessary to carry out the objects of the endowment attempted to be made, and the power to appoint directors of the institutions therein named, are vested in the corporate authorities of the city of Cincinnati; but there are no persons, either artificial or natural, who fall within or are sufficiently identified by said description.

5th. "The trusts attempted to be created by said will are uncertain and illegal for the further reason that the distribution of the trust fund between the two objects of the education of white boys and girls and the support of poor white male and female orphans, is to be left to the unrestrained discretion of the city of Cincinnati, or of the corporate authorities of the said city of Cincinnati.

6th. "The trust attempted to be created by said will for the support of poor white female orphans is illegal and void, because, without authority of law, and in violation of the statutes and public policy of the state of Ohio, it is therein requested that before they shall receive any benefits therefrom, their guardian, or those in whose custody they are, shall have first entirely relinquished the control of them to the said city, and provided that those orphans who may have remained until they have reached any age between fourteen and eighteen years, shall be bound out by the said city to some proper art, trade, occupation, or employment."

The circuit court sustained the demurrer of the defendants, and dismissed the bill of complaint with costs, from which decree the complainants have taken this appeal.

Messrs. **T. Ewing, F. Perin** and **N. Headington,** for appellants:

We claim, first, that the devise and bequest is void, on the ground that the trustee is incapable of taking and executing the trust, and the *cestuis que trust* are dependent on the selection of the trustee and, therefore, there can never be either trustee or *cestuis que trust.*

We will consider this point first, irrespective of the law of charities, under the ordinary rule of equity.

If the trustee be incompetent to take, and the *cestui que trust* uncertain or incompetent, the estate descends unencumbered to the heir; but if the trustee can take the estate, but cannot execute the trusts, and the *cestui que trust* is incapable of taking, or dependent on an act of the trustee to designate him, or call him into being, and the trustee cannot do the act, or if in any way it become impossible that the *cestui que trust* should come into being, the trustee holds for the benefit of the heirs.

King v. *Mitchell,* 8 Pet. 349; *Morice* v. *Bishop of Durham,* 10 Ves. 535; *Atty. Gen.* v. *Bishop of Oxford,* 1 Bro. C. C. 444, note q; Hill, Trust, 113.

The prime object or destination of the fund devised, is the erection of two colleges, one for boys and one for girls, and the education therein of such of the testator's relations and their descendants, his legatees and their descendants, etc., etc., as should apply to and be selected by the city.

It was also provided that the land devised and thereafter purchased for the benefit of the trust should be inalienable forever, and that the colleges should be immortal and free from legislative control. Now, if the city of Cin-

cinnati cannot take charge of this prime destination of the fund, independently of all else, it cannot execute the trust.

Atty. Gen. v. *Bishop*, 1 Bro. C. C. 444, note q; *Atty. Gen.* v. *Goulding*, 2 Bro. C. C. 427, 430; *Grieves* v. *Case*, 1 Ves. Jr. 548, 551; *Chapman* v. *Brown*, 6 Ves. 404; *Atty. Gen.* v. *Hinxman*, 2 Jac. & W. 270, 278.

The first question then is, can the city take and execute the trusts to build colleges and superintend them forever for the education of the descendants of the relatives and devisees of Charles McMicken, whether rich or poor, without regard to residence.

The city derives all its powers from the statute of May 1, 1852.

Many specific powers are enumerated, under none of which could it exercise this or like trusts. The 18th section contained this clause: "to exercise such other powers and to have such other privileges as are incident to municipal corporations of like character or degree, not inconsistent with this act or the general laws of this state."

We are to determine, then, what are the general powers of municipal corporations. Such corporations are confined strictly to the letter of their charters.

7 Ohio, part 1, 232; *Collins* v. *Hatch*, 18 Ohio, 524; *New London* v. *Brainard*, 22 Conn. 555; *Hodges* v. *City of Buffalo*, 2 Den. 110.

Corporations in the United States are, with few exceptions, creatures of statutory creation. They have just such powers as the statute gives them directly or by implication.

Head v. *Providence Ins. Co.* 2 Cranch, 167; *Dartmouth Col.* v. *Woodward*, 4 Wheat. 636; *Bank* v. *Dandridge*, 12 Wheat. 68; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 544; *Bank* v. *Earl*, 13 Pet. 587; *Perrine* v. *Canal Co.* 9 How. 184.

The Ohio decisions conform to the above.

Gallia Co. v. *Holcomb*, 7 Ohio, part 1, 232; *Bank of Chillicothe* v. *Town of Chillicothe*, 7 Ohio, part 2, 35, 36; 5 Ohio, 393; *Bank* v. *Swayne*, 8 Ohio, 286; *Collins* v. *Hatch*, 18 Ohio, 523.

Such was the law in Ohio in 1852, and the act of that year should be construed in conformity therewith.

There have been two subsequent decisions. *Bartholomew* v. *Bentley*, 1 Ohio St. 41; *Straus* v. *Eagle Ins. Co.* 5 Ohio St. 60.

Now, if we examine the charter of this city by the light of these principles, and compare it with the terms of the trust, we shall find them absolutely irreconcilable. The trust, therefore, and the devise which creates it, must be void, or they must stand without the support of the city as trustee.

The city cannot take, as discretionary trustee, for any person or any object not within the scope of its own proper function.

The legislature has deemed an express provision necessary to authorize the city to erect and maintain infirmaries for the accommodation of their poor (Swan, p. 973, § 77); to erect, regulate, and maintain a house of refuge for children under 16, convicted of offenses, to erect city prisons (§ 82); but the power to found colleges is nowhere expressly granted, and cannot be implied, as it is not necessary to carry out any of the expressly granted powers, nor is it incident to the existence of the corporation.

See, also, *McDonogh* v. *Murdoch*, 15 How. 410; *King* v. *Mitchell*, 8 Pet. 349; *Malim* v. *Keighley*, 2 Ves. Jr. 334; *Briggs* v. *Penny*, 3 McN. & Gordon, ch. 557.

II. We maintain that this devise, void on general principles, cannot be sustained as a charity.

The peculiar course of decisions under the head of charities, finds no warrant in the doctrines of the common law, or the practice of courts in equity prior to the statute of Elizabeth.

10 Co. 26; 1 Co. 25; 4 Wheat. 35; 3 Pet. 115; 18 Beavan, 256; 17 Beavan, 495; 12 Beavan, 113; 10 Beavan, 209, 210; 7 Jurist, 751; 11 Jurist, 681; 3 Bl. Com. 373, 375; 4 Kent's Com. 503, 504; 2 Beavan, 588; 23 Beavan, 248; 24 Beavan, 299, 383; *Magill* v. *Brown*, Brightly, 380; 2 How. 179, note; 4 N. Y. 380.

Whatever doubt may exist upon the question of jurisdiction, it is now settled beyond dispute that the power which the Chancellor exercises over donations to charitable uses, whether it existed before the statute of 43 Elizabeth, or not, so far as it differs from the power he exercised in the other cases of trusts, does not belong to the court of chancery as a court of equity, nor is it a part of its judicial power and jurisdiction. It is a branch of the prerogative power of King as *parens patriæ* which he exercises by the Chancellor.

58 U. S. (17 How.), 385, 392; 9 How. 79; 4 Wheat. 48; 14 N. Y. 380; 2 Sto. Eq. Jur. §§ 1188, 1190, 1191.

The course of decision in England under the statute of Elizabeth is not entitled to the special favor of our courts. They are entitled to favor just as far as the law favors them and no farther. If they be specially favored, the inheritance of the heir must be specially disfavored. Such devises as these are said to be beneficial to the public just the same, whether the public or an individual be interested, and surely equity cannot take from the heir the inheritance which is his by law, simply because the public will profit by devesting him.

See, on this subject, Stat. 9 Ga. 2 ch. 36; 2 Am. b. 616; 7 Ves. 42, 77, 87; 4 Wheat. 48, 49; 2 Sto. Eq. Jur. §§ 1193, 1194; *Wheeler* v. *Smith*, 9 How. 78; *Fontain* v. *Ravenel*, 58 U. S. (17 How.), 387, 394-396.

By it is said there has been a course of legislation in Ohio tending to the same result with the statute of Elizabeth, and that, *pro tanto* at least, the decisions under that statute ought to be regarded. An analysis of those laws will, I think, set these questions of legislative sanction at rest. They are six in number, providing,

1st. That a devise to the poor of a township shall vest the estate in the trustees of the township, for the use of the poor.

Swan, 612, § 14.

2d. A devise to the state of Ohio, or to any person whomsoever, in trust for the common school fund, shall be vested in the common school fund.

Swan, 832, § 5.

3d. The respective township boards of education shall have power to take and hold in trust for the use and benefit of any "central or high

school or sub-district school in the township."

Swan, 852.

4th. The trustees of the lunatic asylum may take and hold in trust any lands, etc., conveyed, etc., to be applied to any purpose connected with the institution.

Swan, 556 and 127.

5th. Townships which have been lawfully laid off and designated shall have power to receive any devise, etc., to the township for the benefit of the township, either for a public square or other useful purpose specified in such devise, etc., and shall hold the same in trust for the township for the purposes specified in such conveyance.

Swan, 992, § 1.

6th. The trustees of any university, college, or academy (created according to the provisions of the act in which the authority is found), may hold in trust any property devised, bequeathed, or donated upon any specific trust consistent with the objects of such corporation.

Swan, 192, § 3.

Now, all these provisions are very distinct and exact, and require no loose or irregular construction. On the contrary, they seem intended to prevent it by laying down plain rules for conveyances to all such uses as the Ohio legislature thought proper to regard with favor; and if any of the requisites of an ordinary conveyance in trust is dispensed with, it is written down in plain terms.

The statute of March 26, 1856, is relied on by defendant's counsel.

But it cannot be supposed that this act, under any ordinary construction, can reach the case; but enlarged and extended under the statute of Elizabeth, it might answer any purpose to which chancellors should please to apply it. According to the ordinary rules of construction, it has the reverse effect. The legislature had the subject of donation for educational purposes before them. They provided for schools and academies, but did not choose to provide in like manner for colleges. And the testator did not think fit to give his land or money to a school or academy under the control of trustees selected by the court of common pleas.

While denying the application of the statute of Elizabeth in Ohio, we are safe in saying that this devise could not be sustained in the English chancery by the present settled construction of the law under that act. There is no expression of a general charitable intent *dehors* the defined object, and equity could not apply it *cy pres* to any other like charity.

Atty. Gen. v. *Whitchurch*, 3 Ves. 145; *Corbyn* v. *French*, 4 Ves. 431; *Clark* v. *Taylor*, 21 Eng. L. & E. 308, 309.

There are some familiar cases where corporations or associations made trustees were incompetent to execute the trust; in which the legislatures, as *parens patriæ*, having passed enabling acts granting the power, as in case of *The Sailor's Snug Harbor* in New York, *The Girard College* in Pennsylvania, and *The McIntire Poor School* in Ohio.

But the Constitution of Ohio of 1851 does not admit, in future, of such enabling statutes. The legislature of that state cannot now confer upon a corporation any special powers.

Art. 13, § 1, Swan, 27.

There is no judicial decision in Ohio, even prior to the Constitution of 1851, which would sustain this trust. The first case that was supposed to involve the English doctrine of charity was that of *The McIntire Poor School*, 9 Ohio, 262. The court held that the corporation thus empowered took the estate as a contingent remainder, and this is all that was decided in that case.

The case of *Urmey's Exrs.* v. *Wooden*, 1 Ohio St. 160, is also relied on. In that there was a competent trustee and a *cestui que trust* recognized by statute.

We claim, further, that this trust is void, on the general grounds that it makes the colleges it creates immortal, and that it creates a perpetuity in the lands with which it endows them.

1. The city is trustee, and though its charter is subject to repeal, there must be, in the very nature of things, organizations which will be its successors *ad infinitum;* the trust which the city corporation and its successors assume must therefore endure, and the colleges exist forever. If the city can accept the trust, it constitutes a contract, the validity of which no law of state can ever impair; therefore, either the trust is not void, or the colleges are immortal and the lands devised and hereafter to be acquired are so absolutely in mortmain that neither a corporation nor man nor law will have, over it, the power of alienation.

2. Colleges created according to law have not this immunity from destruction or change. The law under which they may be chartered is subject to repeal or amendment, and there can be no vested right to corporate powers in those created under the Constitution of 1851.

3. The state of Ohio has abolished entails, and the issue of the first tenant in entail takes in fee simple.

See Swan, 355, 193.

4. The law may not be evaded by making trustee of an immortal being. Equity limits an estate in trust, as the law limits a legal estate.

1 Vern. 163.

The *cestui que trust* cannot take an estate of the trustee of longer duration, or bound by more permanent restraints against alienation, than if the legal title were made directly to himself; and an estate, either at law or in equity, which exceeds the limits allowed by law within which property may be rendered inalienable, is void in its creation, and incapable of modification so as to establish it to the extent to which it might have been originally carried.

Leake v. *Robinson*, 2 Mer. 388; *Southampton* v. *Hertford*, 2 Ves. & B. 54; *Andrew* v. *N. Y. Bible Soc.* 4 Sand. 157; *Hillyard* v. *Miller*, 10 Pa. 335.

Mr. **G. E. Pugh** and *Messrs.* **Taft & Perry**, for appellees:

I. The doctrines founded upon the statute of 43 Eliz. ch. 4, have been adopted by the courts of Ohio, and are recognized in that state by express legislation.

Brown v. *Manning*, 6 Ohio, 303; *Bryant* v. *McCandless*, 7 Ohio, part 2, 136; *Mason* v. *Muncaster*, 9 Wheat. 445; *Williams* v. *First Pres. Soc.* 1 Ohio St. 478, 501; *McIntire Poor School* v. *Zanesville Canal Co.* 9 Ohio, 203, 287; *Zanesville Canal Co.* v. *City of Zanesville*, 20 Ohio, 488; *Urmey* v. *Wooden*, 1 Ohio St. 164; Attorney-Generals' act, May 1st, 1852, § 14; Swan's Stat. 51, 52; *Derby* v. *Derby*, 4 R. I. 439.

The original jurisdiction of courts of equity to protect and preserve such charitable trusts as this under Mr. McMicken's will, has been recognized and thoroughly established both by statute and judicial decision, not only in Ohio, where it is now the settled law, but in nearly all the states of the Union.

We are advised that this court is to be asked to review and overrule the case of *Vidal* v. *Philadelphia*, so far as it recognizes the original jurisdiction of the court of equity over charities, prior to and independent of the statute of Elizabeth. Never was there a case more thoroughly investigated than that. After the enactment of 43 Elizabeth, it was easy for the English courts to refer cases of the kind to the statute. The most thorough investigation of the subject is found in the Irish and American courts. English cases, however, are abundant sustaining the original jurisdiction of the court of equity.

See *Moggridge* v. *Thackwell*, 3 Bro. Ch. 517; *Atty-Gen.* v. *Mayor of Dublin*, 1 Bligh. N. R. 347; *Incorporated Society of Dublin* v. *Richards*, 1 Drury & Warran, 293.

The case of *The Baptist Asso.* v. *Hart*, 4 Wheat. 1, is distinguishable from this.

Without going further into the English cases, we will refer to the cases showing how the current opinion stands in the courts of the states of the Union. The court is familiar with the position of the courts of Virginia and Maryland on the subject, and the history of the course of decisions in those states.

It should be premised that that class of charities where the testator did not select anything among the numerous objects of charity, and which was helped out by the King's prerogative, has not been upheld by the American courts, neither has the *cy pres* doctrine been popular in the state courts, although that has not been universally rejected. But the state courts have, with strong concurrence, sustained the validity of charitable trusts, as largely as they have been sustained in England, with the exceptions above named.

See *Whitman* v. *Lex*, 17 Serg. & R. 89; *Philadelphia* v. *Wills*, 3 Rawle, 170; *Sarah Zane's Will*, Brightly, 367; *Domestic and Foreign Missionary Soc.* 30 Pa. 425; 9 Pa. 425; 9 Pa. 433; 10 Pa. 23; *Williams* v. *Williams*, 8 N. Y. 525; 14 N. Y. 380; *Leonard* v. *Burr*, 18 N. Y. 96; 35 N. H. 445; 38 N. H. 459; 14 Pick. 241; 16 Pick. 107; 12 Met. 250; 7 Vt. 241; 17 Conn. 182; 24 Conn. 350; 4 R. I. 414; *Dickson* v. *Montgomery*, 1 Swan, 348; *Gass* v. *Ross*, 3 Sneed, 211; 4 Dana, 368; 8 Dana, 38; 7 B. Mon. 617; 19 Ala. 825; 7 Smedes & M. 663; 20 Tex. 89; 1 Ired. Eq. 436; 2 Ired. Eq. 9, 255; 4 Ired. Eq. 19, 26; 6 Ired. Eq. 130; 1 Rich. Eq. 99; 1 Hawks. 96; 4 Ga. 420; 17 Ark. 483; 16 Ill. 225; 29 Mo. 37.

Twenty-two of the states have adopted, by express decisions of their highest courts, the doctrines of charity. Against it, there is not one, except Virginia and Maryland. The decisions of Louisiana cannot bear upon this question. The decisions of this court bearing upon this question are:

4 Wheat. 1; 3 Pet. 119; 2 How. 127; 9 How. 55; 15 How. 400; 58 U. S. (17 How.) 382.

II. The devises and bequests are to the city of Cincinnati for its own use as a corporation, and are valid, therefore, without regard to the statute of 43 Elizabeth.

1. There is no statute of mortmain in Ohio, nor any exceptions against bodies corporate in the act relating to last wills and testaments.

Helfenstine v. *Garrard*, 7 Ohio, part 1st, 275; *Hall* v. *Ashby*, 9 Ohio, 96, 98; *Crawford* v. *Chapman*, 17 Ohio, 449, 552, 453.

2. The city is a corporation authorized by law to take and hold property, real or personal, by deed or will, for both the purposes designated.

Municipal corporation act of May 3d, 1852, §§ 18, 34; Swan's Stat. 960, 964; *Vidal* v. *Philadelphia*, 2 How. 186–190; *McDonogh* v. *Murdoch*, 15 How. 406, 407; *Collins* v. *Hatch*, 18 Ohio, 524; statutes of Ohio, cited; act of January 14, 1853, Ohio Laws, vol. II. p. 503; act of March 14, 1853, Swan's Stat. 610; act of March 11, 1853, Swan, 988, 989; act of April 29, 1854, Swan, 991 *a*, 991 *b*; act of March 8, 1831, Swan, 41; act of March 12, 1853, Swan, 43, 44; act of March 11, 1853, Swan, 588; *Phillips* v. *Bury*, 2 T. R. 353.

III. The city of Cincinnati has the legal capacity to take the title of property given to it by deed or will, in trust for a valid charity, though it be not certain that such trust falls within the specified purposes of the corporation, in which case, the state only, and not the heirs, can intervene to prevent it from holding a title and executing the trust.

Runyan v. *Coster*, 14 Pet. 122; *Goundie* v. *Northampton Water Co.* 7 Pa. 239, 249; *Leasure* v. *Hillegas*, 7 Serg. & R. 320; *Sheaffe* v. *O'Neil*, 1 Mass. 257, 258; *Fairfax* v. *Hunter*, 7 Cranch, 603; Co. Litt. 2.

The theory of the plaintiffs' counsel gives this point some importance; the objection, as we understand it, is purely technical. It is that there is a want of a party capable of holding the legal title and performing the trusts at the time when the testator died, and this fact destroys a trust which would otherwise be good, and no other court has jurisdiction to support the trust by the appointment of a trustee that can perform it.

The consequences claimed would not follow, even with the objections to the power of the corporation well founded. Our present purpose, however, is to show that the objection itself has no foundation in law. This point is well settled by the following authorities:

Silverlake v. *North*, 4 Johns. Ch. 373; *McIndo* v. *St. Louis*, 10 Mo. 576; *Goundie* v. *Northampton Water Co.* 7 Pa. 239; *Banks* v. *Poitiaux*, 3 Rand. 136; *Chambers* v. *City of St. Louis*, 29 Mo. 572; *Runyan* v. *Coster*, 14 Pet. 122; *Vidal* v. *Philadelphia*, 2 How. 187; *Baird* v. *Bank of Washington*, 11 Serg. & R. 418; *Leazure* v. *Hillegas*, 7 Serg. & R. 319; *Webb* v. *Moler*, 8 Ohio, 552; *Wade* v. *Am. Col. Soc.* 7 Smedes & M. 697.

Angell & Ames in their work on corporation, section 152, have laid down as a doctrine sustained by the authorities, that where a general power "to have, hold, purchase, receive," etc., is limited in amount, and qualified by a proviso, "that nevertheless, such lands" "such said corporation" should "be enabled to purchase and hold," "should only extend to such lots as should be necessary for a bank and occupied for its ordinary purposes," that even in

that case the state only can question the taking and holding the property excluded by the proviso.

These authorities go directly to the point that the corporation may take the title in a case of this kind, and thereby preserve the trust.

Chambers v. *Graham* and *Vidal* v. *Philadelphia*, established not only that the title passed to the corporation, but that such passing of the title was efficient to cut off the heirs of the testator and save the trust for the charitable purposes declared by the testator. This doctrine does not set aside the principle that corporations derive all their powers from their charter. In these cases, the power is granted in the charter and it is the limit it is sought to imply. The court would not attempt to assign a limit by implication in the proceedings where the state is not a party.

If the corporation uses a power for other purposes than those intended, it is a breach of its implied contract with the state, and to the state only is it answerable; but that such express power may be exercised by the corporation, cannot be denied by any other party than the state, or any other proceedings than such as is instituted to inquire into the very question. There is not a case to be found in the reports where a corporation, with the expressed power granted in its charter to take property, real and personal, without any limitation expressed has been held incapable of taking the property given for a valid, charitable trust.

3. The city of Cincinnati has capacity to acquire and hold the property, and to execute the trust under this will.

1 Brooke, Abr. 336, §§ 10, 40, 339; *Holland* v. *Boins*, 2 Leon. 121; 1 Sanders, Uses and Trusts, 388; *Penn* v. *Lord Baltimore*, 1 Ves. 453; *Atty-Gen.* v. *London*, 3 Br. Ch. 171, (143): *City of Coventry* v. *Atty-Gen.* 7 Bro. P. C. 235: *Drummer* v. *Corp. of Chippenham*, 14 Ves. 252; *Beverly* v. *Atty-Gen.* 6 H. L. Cas. 310; *Green* v. *Rutherforth*, 1 Ves. 462: *Mayor South Moulton* v. *Atty-Gen.* 27 Eng. L. & E. 17; 9 Sim. 30, 49, 610; *Whicker* v. *Hume*, 14 Beav. 517; *Mayor, etc.*, v. *Elliott*, 3 Rawle, 170; *Domestic and Foreign Miss. Soc.* 30 Pa. 425; *Town of Hamden* v. *Rice*, 24 Conn. 350; *Wade* v. *Am. Col. Soc.* 7 Smedes & M. 663; *Chapin* v. *School District*, 35 N. H. 453: 38 N. H. 450; *Bartlet* v. *King*, 12 Mass. 545; *Hadley* v. *Hopkins Acad.* 14 Pick. 240; *Phila. Bap. Asso.* v. *Hart*, 4 Wheat. 1; 9 Ohio, 287; *Chambers* v. *City of St. Louis*, 29 Mo. 572; *McDonogh* v. *Murdoch*, 15 How. 367.

IV. The devises and bequests are for the benefit of those denominations of persons and to endow colleges and asylums particularly described; they are valid in equity, therefore, without any trustee and independently of the statute of Elizabeth.

McCartee v. *The Orphan Asy. Soc.* 9 Cow. 484: *Bartlett* v. *Nye*, 4 Met. 378; *Baptist Association* v. *Hart*, 4 Wheat. 1; *Inglis* v. *The Sailor's Snug Harbor*, 3 Pet. 99; *Vidal* v. *Philadelphia*, 2 How. 127; *McDonogh* v. *Murdoch*, 15 How. 367; *Smith* v. *Swormstedt*, 16 How. 288; *McIntire Poor School* v. *Zanesville Canal Co.* 9 Ohio, 203, 287; statutes of Ohio cited; act of May 3, 1852, concerning wills, § 67; Swan, Stat. 1034; act of March 26, 1856, "to provide for the government of schools and academies specially endowed; 53 Ohio Laws, 33, 34; act of March 11, 1853, for the better management of orphan asylums," Swan, Stat. 588; *Fontain* v. *Ravenel*, 58 U. S. (17 How.) 369; *Clark* v. *Taylor*, 21 Eng. L. & E. 38; *Wheeler* v. *Smith*, 9 How. 55.

V. McMicken's direction that certain real estate should not be alienated (§ 32), is only a condition subsequent; and whether valid or invalid, cannot affect the devise.

McDonogh v. *Murdoch*, 15 How. 410, 411, 412; *McIntire Poor School* v. *Zanesville Can. Co.* 9 Ohio, 218.

VI. It furnishes no ground for objection that the apportionment of bounty as between the colleges and the asylum will depend somewhat on circumstances, or even the discretion of municipal authority.

Vidal v. *Philadelphia*, 2 How. 127; *McDonogh* v. *Murdoch*, 15 How. 367; *Pickering* v. *Shotwell*, 10 Pa. 23.

VII. The statutes of Ohio authorize such disposition of orphan and destitute children as the 23d section of McMicken's will contemplates.

Act of March 12, 1853, concerning apprentices and servants, §§ 1, 2, 3, 4; Swan. Stat. 43, 44; act of March 11, 1853; for the better management of orphan asylums, see 2 Swan, Stat. 588; Amendment of March 25, 1854, Swan, Stat. 588.

VIII. It furnishes no ground of objection that McMicken stipulated for the preference of particular persons as pupils or beneficiaries whether such person be his own relatives or the children of certain friends or others.

Atty-Gen. v. *Earl of Lonsdale*, 1 Sim. 105; *Wright* v. *Linn*, 9 Pa. 433.

IX. It is of no consequence whether the colleges intended by McMicken be or be not within the act of April 9, 1852, "to enable the trustees of colleges, academies, universities, or other institutions, for the purpose of promoting education, to become corporate bodies." Or its supplement of March 12, 1853, Swan, Stat. 193, 195.

The colleges need not be incorporated, inasmuch as the title of all the property is vested in the city of Cincinnati, and the city is a corporation with perpetual succession. If this were otherwise, the act of March 26, 1856, would be amply sufficient.

Ohio Laws, Vol. LIII. p. 33.

Mr. Justice **Wayne** delivered the opinion of the court:

The appellants here were the complainants in the court below.

The object of their bill is to set aside the devises and bequests in the will of Charles McMicken to the city of Cincinnati, in trust for the foundation and maintenance of two colleges.

The testator says: "Having long cherished the desire to found an institution where white boys and girls may be taught, not only a knowledge of their duty to their Creator and their fellow men, but also receive the benefit of a sound, thorough, and practical English education, and such as might fit them for the active duties of life, as well as instruction in all the higher branches of knowledge, except denominational theology, to the extent that the same are now or may be hereafter taught in any of

492*] the secular colleges or universities *of the highest grade in the country, I feel grateful to God that through His kind providence I have been sufficiently favored to gratify the wish of my heart. I therefore give, devise, and bequeath to the city of Cincinnati, and its successors, for the purpose of building, establishing, and maintaining, as far as practicable, after my decease, two colleges for the education of boys and girls, all the following real and personal estate, in trust forever, to wit:" describing the property in nine clauses of the thirty-first article of the will.

He then proceeds to declare that none of the real estate devised, whether improved or otherwise, or which the city may purchase for the benefit of the colleges, should at any time be sold, but that the buildings upon any part of it should be kept in repair out of the revenues of his estate. In the event, however, of dilapidation, fire, or other cause, or if it shall be deemed expedient to have a larger income, he directs houses to be taken down, and that they are to be rebuilt out of the income of his estate. He further authorizes purchases to be made of other property, buildings to be put up on his vacant lots, and designates a part of the eastern boundary of the grounds devoted to the college for the boys for the erection of boarding houses for the accommodation of the students, from which a revenue may be derived. The testator then declares where the colleges shall be located, that there might be a separation between that for the boys and that for the girls. There are other particulars under this article of the will which we need not recite, as they have no bearing upon the controversy made by the bill. Passing over the 33d article of the will for the same reason, the next article in the will is a direction that the Holy Bible of the Protestant version, as contained in the Old and New Testaments, shall be used as a book of instruction in the colleges. Next, it is declared that in all applications for admission to the colleges, that preference should be given "to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Mrs. McMicken and her descendants." Then he directs: "If, after the organization and establishment of the institution," and the admission of as many pupils as 493*] in the discretion of *the city have been received, there shall remain a sufficient surplus of funds, that the same shall be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents are living, etc., etc., preference to be given to my relations and collateral descendants, etc., etc.; that they were to receive a sound English education, etc., etc.; and afterwards, directions are given as to the mode of receiving such poor white male and female orphans, and the privileges to be allowed under certain circumstances. The testator, in the thirty-fourth article of his will, declares that "the establishment of the regulations *necessary to carry out the objects of my endowment I leave to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution.*" The last article of the will relates to the devises and bequests to the city, and directions as to paying the accounts of the trust. The testator then nominates executors, and they are the appellees in this appeal.

This statement has been made, that the devises and bequests of the testator may be fully disclosed, and the merit of them as a charitable use may be fully understood.

Our first observation is, that it was his intention to establish primarily two colleges for boys and girls, and then a third for the support of poor white male and female orphans, neither of whose parents were living, and who were without any means of support, who were to receive a sound English education. This third school was to be founded by applying to the purpose the surplus funds which might remain after the complete organization of the colleges. (36th article of the will.) The testator anticipated that there would be such a surplus, as he left it in the discretion of the city to determine the number of the pupils who were to be admitted to the colleges. We must then keep in mind the thirty-first and thirty-sixth articles of the will in considering it, though they are but contingently connected by the happening of a surplus in the way just mentioned. For, now, if the first is subject to a failure as a gift for charitable purposes, the devises and bequests may be good under the second. Our attention, however, will be *chiefly given to the thirty-first [*494 section and its clauses, as under that it was principally argued by counsel.

The learned sergeant, Sir Francis Moore, who drew the statute of 43 Elizabeth, ch. 4, says, in his exposition of it: "As in all other grants, so in a gift to a charitable use, four things are principally to be considered: 1. The ability of the donor. 2. The capacity of the donee. 3. The instrument or means whereby it is given. 4. The thing itself which is or may be given to a charitable use." And then, by way of caution to donors, he says: "There are five things which cannot be granted to such a use: 1. Things that yield no profit. 2. Things that are incident to others, and inseparable. 3. Possibilities of interest. 4. Conditions—meaning that such things are from their nature insusceptible of serving such a purpose;" and then he adds the 5th: "Copyholds, if in any way prejudicial to the lord." We shall not consider them numerically, but both seem to be the natural way to discuss such a gift when its validity is disputed. We shall follow it in those particulars as briefly as we can.

No question is made, however, in this case, as to the execution of the will nor as to the capacity of the devisor. It is insisted, though, that the devises and bequests to the donee, the city of Cincinnati, are void, because the city has not the capacity to take them, and also that they create a perpetuity from being inalienable, which is contrary to law.

Charity, in a legal sense, is rather a matter of description than of definition; and the word "perpetuity" in law is only determined by the circumstances of such cases. But for the purpose of this case, the objection to the validity of the charity on account of its perpetuity, we will place under Mr. Sanders' definition in his Essay upon Uses and Trusts, 196: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee of the property, discharged of such future use or estate, before the event is determined or the pe-

riod is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." It is then a limitation upon the *jus disponendi* of property, upon the common-law 495*] *right of every man to dispose of his land "to any other private man at his own discretion." And one class of those limitations is technically termed "alienation in mortmain, and to charitable uses." Alienation in mortmain, in its primary signification, is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical or temporal, the consequence of which in former times was, that by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the general policy of the common law, which favored the free circulation of property was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation. The effect of these statutes deprived every corporation in England, spiritual or secular, from acquiring, either by purchase or gift, real property of any description, without a general license from the Crown enabling it to hold lands in mortmain, or a special license in reference to any particular acquisition. These restraints were subsequently relaxed in many particulars, including gifts to a corporation for purposes of education. But this case does not require us to particularize them; our only purpose for having alluded to statutes of mortmain being to show, from the view taken of them from an early day by the courts in England, that devises to corporations, which generally cannot take lands under a will, were held good when made in favor of charities, and that such gifts, from the purposes to which they were to be applied, and the ownership to which they are subjected, have had the protection of courts of equity to prevent any alienation of them on the part of the person or body interested with the offices of giving them effect; and that in all such cases land has been decreed by courts of equity to be practically inalienable, or that a perpetuity of them exists in corporations when they are charitable gifts.

Hillam's Case, Duke, 80, 375; *Mayor of Bristol* v. *Whitton*, 1633, Duke, 81, 377; *Mayor of Reading* v. *Lane*, 1601, Duke, 81, 361; Lewis on Perpetuity, 684; *Christ's Hospital* v. *Grainger*, 1 Macn. & G. 460; *Griffin* v. *Graham*, 1 Hawks, 130; *State* v. *Gerard*, 2 Ired. Eq. 210.

The objection that the devises and bequests create a perpetuity, cannot be maintained 496*] *unless they are forbidden by the law of Ohio. And if a perpetuity was forbidden, the charitable trust would not fail, but would be held good and carried out in equity.

We are told that the 1st and 2d sections of the 13th article of the Constitution, in connection with the legislation of the state under them, prevent an estate in perpetuity from being made in Ohio. And for showing the bearing of them upon this case, we were referred to an act of Ohio to restrain the entailment of real estates. 2 Swan, §§ 355, 356.

We are unable to see any fair connection between them. The 1st and 2d sections of the 13th article of the Constitution were, that the general assembly shall pass no special act conferring corporate powers. Sec. 2. Corporations may be formed under general laws, but all such may from time to time be altered or repealed—that is, though they may be formed under general laws, that the Legislature may alter or repeal them. That by the provision they meant to retain their legislative powers to give larger powers than a corporation might have had, to reform them in any particular that might become necessary, that of a violation of the contract excepted. The act to restrict the entailment of real estates obviously applies to individuals exclusively, and not at all to corporations, and especially to such of them as may take and hold charitable gifts in perpetuity.

The first act passed under the Constitution of 1851, relating to corporations, was to enable the trustees of colleges, academies, universities, and other institutions for promoting education, to become bodies corporate. We will give it in its terms, for nothing in the legislation of that State can show more satisfactorily than it does, that public spirit there is in harmony with and fully up to that of the age, upon the subject of education. The language of the 1st section is, that any number of persons, not less than five, desiring to establish a college, university, or other institution for the purpose of promoting education, religion or morality, agriculture and the fine arts, may, by complying with the provisions of the act, become a body corporate and politic, with perpetual succession, and may assume a corporate name, by which they may sue and be sued, plead *and be impleaded, in [*497 all courts of law and equity; may have a corporate seal, and the same alter or break at pleasure; may hold all kinds of estate, real, personal and mixed, which they may acquire by purchase, donation, devise, or otherwise, necessary to accomplish the objects of the corporation; and further, the trustees of any university, college or academy, may hold in trust any property devised, or bequeathed, "or donated" to such institution, upon any specific trust consistent with the objects of said corporation; also, when any number of persons shall have procured by subscription, donation or devise, purchase, or otherwise, the sum of $500 for the purpose of establishing an academy, they may become a body corporate, etc., etc., and do all acts and things necessary for the promotion of education and the general interests of such academy. Time and the occasion will not permit us to give more of this liberal and enlightened statute and of the Supplemental Acts passed in August, 1852, and March, 1853. 2 Swan, §§ 195, 196.

There is nothing in either of them in any way interfering with the power of before existing corporations, to become the trustees of charitable devises and bequests for education, and to hold them in perpetuity. There is rather a disposition manifested to enlarge and confirm their power to do so, and to give to other corporations under the act certainty and security in the administration of such trusts. The Legislature has succeeded in giving to corporations, for the promotion of education, what the learned gentlemen who brought this bill said were the requisites of a corporation: lawful existence; artificial capacity and perpetuity of existence; and, we add, the unquestioned enjoyment of all these privileges, which courts of equity have said for more than two hundred years they were entitled to, in the construction of devises and

gifts for charity, and for the administration of them.

It was conceded in the argument, that the trusts in this will fall within the description of public trusts or charitable uses, as recognized in England since the statute of 43 Elizabeth, ch. 4, notwithstanding that statute is not in force in Ohio, and, in our opinion, never was, as we shall show presently.

498*] *Charities had their origin in the great command, to love thy neighbor as thyself. But when the Emperor Constantine permitted his subjects to bequeath their property to the church, it was soon abused; so much so, that afterwards, when it became too common to give land to religious uses, consistently with the free circulation of property, the supreme authority of every nation in Europe, where Christianity prevailed, found it necessary to limit such devises by statutes of mortmain.

In France, by the ancient constitutions of that Kingdom, churches, communities, chapters, colleges, convents, etc., were not permitted to acquire or hold immovable property. Dumoulin sur, 1st art., 51 De la Cou. Paris. This incapacity after a long time was relaxed, and they were allowed to hold, by license of the King.

In Spain, the communities mentioned before could neither acquire nor hold property, unless by authority of the sovereign; but in England, corporations had the capacity to take property by the common law. Co. Litt. 99. They were rendered incapable of purchasing without the King's license by a succession of statutes from Magna Charta, 9 Henry III. to 9 Geo. II.

They are known as the statutes of Mortmain; that is, as it was the privilege of anyone, before such statute restrained it, to leave his property of every kind by testament to whom he pleased, and for such purposes, charitable or otherwise, as he chose: and the will was, in every particular, administered according to the testator's intentions, sometimes by the courts of common law, and at others by a court in chancery, as may be seen from the cases in Duke and other writers upon charities. The question, then, under such a condition of the law in Ohio, where there was no statute of mortmain, cannot be in this case, whether chancery had such a jurisdiction, or whether Ohio had adopted in whole or in part the common law, but whether Ohio, in the construction of her judicial system, did not mean to give to those courts which were to have equity jurisdiction cognizance of trusts made by wills for charitable uses, as well as of other trusts; and whether the judges in Ohio have not uniformly entertained it upon that principle. We cannot be mistaken in the conclusion that 499*] they have done *so from the cases cited on both sides in the argument of this case, the larger number of which we have verified by examination.

And we are more confirmed in what has just been said, for the English statutes of Mortmain were never in England supposed to have been meant to extend to her colonies, and were never in force in those of them in America which became independent states, but by legislative adoption.

First, it will be observed in all commentaries upon those statutes they are termed local or political laws, meant to suppress a public mischief and abuse in England. The Stat. of 43 Elizabeth is entitled, "An Act to Redress the Misemployment of Lands, Goods, and Stocks of Money, Heretofore Given to Charitable Uses." The mode and manner for the enforcement of it in any particular did not exist in any one of the English colonies. There was not in either of them a Lord Keeper or Lord Chancellor, or any corresponding officer to mature the regulations enjoined by the act for its enforcement. There were not in the colonies any abuses to redress for the misemployment of lands, goods, or money heretofore given to charitable uses; further, there were not then in any one of them those religious institutions which the monarchs of Europe deemd it politic to restrain from holding lands.

The statute, after beginning with a statement of the abuses to be controlled, declares that for the redress of them it shall be the duty of the Lord Chancellor or Lord Keeper of the great seal for the time being, and for the Chancellor of the Duchy of Lancaster for the time being, to award commissions, etc., into all or any part of the realm, for the purpose of executing the, etc., statute, and the realm or kingdom of England, in statutory parlance, as well in the time of Elizabeth as now, "meant the kingdom over which her municipal laws or the common law had jurisdiction, and did not include either Wales, Scotland, or Ireland, or any other part of the King's dominions, except the territory of England only." 1 Bl. Com. § 4, p. 93, Wendell.

And in the same section, after having enumerated those dominions which had been subjected by statute or otherwise *to the laws [*500 of England, and such as had not been, all being adjacent to England, Blackstone says our more distant plantations in America or elsewhere, are also in some respects subject to English law. But that must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance and of protection from personal injuries. Pp. 107, 108, marginal. But we are not left to inferences to establish the locality of the operation of the statutes of Mortmain to England, and that they never had any force in the colonies. The whole subject in all its generality was ably discussed and decided in the High Court of Chancery in England some forty years since. In that case, *Atty. Gen.* v. *Stewart*, 2 Mer. 143, the question being whether the statute of Mortmain, 9 Geo. II., extended to the Island of Grenada, in the West Indies, it was ruled that it did not, and that none of the English Mortmain acts were of force in the colonies.

Without, then, a particular enactment for such purpose, the statute of 43 Eliz., ch. 4, could never have been in force in Ohio. Nor do we think it to be a point of judicial uncertainty there, for we cannot find a decision in the courts of Ohio directly declaring that it ever was.

The law was adopted in terms from the statute of Virginia by the governor and judges of the territory. 1 Chase, 190. Whatever may have been its validity in other respects, it did not comprehend the statute of Elizabeth. For though it was a remedial statute to correct abuses, it was a restraining statute of the common law right of every man to dispose of his

property, by will, as he pleased. The law taken from Virginia for Ohio made statutes and acts of Parliament in aid of the common law, which were of a general nature, and not local to that kingdom, of force in Ohio. It was not in aid of the common law, but being restrictive of it, it should have, as to the places assigned for its operation, a strict interpretation.

But whether we are right or not so, in respect to the law adopted from Virginia, and passed in **501***] the territorial legislature *of Ohio, it is certain that in the year 1806 it was repealed; and that since the statute of Elizabeth has had no force in Ohio as a statute, though the judges of that state, without any assumption, have applied its principles to all cases of charitable devises as a part of chancery jurisdiction. It certainly was right in them and a duty to carry out the charitable intentions of a testator by the same principles that his will was executed in every other respect, when the legislature was silent in respect to such devises, or had given no other rule concerning them.

No more was done by them in Ohio than was done in every other state in this Union where the statute of Elizabeth had not been adopted by legislative enactment.

But in justice to the subject we cannot leave it without saying that original chancery jurisdiction over charities existed in England, and was exercised there, before the statute of Elizabeth was passed; also, that it has now become an established principle of American law, that courts of chancery will sustain and protect such a gift, devise or bequest, or dedication of property to public charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift is a dedication specific and capable of being carried into effect according to the intentions of the donor. In confirmation of this we refer to the cases collected in Angell and Ames upon Corporations, private and aggregate, 6th edition, 182, 177, and from pages 170 to 180, inclusive.

And this court, in *Vidal* v. *Mayor of Philadelphia*, 2 How. 127, reviewed its opinion to the contrary of what has just been said in the case of *The Bapt. Asso.* v. *Hart*, 4 Wheat. 1, and admitted, whatever doubts had been expressed in that opinion, that they had been removed by later and more satisfactory sources of information.

And in *Vidal's Case* the court went on to say: "It may, therefore, be considered as settled, that chancery has an original and necessary jurisdiction in respect to devises and bequests in trust to persons competent to take for charitable purposes, when the general object is specific and certain, and not contrary to any positive rule of law."

502*] 2 Kent's Com. 287, 288, *4th ed.; *Gibson* v. *McCall*, 1 Rich. (S. C.) Law, 174; *Atty. Gen.* v. *Jolly*, 1 Rich. (S. C.) Law, 176 *n.*; *Sohier* v. *St. Paul's Church*, 12 Met. (Mass.) 250; *Beall* v. *Fox*, 4 Ga. 404; *Miller* v. *Chittenden*, 2 Clarke (Ia.) 315: and *Williams* v. *Williams*, Opinion by Judge Denio, 8 N. Y. 525.

We also refer to the opinion of Mr. Justice Baldwin, which led the way upon this question of jurisdiction in the United States in the will of Sarah Zane in pamphlet, Cir. Co. in Pennsylvania, April term, 1833; and to Mr. Justice Story's Essay in the Appendix to 3 Pet. 481 to 502, inclusive.

The same results have been announced by the decisions in Ohio. *McIntire Poor School* v. *The Zanesville Can. & Mfg. Co.* 9 Ohio, 203, does so. Lane, Ch. J., avoiding the discussion of the extent of chancery jurisdiction over charities, independently of the statute, says: But one of the earliest claims of every social community upon its law-givers is an adequate protection to its property and institutions, which subserve public uses, or are devoted to its elevation, etc.; and, in a proper case, the courts of one state might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth as a necessary element of our jurisprudence. But without reference to these considerations, where a trust is clearly defined, and a trustee exists capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it by its own inherent authority, not derived from the statute, nor resulting from its functions as *parens patriæ*. The same ruling was made afterwards in 15 Ohio, 593, and in 18 Ohio, 500, and the main point in both of them could not have been decided without maintaining the jurisdiction in chancery over charitable uses, independently of the statute of Elizabeth. The same may be assumed of the case growing out of the will in 20 Ohio, 483. Indeed, it was assumed that no case in Ohio of a charitable trust has been judicially maintained, or could have been valid under the universal admission that the statute of the 43 Elizabeth, ch. 4, was not in force in Ohio, unless the courts *there [*503 had acted from the conviction that in such cases chancery had a jurisdiction over them by its own authority.

We shall now consider the objections which were made by the counsel for the appellants to the validity of the devises and bequests of Mr. McMicken, that the city of Cincinnati has not the capacity to take them and to execute the trusts of the will, and that no other trustee can be appointed.

In our view, the answers to them from the opposing counsel were decisive. No incapacity of the city of Cincinnati to take in this instance can be inferred from its charter. It has the power to acquire, to hold, and possess, real and personal property, etc., etc. and to exercise such other powers and to have such other privileges as are incident to municipal corporations of a like character and degree, not inconsistent with this act or the general laws of the state. Swan, 960. It was admitted in the argument, that the section just read confers power upon the city to acquire and hold real estate for the legitimate objects of the city. These objects are enumerated in many particulars directly connected with its powers to govern the city; and in the nineteen sections following that cited, there is not a sentence or word from which an inference can be made that the legislature meant to deprive the city of Cincinnati from taking and administering charitable trusts. Indeed, such a course would have been inconsistent with the legislature's caution in its enactments under the Constitution of 1851.. It would be doing great injustice to the legislature even to suppose that it meant, in passing an act for the government

of corporations, under the provisions of the Constitution, that it designed to encroach upon that of the judiciary, or to alter the whole power of chancery in respect to charitable uses, and the long-established practice of corporations, private and municipal, to receive them as trustees, and to administer them according to the intention of donors. So far from any intention to interfere with such a privilege in the city of Cincinnati, we infer from previous and subsequent legislation that it was to have an important agency in carrying out the 6th article of the Constitution in respect to education. We allude to the act for the better or-
504*] ganization and classification *of the common schools of Cincinnati and Dayton, passed in the year 1846 (Ohio Local Laws, 91), and to that of the 27th January, 1853, both now in force. In the first, the trustees and visitors of common schools in the city of Cincinnati, with the consent of the city council, have the power to establish and maintain out of any funds under the control of the trustees and visitors, such other grades of schools than those already established as they may deem expedient for such purpose. Further, by the 68th section of the state school law, Swan, 852, passed in January, 1856, power is given to township boards of education and their successors in office to take and hold in trust for the use of central or high schools, or sub-district schools, in the township, any grant or donation, or bequests of money, or other personal property, to be applied to the support of such public schools. Again, in Ohio Laws, 33, March 26, 1856, it is declared that whenever anyone gives lands or money for the endowment of a school or academy, not previously established, and shall not provide for the management of it, that the court of common pleas shall appoint trustees with corporate powers. That act provides also for the management of charities when the founders have not given directions; and another act (Swan, 193, 1856) provides how colleges may be incorporated by their own act, and how trustees of an endowment may also become a corporation by their own act. These acts have been cited to show that Ohio, in her legislation, has made municipal corporations trustees for charity devises and bequests, and that the management of them is a duty. They also prove that the privilege to take them is one given and imposed by law.

After a close examination of all the legislation of Ohio relating to corporations, and its system of education, we have not been able to detect any sentence or word going to show any intent to alter the law as it stood before the adoption of the Constitution of 1851, in respect to a corporation receiving and taking, either by testament or donation, property for a charity, or to prevent them from having trustees for the execution of it according to the intention of the donor. To take such privileges from them can only be done by statute expressly, and
505*] *not by any implications by statutes, or from any number of sections in statutes analogous to the subject, containing directions for the management of corporations. The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But if the purposes of the trust be germain to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness, where is the law to be found which prohibits the corporation from taking the devise upon such trust in a state where the statutes of Mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers. 2 How. 190. This court announced the same principle again in the case of *McDonogh* v. *Murdoch*, 15 How. 367, with other and new illustrations, and with direct reference to the capacity of a corporation to take such trusts, if within its general objects, or such as were collateral or incidental to its main purpose. There is nothing in the Ohio Statute of Wills to prevent corporations from taking by devise. Much was also said in the argument, denying the legality of the trusts, in consequence of the uncertainty of the beneficiaries, and because the relatives of the testator were to have the preference. As to the first, white boys and girls make as *dis- [*506
tinctive a status of a class who are to be the first beneficiaries of the trust, and the words in the 36th section, that, "if any surplus shall remain, etc., it shall be applied to the support of poor white male and female orphans, neither of whose parents are living, and who are without any means of support," make as certain a description as could have been expressed.

It seems to us, now, that the objection relative to the condition of the beneficiaries is at variance with the established primary rule in respect to a charity, not only with reference to the statute of 43 Elizabeth, ch. 4, but to a charity under the common law. The answer is, that a charity is a gift to a general public use, which extends to the rich as well as to the poor. *Jones* v. *Williams*, 2 Amb. ch. 651. Generally, devises and bequests having for their object establishments of learning, are considered as given to charitable uses, under the statute of Elizabeth. *Atty. Gen.* v. *Earl of Lonsdale*, 1 Sim. 105; but that does not make a devise good to a college for purposes not of a collegiate character, intended chiefly to gratify the vanity of the testator. And we cannot be mistaken, that a devise to a corporation in trust for any person is good, and will be effectuated in equity. 1 Bro. Ch. Cas. 81. And *a fortiori*,

a devise to a charitable corporation, in trust for any other charitable use, would be good. All property held for public purposes is held as a charitable use, in the legal sense of the term "charity." Law Library, Vol. LXXX. p. 116, Grant, Corporations.

We will not pursue the subject further; for, without having discussed either of the six objections made in the bill of the complainants, or the points made by counsel in support of the demurrer to the bill, numerically, both have been under our examination; for all were appropriately in the argument of the cause, and in this opinion we meant to decide all of them, and have done so.

We cannot announce them more expressively than they were urged in argument.

1. The doctrines founded upon the statute of 43 Elizabeth, ch. 4, in relation to charitable 507*] trusts to corporations, *either municipal or private, have been adopted by the courts of equity in Ohio, but not by express legislation; nor was that necessary to give courts of equity in Ohio that jurisdiction.

2. The English statutes of Mortmain were never in force in the English colonies; and if they were ever considered to be so in the state of Ohio, it must have been from that resolution by the governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.

3. The city of Cincinnati, as a corporation, is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.

4. Those devises and bequests are charities, in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the state of Ohio..

5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons, as to who should be pupils in the colleges which he meant to found, was a lawful exercise of his rightful power to make the devises and bequests.

7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.

8. Legislation of Ohio upon the subject of corporations by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

This cause was argued on both sides with such learning and ability, that we feel it to be only right to the profession to acknowledge the assistance given to us in forming our conclusions; and our only regret is, that it should necessarily have extended this opinion to a greater length than we wished it to be.

508*] *We shall direct the affirmance of the decree, dismissing the bill, by the court below.*

GEORGE W. DAY, Bowen Matlock, Isaac H. Frothingham and Geo. W. Warner, *Plffs. in Err.*,

v.

W. A. WASHBURN and John A. Keith.

(See S. C. 24 How. 352–357.)

Chancery only gives preference to creditors having specific liens; but will, without judgment or execution, enforce pro rata division of trust fund, for benefit of creditors, among them.

The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law.

It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired, which a court of chancery will enforce.

Where creditors have not reduced their demands to judgment and execution before seeking relief against a fraudulent assignment of the debtor, they cannot set up any claim to a preference over the other creditors or object to an equitable distribution of the assets among all the creditors.

Where a specific fund has been assigned or pledged for the benefit of creditors, chancery upon its own principles, distributes the fund *pro rata* among all the creditors, unless preference is given in the pledge or assignment of the fund.

If a bill is filed to enforce a trust, no judgment or execution is necessary as preliminary steps to the interposition of the court; but in that case the complainants are not entitled to a preference, where none is given to them in the trust deed.

Where the bill is filed to set aside the deed as fraudulent, to defeat the preference given therein to other creditors, the objection that the demands of complainants had not been reduced to judgment and execution before filing the bill, is fatal to the relief sought, if taken in time.

When such objection was waived, the court was right in proceeding to make a ratable distribution among all the creditors.

Submitted Feb. 21, 1861. Decided Mar. 5, 1861.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

The case is fully stated by the court.

Messrs. **William Henderson** and **R. W. Thompson,** for plaintiffs in error:

1st. Can the complainants, not being judgment creditors of Washburn, maintain this bill in chancery to reach his equitable assets in the hands of his assignee, to whom he has fraudulently assigned them?

The bill avers that Washburn had no real estate upon which a judgment at law would be a lien; that he had no personal property, whatever, subject to execution; these facts are admitted by the answer. What, then, was to be gained by the complainants first suing at law, and obtaining a judgment, and having an execution returned *nulla bona?* It would be doing a useless thing. The law does not require a party to do a useless thing.

We think the law well settled, "that if a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law.

Russell v. *Clark's Exrs.* 7 Cranch, 69; *O'Brien* v. *Coulter*, 2 Blackf. 421; *Piatt* v. *St. Clair*, 6 Ohio, 227.

2d. The other creditors of Washburn, none

NOTE.—*Priority as to proceeds of creditors' bills*—see note, 17 L. R. A. 345.

of whom were judgment creditors, were not necessary parties to the bill. If the object of the bill had been to enforce the due execution of the assignment, then there would have been some plausibility in making them parties. The claim of the complainants being antagonistic to the assignment, it was only necessary to make the assignor and assignee defendants.

1 Dan. Ch. Pr. 302; Sto. Eq. Pl. 215, 216; Burr. on Ass. 599; *Edmeston* v. *Lyde*, 1 Paige, 637; *Rogers* v. *Rogers*, 3 Paige, 378, 379; *Butler* v. *Jaffray*, 12 Ind. 504.

3d. The complainants contend that by filing their bill to avoid the assignment they thereby obtained a specific lien on the assets in the hands of the assignee and were, under the law of the case, entitled to be fully paid to the exclusion of the other creditors whose equity is not superior to complainants. It is a well-established rule in equity, "that when the equities are equal, that title which is prior in time shall prevail."

1 Story, Eq. Jur. 400.

This rule applies as well to a case like the one before the court as to equities growing out of conveyances. With regard to cases like this, the general rule is laid down by numerous adjudications, that a creditor may file a bill in his own name for his sole benefit, or he may file in behalf of himself and all others who may be entitled and may choose to come in. If he proceeds on his own account alone, and no lien has been gained or can be acquired at law, he acquires a specific lien by filing the bill, and is entitled to priority over other creditors.

1 Am. Lead. Cas. 85; *Edmeston* v. *Lyde*, before referred to, 1 Paige, 637; *Corning* v. *White*, 2 Paige, 567; *Butler* v. *Jaffray*, 12 Ind. 504; *Farnham* v. *Campbell*, 10 Paige, 598-601; *Weed* v. *Pierce*, 9 Cow. 722, 728; *U. S. Bank* v. *Burke*, 4 Blackf. 141; *Miers* v. *Zanesville, etc., Turnpike Co.* 13 Ohio, 197; *Douglass* v. *Huston*, 6 Ohio, 156; *Wakeman* v. *Grover*, 4 Paige, 23; *Russell* v. *Lasher*, 4 Barb. 232; Burr. on Asso. 600, 601; *Hubbs* v. *Bancroft*, 4 Ind. 388; 1 Kent, note to 263, 264.

Messrs. **McDonald** and **Porter**, for defendants in error:

Some authorities state that where a creditor's bill is filed to reach assets of a purely equitable nature, it is not incumbent upon the creditor to show that he had first obtained a judgment at law, but it is believed that the better opinion is the other way.

McElwain v. *Willis*, 9 Wend. 548; 1 Man. Mich. 446.

But where the assets are not of that nature, and especially in all cases where the demand is of a legal nature, the averment is indispensable.

Hendricks v. *Robinson*, 2 Johns. Ch. 296; 1 Am. Lead. Cas. 84, and numerous cases there cited.

The complainants in the present case endeavor to dispense with this averment by an allegation that Washburn has no property upon which a judgment or execution would be a lien.

But there are other averments in the bill showing just the contrary. The property being such that a judgment would have been a lien on the real estate, and an execution on the personalty, the demurrer ought to have been sustained.

Before the court proceeded to render a decree certain, other creditors of Washburn, whose names appear in the record, presented a supplemental bill and applied upon motion to be admitted as cocomplainants, and to be permitted to establish their claims and to participate equitably in the distribution of the assets. The motion was granted. The court afterwards found the assignment to be fraudulent and void, and decreed that the moneys in the hands of Keith should be distributed ratably among the creditors who were parties to the record.

Whether the decree, so far as it directs a ratable distribution of the assets, was right or not, is not now before the court. The appellees do not and did not object to such ratable distribution. The question, so far as relates to that, is a question between the appellants and their cocomplainants, and the latter are not made parties to the appeal. Of course, therefore, nothing affecting their interest will be adjudicated by this court.

7 Pet. 399; 16 Pet. 521.

If this view were not correct, still the appellants cannot reverse that part of the decree: 1 Because they do not assign for error, in their brief or otherwise, that the court improperly admitted as complainants the other creditors. 2. The decree was for the ratable distribution of money so far as the appellants complain of it; and the creditors, admitted as cocomplainants, were the first to aver specifically that Keith had moneys in his possession. So far, therefore, as diligence is concerned in reference to the very thing to which the decree applies, these second complainants were more diligent than the appellants. 3. In equity there is no preference between creditors.

Purdy v. *Doyle*, 1 Paige, 558; *Codwise* v. *Gelston*, 10 Johns. 507; *Morrice* v. *Bank of England*, cases *temp.* Talbot, 216; *Robinson* v. *The Bank*, 18 Ga. 108.

It is admitted that there are cases the other way, but it is believed that the better opinion coincides with that of Chancellor Walworth in the case first cited.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the United States for the district of Indiana.

The bill was filed in the court below by two mercantile firms, creditors of Washburn, against him and the assignee of his property, for the purpose of setting aside the assignment as fraudulent against creditors, and that the property might be applied in satisfaction of the complainants' demands. These demands were simple-contract debts, not reduced to judgment.

The defendants demurred to the bill, and assigned, as the ground of the demurrer, the want of equity.

The court overruled the demurrer, and the defendants answered separately, among other things denying all fraud in the assignment. Replications were filed to the answers.

In this stage of the case, the other creditors of Washburn applied by petition to the court to be made parties to the bill, *charging [*355 fraud in the assignment, and praying that it might be set aside, and the property and effects of the debtor be subjected to the payment of all

his debts, and be divided equally among all the creditors.

The court ordered that these petitioning creditors become cocomplainants, and referred the case to a master to take an account of what was due to each of the complainants, which account was duly taken, and a report made to the court; and afterwards the defendant, Keith, was ordered to bring into court the amount of moneys admitted by him to be in his hands, made out of the assigned property, amounting to the sum of $2,437; and then, at a subsequent day in the term, the court overruled a motion made, on behalf of the two firms who filed the bill, to have the moneys in court applied to the payment of their debts in preference to the other creditors; and adjudged the assignment fraudulent as to creditors, and directed that the whole fund be distributed ratably among all of them, according to their respective demands, and referred the case to a master to make the distribution; and, on his report, confirmed the same.

The case is before us on appeal by the two firms who filed the bill, alleging for error the refusal of the court to give them preference in the distribution of the assets.

The proceedings in the case have not been conducted with much regularity, but the principles of equity governing the rights of the parties concerned are very well settled, and the application of them to the facts as presented will satisfactorily dispose of it.

The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a *pro rata* distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that 356*] *a legal preference is acquired, which a court of chancery will enforce. 2 Johns. Ch. 283; 4 Johns. Ch. 691.

The two firms, therefore, who filed the bill, the appellants here not having reduced their demands to judgment and execution before seeking relief against the fraudulent assignment of the debtor, are not in a situation to set up any claim to a preference over the other cocomplainants, or to object to an equitable distribution of the assets among all the creditors.

Indeed, the principle upon which the bill seems to have been drawn, and is now sought to be sustained, would preclude any preference in favor of the appellants—which is, that the debtor's property, in the hands of the assignee, constituted a fund for the benefit of creditors, which a court of equity only could reach, and hence that the creditor had a right to the interposition of the court without first obtaining a judgment and execution. It is true, where a specific fund has been assigned or pledged for the benefit of creditors, and it is necessary to go into a court of chancery to make a distribution among them, the equitable lien of each creditor upon the fund lays a sufficient foundation for the interposition of the court. It will enforce this equitable lien thus arising out of the assignment or pledge for the benefit of the creditors, in the exercise of its own appropriate jurisdiction. But in all these cases, chancery, upon its own principles, distributes the fund *pro rata* among all the creditors, unless preference is given in the pledge or assignment of the fund. In the present case, as the assignment was made to Keith, in trust for the benefit of creditors, if the bill had been filed to enforce the trust, no judgment or execution would have been necessary, as preliminary steps to the interposition of the court; but in that case the appellants would not have been entitled to a preference, as none was given to them in the trust deed, but the contrary.

For this reason, doubtless, the bill was filed to set aside the deed as fraudulent, with a view to defeat the preferences given therein to other creditors. The objection that the demands of the appellants had not been reduced to judgment and execution before filing the bill, would have been fatal to the relief sought, if taken in time by the defendants. It was waived, *however, both as respected the appel- [*357 lant and the other complainants; and as the court was left unembarrassed by the objection, it was right in proceeding to dispose of the property and effects of the debtor, and to make the proper application of them; and as we have seen, neither of the creditors had acquired a preference at law, the application in chancery, upon its own principles, was a ratable distribution among all the creditors, as decreed by the court below.

Decree affirmed.

LESSEE OF ROBT. W. SMITH and Carey W. Butt, *Plff. in Err.*,

v.

WM. McCANN.

(See S. C. 24 How. 398-407.)

In Maryland, ejectment is the proper action to try title to lands—plaintiff must show a legal title—cannot recover on equitable title—purchaser under execution must show legal title in debtor—naked legal title of trustee not sufficient to recover on—parol evidence inadmissible to enlarge estate of trustee—trust fraudulent as to creditors—trustee bound by trusts.

In Maryland the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence; and the action of ejectment is the only mode of trying a title to lands.

In that action the lessor of the plaintiff must show a legal title; he cannot support the action upon an equitable title, nor is the defendant required to show any title in himself; and if the plaintiff makes out a prima facie legal title, the defendant may show an elder and superior one in a stranger, and thereby defeat the action.

The purchaser under a fi. fa. when compelled to bring an ejectment to obtain the possession, must show a legal title to the land; and, consequently, must show that the debtor, at the time of the levy, had a legal title.

If the debtor had but an equitable title, the purchaser is compelled to go into equity, and obtain a legal one before he can support an action of ejectment against the party in possession.

It is not every legal interest that is made liable to sale on a fi. fa.; the debtor must have a beneficial interest in the property.

NOTE.—*What title or interest will support an action of ejectment*—see note, 18 L. R. A. 781.

Where the deed to the debtor only conveyed to him a naked legal title as a trustee for others, he took under it no interest that could be seized and sold by the marshal upon a fi. fa.; and the deed of the marshal, therefore, conveyed no title to the plaintiff.

Standing only upon this title, derived under this deed, and showing no other title, the plaintiff certainly could not recover in an action of ejectment.

Evidence to prove that the trusts in the deed are fraudulent, and that the deed was executed to hinder and defraud creditors, is not admissible to show that the grantee had a beneficial interest in the property, liable to be seized and sold for the payment of his debts.

Parol evidence is inadmissible to enlarge the estate of a trustee, and to show that he had not merely a barren legal title, but a beneficial interest, which was liable for the payment of his debts.

If the evidence was admissible, the fraudulent character of the trusts, as against his creditors, could not enlarge his legal interest beyond the terms of the deed.

As between the trustee and the *cestuis que trust*, the trustee can have no equity against the express trusts to which he assented.

Where the *cestuis que trust* are not before the court, an inquiry into the validity of the trusts cannot be made.

Argued Feb. 11, 1861. Decided Mar. 5, 1861.

IN ERROR to the Circuit Court of the United States for the District of Maryland.

This was an action of ejectment commenced in the court below by the present plaintiff in error.

The case is fully stated by the court.

Messrs. **Francis Lee Smith** and **H. Winter Davis**, for plaintiffs in error:

The plaintiffs in error insist that the instruction given to the jury by the court below is erroneous.

McMechen v. Marman, 8 Gill & J. 57, 73, 74, 75; *Jackson* v. *Graham*, 3 Cai. 188; *Jackson* v. *Scott*, 18 Johns. 94; *Jackson* v. *Parker*, 9 Cow. 83; *Jackson* v. *Walker*, 4 Wend. 462; *Culbertson* v. *Martin*, 2 Yeates, 443; *Remington* v. *Linthicum*, 14 Pet. 84; *Young* v. *Algeo*, 3 Watts, 223. 227; *Jackson* v. *Bush*, 10 Johns. 223.

In ejectment against a defendant in an execution or those claiming under him, the purchaser of land at a sheriff's sale, having complied with the terms of sale, is entitled as plaintiff to recover the possession against said defendant or his alienee, and the defendant will not be permitted to controvert the title by showing it to be defective, or by setting up a better outstanding title in a third person.

Remington v. *Linthicum*, *McMechen* v. *Marman*, above cited, also *Cooper* v. *Galbraith*, 3 Wash. C. C. 546, 550; *Jackson* v. *Chase*, 2 Johns. 84; *Jackson* v. *Pierce*, 2 Johns. 221; *Jackson* v. *Deyo*. 3 Johns. 422; *Bayard* v. *Colefax*, 4 Wash. C. C. 38; Cox, Digest, 272, sec. 41; *Jackson* v. *Davis*, 18 Johns. 7; *Jackson* v. *Van Slyck*, 8 Johns. 487.

The trusts in the deed from Brown and wife to Richard D. Fenby being fraudulent and void, the deed passed an absolute title to Fenby, of the land in controversy.

2 Bac. Abr. Bouvier's ed. 298, 305; *Hughes* v. *Edwards*, 9 Wheat. 493.

The terms of trust, in the deed from Brown and wife to Fenby, not being established by any evidence *aliunde*, the said trust can be considered as existing, if at all, only from the date of the deed.

Hill, Trust. top pa. 87, 87, note 2.

Messrs. **J. Mason Campbell** and **James Malcolm**, for defendant in error:

In support of the correctness of the instruction, the defendant in error will rely on the following points and authorities:

1. This action of ejectment being brought in Maryland, and the common law of that state being unchanged, the plaintiff must show in evidence a legal title, to enable him to recover. The Maryland statute (1810, ch. 160), which authorizes a sale on execution at law, of equitable estates, does not change an equitable into a legal title, and a purchaser must assert his rights in their appropriate form.

Carroll v. *Norwood*, 5 Harr. & J. 155; *Wilson* v. *Inloes*, 11 Gill & J. 351; *Hammond* v. *Inloes*, 4 Md. 138.

The deed, from Brown and wife to Fenby, given in evidence, gave him but a dry legal title with no beneficial interest in himself, and so vested nothing in him which could be attached or taken in execution upon process against him.

Houston v. *Nowland*, 7 Gill & J. 493.

The plaintiffs in error seek, by a charge of fraud against the deed, to extinguish the trust. But if the deed be void against creditors, the statute of Elizabeth avoids it *in toto*. If the deed be wholly void, for fraud or any other cause, then the foundation of the plaintiffs' title fails, for without it Fenby had no estate.

Mackie v. *Cairns*, Hopk. Ch. 405; 5 Cow. 580; 17 Me. 369; 4 Yerg. 164; *Goodhue* v. *Berrien*, 2 Sandf. Ch. 630; *State* v. *Bank of Maryland*, 6 Gill & J. 231.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This case comes up upon a writ of error to revise the judgment of the circuit court for the district of Maryland, in an action of ejectment, brought by the plaintiff in error against the defendant, to recover certain lands lying in that state.

The plaintiff, in order to show title to the land claimed, offered in evidence, that Smith & Butt, lessors of the plaintiff, having sold cotton to Fenby & Brother, of Baltimore, in 1857, drew on them for the sum due, and their bills were protested to the amount of $13,708. They, thereupon, brought suit on the 3d of June, 1857, and recovered judgment in the circuit court on the 6th of April, 1858; and on the 10th of the same month they issued a fieri facias, which was, on the same day, levied by the marshal on the land in controversy; and *after- [*402 wards, on the 2d of September next following, sold at public auction. At this sale the lessors of the plaintiff were the purchasers, and received from the marshal a deed in due form.

The plaintiff further proved that a certain Robert D. Brown was seised in fee of the land at the times hereinafter mentioned, and read in evidence a deed from him and his wife, dated April 6th, 1857, whereby they conveyed it to Richard D. Fenby, one of the defendants, against whom the judgment was afterwards obtained, stating at the time he offered it in evidence, that he impeached the trusts in the deed for fraud, and intended to show such trusts to be void against him.

The deed purports to be in consideration of $7,800.50, and recited that the land was pur-

chased by Fenby, from Brown, on the 13th of March, 1852, and then grants to Fenby, "as trustee," the lands in question in fee simple, in "trust" for the sole and separate benefit of Jane Fenby, the wife of the said Richard D. Fenby, for and during the term of her natural life, in all respects as if she was a *feme sole*, free from all liability for the debts of her husband, and from and immediately after the death of the said Jane Fenby, in trust for such child or children and descendants of a deceased child or children of the said Jane, as she may leave living at the time of her death. Such child, children, and descendants, to take *per stirpes*.

The deed gives authority to Fenby to sell and dispose of any part of the trust property, and to invest the proceeds in safe securities upon the same trusts.

The plaintiff further offered evidence tending to prove that Fenby was hopelessly insolvent when this deed was made, and that he was in possession of the land from the time he purchased it in 1852.

The defendant (McCann) then read in evidence a deed from Fenby to him, dated March 23, 1858, purporting to be made in execution of the power conferred by the trust deed, and conveying the property in fee simple in consideration of $22,000.

And the plaintiff thereupon offered evidence tending to show that this deed was intended to cover the previous fraud of the one to Fenby; that McCann was privy to this design, **403***] *and co-operated in it; that he paid no money; and that notwithstanding this deed, Fenby continued in possession after the land had been advertised for sale by the marshal, and that the possession was delivered to McCann only a few days before the sale was actually made.

The defendant offered evidence for the purpose of rebutting the charge of fraud against Fenby and himself, and upon the whole testimony as offered, several instructions to the jury were moved for by each of the parties, which were all refused, and the following instruction given by the court:

"The deed from Robert P. Brown to Richard D. Fenby, of the 6th of April, 1857, conveyed only a naked legal interest to said Fenby, which could not be levied on and sold under a fi. fa. issued on a judgment against him, he having no beneficial interest therein. And as the plaintiff, to sustain this action, has offered the said deed in evidence, and as without it there is no evidence of any legal title whatever in said Fenby at the date of the levying of said fi. fa., or at any other time, the plaintiff cannot recover in this action."

As this instruction disposed of the case, it is unnecessary to state at large the prayers offered by the respective parties, or the testimony upon which they respectively relied to prove or disprove the imputations of fraud.

In discussing the question thus presented by the decision of the court below, it is proper to state, that in Maryland the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence; and the action of ejectment is the only mode of trying a title to lands. And in that action the lessor of the plaintiff must show a legal title in himself to the land he claims, and the right of possession under it, at the time of the demise laid in the declaration, and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery; nor is the defendant required to show any title in himself, and if the plaintiff makes out a prima facie legal title, the defendant may show an elder and superior one in a stranger, and thereby defeat the action.

*The law upon this subject is briefly [*404 and clearly stated by the court of appeals of the state, in 11 Gill & J. 358, and 4 Md. 140, 173.

We state the law of Maryland upon this subject, because very few of the states have preserved the distinction between legal and equitable titles to land. And in states where there is no court of equity, the courts of common law necessarily deal with equitable interests as if they were legal, and exercise powers over them which are unknown to courts of common law, where a separate chancery jurisdiction is established. Cases, therefore, decided in states which have no courts of equity, as contradistinguished from courts of common law, can have no application to this case so far as trusts or any other equitable interest is involved. And even in states where the chancery jurisdiction has been preserved, the decisions of their respective courts do not always harmonize in marking the line of division between law and equity. And as the title to real property, whether legal or equitable, and the mode of asserting that title in courts of justice depend altogether upon the laws of the state in which the land is situated, cases like that now before the court are questions of local law only, in which we must be guided by the decisions of the state tribunals.

Since the passage of the act of George II., which made land in the American colonies liable to be sold under a fi. fa. issued upon a judgment in a court of common law, the process of extent has fallen into disuse, and is regarded as obsolete in Maryland. But this statute did not interfere with the established distinction between law and equity, and an equitable interest could not be seized under a fi. fa. until the law of Maryland was in this respect altered by an act of assembly of the state in 1810. But this law does not convert the equitable interest into a legal one, in the hands of the purchaser. He buys precisely the interest which the debtor had at the time the execution was levied; and if he purchased an equitable interest and desires to perfect his title, he must go into equity, where the court will decree a conveyance to him from *the holder of the legal title, [*405 if he shows that the debtor was entitled to it at the time of the levy.

But the statute of George II. which authorized the sale of lands under a fi. fa., did not authorize the sheriff to deliver them, nor the court to issue the writ of *hab. fac. poss.* upon the return of the process. And the result of this was, that the purchaser was compelled to bring an ejectment to obtain the possession, in which as we have already said, he must show a legal title to the land; and, consequently, must show that the debtor, at the time of the levy, had a legal title, and such a title as was

subject to seizure and sale under the fieri facias. And if the debtor had but an equitable title, the purchaser was compelled to go into equity, and obtain a legal one before he could support an action of ejectment against the party in possession. A more summary process in certain cases has been since provided, by a law of the state passed in 1825. But up to that time the principles above stated were the settled law of the state; and remain so, except in so far as they are altered by that act of assembly. It is unnecessary to state the provisions of that act, because the plaintiff did not proceed under it. He has resorted to the action of ejectment to obtain possession, and cannot recover, unless he can show a legal title to the premises. It is not, however, every legal interest that is made liable to sale on a fi. fa. The debtor must have a beneficial interest in the property. And in *Houston* v. *Newland*, 7 Gill & J. 493, where a party had sold the land to another bona fide, but had not conveyed the legal title, the court held that the title remaining in the vendors was a barren legal title, in trust for the purchaser, and could not be sold for the payment of his debts. And a still later case, *Matthews* v. *Ward*, 10 Gill & J. 443, 451, 452, where land had been conveyed to a trustee, in trust for third persons, and the *cestuis que trust* had died without heirs, the court decided that the land escheated to the state, although the heirs of the trustee to whom the legal estate was conveyed were still living, and said that "the rights of such trustee, who is a mere instrument, are treated with no respect, and the state deals with the property as her own." 406*] *We proceed to apply these principles to the case before us. The deed to Fenby, in plain and unambiguous words, conveyed to him a naked legal title; he took under it no interest that could be seized and sold by the marshal, upon a fi. fa.; and the deed of the marshal, therefore, conveyed no title to the lessors of the plaintiff. Standing only upon this title, derived under this deed to Fenby, and showing no other title, he certainly could not recover in an action of ejectment.

But the plaintiff offers evidence to prove that the trusts in the deed are fraudulent, and that Fenby purchased the land and procured the deed from Brown in this form, in order to hinder and defraud his creditors. And he offers this proof to show that Fenby had a beneficial interest in the property, liable to be seized and sold for the payment of his debts.

The proposition to enlarge or change the legal estate of the grantee in a deed, by parol evidence, against the plain words of the instrument, is without precedent in any court of common law. And in the case of *Remington* v. *Linthicum*, 14 Pet. 84, relied on by the plaintiff, the evidence was offered, not to change the estate limited in the grant, but to show that the grant was fraudulent and utterly void, and conveyed no interest whatever to the grantee named in it. The party offering the evidence did not claim under that deed, but against it. And if, in this case, the evidence was offered for a like purpose, and the deed proved to be fraudulent and void, it would defeat the plaintiff's action instead of supporting it.

He does not, however, offer the parol evidence for this purpose, but offers it to enlarge the estate of Fenby, and to show that he had not merely a barren legal title, but a beneficial interest, which was liable for the payment of his debts. But if the evidence were admissible, we do not perceive how the fraudulent character of the trusts, as against his creditors, could enlarge his legal interest beyond the terms of the deed. It is true he paid the money for the property. And if this circumstance could be supposed to create a resulting trust for the benefit of Fenby, it would be a mere equitable right exclusively within the jurisdiction of a court of chancery, and a court of common law could neither enforce it nor notice it; *and, consequently, it would not be a [*407 title upon which an action of ejectment could be maintained. But it obviously is not a case to which the doctrine of resulting trusts can be applied; for, as between Fenby and the *cestuis que trust*, he can have no equity against the express trusts to which he assented, and which, indeed, according to the plaintiff's allegation, he procured to be made. And when the deed is offered in evidence by the plaintiff, in order to derive to himself a legal title under it, the interests and estates thereby conveyed cannot be enlarged or diminished by testimony *dehors* the deed. The deed must speak for itself.

If these trusts are fraudulent, the lessors of the plaintiff have a plain and ample remedy in the court of chancery, which has the exclusive jurisdiction of trusts and trust estates. In that forum all of the parties interested in the controversy can be brought before the court, and heard in defense of their respective claims. But as the case now stands, the only interest which the plaintiff seeks to impeach is that of the *cestuis que trust;* yet they are not before the court, nor can they, by any process, be made parties in this ejectment suit, nor even be permitted to make themselves parties if they desired to do so, and cannot have an opportunity of adducing testimony in defense of their rights. Under such circumstances, an inquiry into the validity of these trusts would not only be inconsistent with the established principles and jurisdiction of courts of common law, but also inconsistent with that great fundamental rule in the administration of justice, which requires that everyone shall have an opportunity of defending his rights before judgment is pronounced against him.

The judgment of the circuit court is, therefore, affirmed.

Ex parte IN THE MATTER OF THE COMMONWEALTH OF KENTUCKY, one of the United States of America, by Beriah Magoffin, Governor, and the Executive Authority thereof, *Petitioner*, [*66

v.

WILLIAM DENNISON, Governor of the State of Ohio.

(See S. C. 24 How. 66-110.)

Jurisdiction of this court—when conferred by the Constitution, may be exercised without

NOTE.—Mandamus, *when will issue*—see note to 4 L. ed. U. S. 263, and note to 39 L. ed. U. S. 160. *Extradition of persons accused of crime, on demand of foreign governments.*

The surrender of fugitives from justice as between the states depends on art. 4, § 2, of the Con-

further act of Congress—when state is a party, suit may be in name of the governor—mandamus—delivery, by one state, of fugitives from another—constitutional provisions in regard to—what offenses they include—the right is absolute—practice—act of 1793—executive certificate conclusive—duty to deliver—no power to coerce governor.

This court may exercise its original jurisdiction in suits against a state, under the authority conferred by the Constitution and existing acts of Congress.

In all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and the court may regulate and mold the process it uses, in such manner as in its judgment will best promote the purposes of justice.

Where the state is a party, plaintiff or defendant, the governor represents the state; and the suit may be, in form, a suit by him as governor in behalf of the state, where the state is plaintiff; and he must be summoned or notified as the officer representing the state, where the state is defendant.

The writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which everyone is entitled where it is the appropriate process for asserting the right he claims.

The words (in the U. S. Constitution as to delivery by one state of fugitives from another) "treason, felony, or other crime," embrace every act forbidden and made punishable by a law of the state.

The word "crime" of itself includes every offense from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors" as well as treason and felony.

History and reason for this article in the Constitution, stated.

It included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found.

The right given to "demand" implies that it is an absolute right; and there is a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled.

The executive authority of the state is not authorized by this article to make the demand, unless the party is charged in the regular course of judicial proceedings.

The executive authority of the state upon which the demand is made, should be satisfied by competent proof that the party is so charged. The proceeding, when duly authenticated, is his authority for arresting the offender.

The duty of providing by law the regulations necessary to carry this compact into execution, is devolved upon Congress.

The act of 1793, February 12th, as far as relates to this subject, recited.

The judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress; and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the state where the fugitive is found.

He has no right to look behind them, or to question them, or to look into the character of the crime specified in the judicial proceedings. The duty which he is to perform is merely ministerial.

That he must inquire and decide who is the person demanded, is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty.

Whether the charge is legally and sufficiently laid in the indictment is a judicial question to be decided by the courts of the state in which the crime was committed, and not by the executive authority of the state upon which the demand is made.

The act of Congress declares, that "it shall be the duty of the executive authority of the state," to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding state.

The words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created.

If the governor refuses to discharge his duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him.

Argued Feb. 20, 1861. Decided Mar. 14, 1861.

ON PETITION for a mandamus, or for a rule on William Dennison, the governor of Ohio, to show cause why a mandamus should not be issued by this court, commanding him to cause Willis Lago, a fugitive from justice, to be delivered up to be removed to the state of Kentucky, having jurisdiction of the crime with which he is charged. The petition was filed and the motion for mandamus, or for a rule to show cause made by Mr. Thomas D. Monroe, Jr.

The court ordered that the motion be set down for argument three weeks thereafter, and that a copy of the order and petition and exhibits be served on the governor of Ohio. The petition of the commonwealth of Kentucky by Beriah Magoffin, governor, filed as above, set forth substantially the following state of facts:

The grand jury of Woodford county, Kentucky, indicted Willis Lago under an act of the state of Kentucky which became a law July 1, 1852, and which is still in force in Kentucky, which is as follows:

Sec. 1. If any free person, not having lawful or in good faith a color of claim thereto, shall steal or shall seduce or entice a slave to leave his owner or possessor, or if he shall make, or furnish, or aid, or advise in the making or furnishing a forged or false pass or deed of emancipation or other writing purporting to liberate a slave, or if in any manner he aid or assist a slave to make his escape or attempt to make his escape from such owner or possessor, he

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stitution of the U. S. As between the United States and foreign governments, the U. S. has always declined to surrender criminals unless bound by a treaty to do so. International law does not require it. Wheat. Int. Law, 171; 1 Op. Atty. Gen. 510; 1 Kent's Com. 39, n.; Hurd. Hab. Corp. 575; 2 Op. Attv. Gen. 359; Case of Jose Ferreira dos Santos, 2 Brock. Marsh. 492; U. S. v. Davis, 2 Sumn. 482; Matter of Metzger, 5 How. 176; 6 Op. Atty. Gen. 85; 1 Op. Atty. Gen. 68; 3 Atty. Gen. 661; 7 Op. Atty. Gen. 536.

To authorize arrest and removal from the state or country, it must appear on the application that the crime was committed in the state or country from which the requisition proceeds. *Ex parte* Smith, 3 McLean, 121, 6 Law. Rep. 57; 8 Op. Atty. Gen. 215; 1 Op. Atty. Gen. 83; 8 Op. Atty. Gen. 306; case of Vogt, 14, Op. Atty. Gen. 281.

No state can deliver up fugitive, to foreign government. 3 Op. Atty. Gen. 559; Holmes v. Jennison, 39 U. S. (14 Pet.) 540.

Nor can state courts interfere with the surrender. Marshal may disregard their process. 6 Op. Atty. Gen. 227, 237, 270, 290, 466, 713; 7 Op. Atty. Gen. 482.

Requisitions should issue from supreme political authority of demanding state and be addressed to secretary of state. 8 Op. Atty. Gen. 240; 4 Op. Atty. Gen. 201; 7 Op. Atty. Gen. 6; 8 Op. Atty. Gen. 420.

It need not be founded on an indictment or on a warrant issued on one. British Prisoners, 1 Wood. 2 M. 66; *In Re* Thomas, 12 Blatchf. 370.

In complaint for warrant of extradition, the crime must be clearly set forth and facts constituting it stated. It need not aver personal knowledge. *In Re* Fares, 7 Blatchf. 34; 7 Blatchf. 345, 491; 2 Abb. U. S. 346; 40 How. Pr. 107; *Ex parte* Van Hoven, 4 Dill. 411; 22 Int. Rev. Rec. 217.

No person will be surrendered to a foreign power where the United States has jurisdiction to punish him for the offense charged. Op. Atty. Gen. 85; 8 Op. Atty. Gen. 215, 306; *In Re* Vogt, 18 Int. Rev. Rec. 18.

Court will not revise decision of commissioner on the question of fact as to criminality of accused, or

shall be confined in the penitentiary for a period of not less than two nor more than twenty years.

Sec. 2. A free person convicted of an attempt to persuade or entice away a slave from the service of his master or owner or the person in possession of the slave, or if convicted of the attempt to persuade or induce by any means a slave to run away from his master or owner or person in possession of him, shall be confined in the penitentiary for a period not less than two years nor more than twenty-five years.

February 10, 1860, Beriah Magoffin, governor of Kentucky, made demand upon William Dennison, the governor of Ohio, for the person of said Willis Lago, as a fugitive from justice, the said Lago having fled from Kentucky after the commission of the alleged crime, and being found in the state of Ohio, to be delivered up and removed to the state of Kentucky, having jurisdiction of the crime. This demand was accompanied by a copy of the indictment above mentioned. One William S. Manson was appointed agent of the executive authority of Kentucky to receive the said fugitive. Said Manson duly presented the above demand and copy of indictment to the governor of Ohio.

Governor Dennison referred the matter to the Attorney General of Ohio, and after receiving the opinion of the Attorney General, he refused to deliver up the fugitive Lago, and transmitted to the governor of Kentucky, as his reason therefor, the opinion of the Attorney General of Ohio. In this opinion, the Attorney General, after stating that the offense was not treason or felony, though it was a crime under the law of Kentucky, went on to say that the offense charged was not a crime in Ohio, nor was it an offense affecting the public safety, nor was it *malum in se*. He stated as his opinion that the rule which should govern cases like the present was that which "holds the power" (that is, the power of delivering up fugitives from justice from another state on the demand of the executive of that state), "to be limited to such acts as constitute either treason or felony by the common law, as that stood when the Constitution was adopted, or which are regarded as crimes by the usage and laws of all civilized nations." He also added, that even in such cases the power of the executive of a state to deliver up fugitives from justice was only to be exercised in accordance with a sound legal discretion. Governor Magoffin replied to the letter of the governor of Ohio, transmitting the opinion of the Attorney General, at considerable length, criticising that opinion and stating, as the true doctrine, that it was for each state to determine for itself what were or were not crimes within the meaning of the Constitution and the acts of Congress, and that the executive of the state called upon to deliver up the fugitives had no discretion in the matter.

Governor Dennison made no reply to this letter of Governor Magoffin, but in the language of the petition "still fails and refuses, in violation of his legal obligation under the Constitution and laws of the United States, and of the rights and dignity of the commonwealth of Kentucky, to cause such fugitive from justice, Willis Lago, to be arrested and delivered to said agent, William S. Manson, to be removed to the state of Kentucky, having jurisdiction of the crime with which he is charged.

Upon the above state of facts, the application for mandamus came up for argument.

Messrs. **Cooper, H. Marshall, J. W. Stevenson, Crittenden,** and **Thos. B. Monroe, Jr.,** in support of the motion:

The extradition of Lago has been duly demanded by the governor of Kentucky from the governor of Ohio, but the latter "refused and still refuses" to surrender Lago, and this refusal, it is insisted, is a "violation" by the governor of Ohio "of his legal obligation under the Constitution and laws of the United States." Hereupon application is made in the name of the "commonwealth of Kentucky to the Supreme Court of the United States, praying it to issue, as an act of original jurisdiction, the writ of mandamus against William Dennison, governor of Ohio, compelling him to deliver up said Lago."

I. The commonwealth of Kentucky is, properly, the plaintiff in this case.

Tapping on Mandamus, 289.

The duty prescribed by the Constitution and law was to have been performed by the defendant, Dennison, as the officer wielding the executive authority of the state of Ohio. He is, therefore, the proper person against whom to institute the proceedings.

II. Is mandamus the proper remedy? It has been used since the days of Edward II. in England, and has been the suppletory police power of the kingdom.

See Tapp. on Mand. 5-30; Cowp. 378, 2 Barn.

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as to weight of evidence. *In Re* Stupp, 12 Blatchf. 501; *In Re* Macdonnell, 11 Blatchf. 170; Matter of Vandervelfen, 14 Blatchf. 137; Matter of Wahl, 15 Blatchf. 334; Matter of Wiegand, 14 Blatchf. 370.

Extradition proceedings do not involve, in their nature, the right to accused not to be prosecuted upon any other charge than that upon which his extradition is asked. U. S. v. Lawrence, 13 Blatchf. 295.

Persons may be surrendered under a treaty made after crime was committed and after he came to the U. S. He has not acquired a right of asylum. *In Re* Giacomo, 12 Blatchf. 391.

The President may decline to surrender even after accused has been held and court has refused to discharge on habeas corpus, on ground case is not within treaty, or for want of sufficient evidence. *In Re* Stupp, 12 Blatchf. 501.

As to the offenses for which extradition may be had, see the various treaties and the following decisions. 8 Op. Atty. Gen. 106; 7 Op. Atty. Gen. 642; 6 Op. Atty. Gen. 85, 431, 642, 761; Matter of Metzger, 5 N. Y. Leg. Obs. 83; Gibson's Case, 12 Op. Atty. Gen. 326; Deserter's Case, 12 Op. Atty. Gen. 463; Farez' Case, 2 Abb. U. S. 346; 7 Blatchf. 845; 40 How. Pr. 107; *In Re* Stupp, 11 Blatchf. 124.

Proof of criminality should be full enough before magistrate to warrant commitment for trial. *Ex parte* Kaine, 3 Blatchf. 1; U. S. v. Warr, 3 N. Y. Leg. Obs. 346; Matter of Heilbronn, 12 N. Y. Leg. Obs. 65; 4 Op. Atty. Gen. 201, 330; *In re* Kelley, 2 Low. 339. *In Re* Macdonnell, 18 Int. Rev. Rec. 11; *In Re* Farez, cited above.

Inquiry will not be into grade of guilt. *In Re* Palmer, 18 Int. Rev. Rec. 84.

As to the evidence to be produced and its authentication and the proceedings before magistrate or commissioner, see *Ex parte* Ross, 2 Bond. 252; *In Re* Heinrich, 5 Blatchf. 414; *In re* Dugan, 2 Low. 367; *In Re* Macdonnell, 11 Blatchf. 170; *In Re* Stupp, 12 Blatchf. 501; *In Re* Farez, cited above; *In Re* Thomas, 12 Blatchf. 370.

Alleged fugitive from justice may be arrested a second time on a new complaint. 6 Op. Atty. Gen. 691.

& C. 198; Burrows, 1265, 1268; 15 East, 135; 3 Bl. Com. 110.

In this court it is acknowledged as an action, a case, rather than as a "prerogative writ."

12 Pet. 614; 2 Pet. 450.

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety of issuing a mandamus is to be determined.

1 Cranch. 170; 3 How. 99.

There is no remedy for the grievance inflicted on the state of Kentucky by the refusal of Governor Dennison, unless the mandamus applied for will lie. If mandamus will lie in any case where the Supreme Court exercises original jurisdiction, all considerations and all conditions concur to point it out as the proper remedy in this case; for,

1. The duty to be performed is single, simple, only ministerial, and public in its nature and office.

2. The party directed to perform it is certainly named.

3. No other adequate remedy exists or is prescribed by law.

4. The duty is distinctly prescribed by the Constitution and the act of 1793.

5. The office held by Mr. Dennison does not shield him from the performance; "it is the nature of the duty which determines the propriety of mandamus as a remedy."

The Supreme Court of the United States has never adjudicated the question of this remedy as now it is presented.

In *U. S.* v. *Lawrence*, 3 Dall. 53 (A. D. 1795), this court was applied to as a court of original jurisdiction and it entertained the jurisdiction. The case was disposed of on the point that the duty of Judge Lawrence involved the exercise of discretion.

In *Marbury* v. *Madison*, 1 Cranch, 75, the mandamus was refused because the act of 1789 was unconstitutional in so far as it disturbed the constitutional distribution of the judicial power of this court. The application was to this court in its original jurisdiction, whereas the case belonged to it only under its appellate jurisdiction.

In *McIntire* v. *Wood*, 7 Cranch, 504, the point was as to the power of the circuit court of the United States, and the same remark applies to *McClung* v. *Silliman*, 6 Wheat. 600.

Ex parte Roberts, 6 Pet. 216, and *Ex parte Davenport*, 6 Pet. 664, were applications to control the judge of an inferior court by mandamus, which was refused because of the discretion the inferior officer had a right to exercise. *Ex parte Bradstreet*, 8 Pet. 588; *Ex parte Story*, 12 Pet. 339, were cases addressed to this court in the exercise of its appellate jurisdiction; so was the case of *Kendall* v. *The U. S.* 12 Pet. 525-655. *Ex parte Guthrie*, and all the rest of the cases of the applications for mandamus, have been to this court as an appellate court.

The judicial power of the United States is vested by the Constitution in the Supreme Court and in such inferior court as Congress may from time to time establish. This power "shall extend" to a number of classes of cases, among which is "all cases in law or equity arising under this Constitution, the laws of the United States," etc., etc., and within the enumerated classes "in all cases in which a state shall be a party, the Supreme Court shall have original jurisdiction."

It is respectfully submitted, that under these constitutional grants of power and jurisdiction, this court may *debito justitiæ*, entertain the application for mandamus while a state is a party, and this without resort to the act of Congress distributing the means of enforcing the jurisdiction. The judicial power, so far as this jurisdiction of the court is concerned, is vested by the Constitution. It would neither remain dormant nor would it expire, though the legislative power had never passed a law to authorize certain processes to assert such jurisdiction. We adopt the views taken by the counsel in the case of *The U. S.* v. *Peters*, 3 Dall. 126.

If mandamus would then be granted by the court of King's bench, *debito justitiæ* it can be issued in a case of original jurisdiction upon a proper showing by this court, and the express power is extended by the 14th section of the judiciary act of 1789, if the writ is necessary to the exercise of the jurisdiction belonging to the court.

If mandamus should not be regarded as "a prerogative writ," but as an action, a case, it falls in this matter directly within the vested power and original jurisdiction of the court, and can be entertained independently of the judiciary act as a constitutional "flower" of this court.

III. The original jurisdiction of this court is limited to those cases in which foreign ambassadors, ministers, consuls and American states are interested, but in this range it has no limit. There is no judge who can interpose to exercise power over them, but this court in its original jurisdiction. From the very nature of the Constitution, the great police power of the mandamus, as between the states, is a necessity to the exercise of the jurisdiction conferred on this court.

It is the case which gives the jurisdiction, not the court.

Martin v. *Hunter's Lessee*, 1 Wheat. 304.

IV. Under the precepts of the law of nations, the obligation to deliver fugitives from justice touched only a few classes of criminals—those whose crimes "touched the state," or were so enormous as to make them *hostes humani generis*—poisoners, assassins, etc. These were delivered up when convicted, and sometimes before. This was done for comity.

Vattel, book 1, ch. 19; book 2, ch. 6.

The character of this obligation was more frequently rendered certain by treaty. But the Constitution of the United States has among the states of the Union extended and enlarged the rule of the publicists. Our states obey the demand where a person is charged with treason, felony or other crime. Crime is synonymous with misdemeanor (4 Bl. Com. 5), and includes every offense below felony, punished by indictment as an offense against the public.

9 Wend. 222.

We know that in the first draft of this clause of the Constitution the words "high misdemeanor" were used. They were stricken out and "other crime" inserted, because "high mis-

demeanor" might be technical and too limited. The framers wanted to "comprehend all proper cases."

5 Elliott, 487.

The Constitution is harmonious in its complicated structure. As the Federal government is the repository of the power over foreign intercourse, so the inter-state intercourse is established upon a fixed and stable basis by dispensing with comity and the rule of the publicists, and making the obligation to render criminals to the jurisdiction they have offended, a perfect obligation in express constitutional compact. The states have left themselves no discretion on this subject. They cannot enlarge, diminish, abridge or modify the constitutional arrangement: "no state shall, without the consent of Congress, enter into any agreement or compact with another state," etc.

Congress cannot waive an express and mandatory provision of the Constitution. A person charged with treason, felony, or other crime, etc., shall be delivered up, etc. Can two of these states negotiate with each other, a modification of this obligation? Certainly not. Can they with the consent of Congress? Certainly not. It is a fixed, well defined and perfect obligation which furnishes all the essentials for its own execution, if properly considered as an inter-state obligation, subject to the judicial grants of the government to enforce its due and proper execution. It expresses plainly what is to be done. The executive of the state is a mere instrument of the Constitution pointed out by the law, because he holds the executive authority of his state, and is a sworn officer of the Constitution of the United States, bound by his oath to observe its mandate and the laws of the United States made in pursuance thereof, as the supreme law of the land, even in preference to those of his own state.

It would not be within the right or competency of the state of Ohio to refuse this delivery. All its departments could not make a law effective to prevent it. Can its executive alone avoid it? If he can, why may not any one else, no matter how appointed or in what way qualified?

The state of Ohio must be considered as willing to abide by its constitutional obligations; for this refusal is not the act of the government of the state, it is only the act of its executive, of one department of its government. The state is bound so strongly by the term of the Constitution, it cannot refuse. If, then, it is consenting and Kentucky is demanding, and only Mr. Dennison refusing, it remains to be seen whether there resides in the judicial department of the Federal government power to compel him to the performance of a ministerial duty assigned to him by law, in order to execute the inter-state covenants inscribed in the Constitution. In that memorable case of *Prigg* v. *Pennsylvania*, 16 Pet. 539, several leading principles of construction were asserted, to the observance of which we now invite the attention of this court.

1st. When the end is required, the means are given. When the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted.

2d. The general government is bound. through its own departments, legislative, judicial, or executive, as the case may be, to carry into effect all the rights and duties imposed upon it by the Constitution.

We are perfectly aware that reliance may be placed on the very case from which these principles are extracted, to prove that the obligation to deliver the fugitive from justice is "exclusively Federal," and that, therefore, it may be insisted that Congress cannot direct a state executive authority to execute it, but must impose this duty on some person who will be amenable as belonging to one of the departments of the Federal government. The court says the obligation is "exclusively Federal," that "the states cannot be compelled to enforce it." From this *dictum* the inference is drawn, that if the person indicated to perform the duty (though it be only ministerial) holds any office under the state government, this court cannot or will not compel him to perform the duty, but will wait for Congress to remodel the legislation of 1793, so as to make the person exclusively a Federal officer. We resist the propriety of such inference from the points decided by the court in *Prigg's Case*. The court alluded to the resort which the claimant of a fugitive from service must have to the judiciary to ascertain a fact, in order to support a right upon the finding of the fact, that did intimate that the action of the state magistracy was voluntary though valid unless prohibited by the state. In the case of a fugitive from justice, however, there is no fact to be ascertained, no question to be adjudicated, no necessity to appeal to anyone to support a right, but simply to deliver upon a demand. Will it be replied that to afford even this facility Congress must by law indicate who is to perform the duty? We rejoin that Congress has so indicated by the act of 1793. As well might the defendant plead his citizenship or inhabitancy in Ohio to relieve him, as that he is relieved by being governor or holding an office by authority of the state. The power of this government extends so far that the performance of a public duty may be demanded and the incumbent of a particular office may be required to perform it, especially where the duty is only ministerial, though at the same time he may be in office in the state. We think it is eminently proper that the executive authority of the state should be the power indicated for the performance of this duty; because that officer is at the same time sworn to support the Constitution of the United States, and the laws of Congress made in pursuance thereof; and because he represents the state on which the demand is made, and bound by the constitutional compact on which the demand is founded.

The obligation is said to be "exclusively Federal." Does it not bind the state of Ohio? Is it not from its power the compact subtracts? We think the state has peculiarly come under the obligation expressed in the clause in question. Its hands are tied by the clause. Without the clause it might have been guided by its own discretion or by comity—now it is obliged by the terms of the covenant to which it has consented. It may be it cannot be compelled to enforce the delivery of the fugitives. It may be the general government is compelled through its own department "to carry this into effect;" but that necessity does not shift the obligation. The citizen owes obedience to the law, and is under obligation to perform the

duties the law enjoins. But if he fails, the court enforces the law and secures the right which was infringed by the violation of the duty. Nothing can be more familiar than an obligation resting upon one party, and the right and power to enforce its execution vested in another. We submit very respectfully that this is just the case under our Constitution. The obligation to surrender the fugitive from justice rests upon the state—the power and duty to enforce the obligation resides in the general government. The state of Virginia failing in 1790 to deliver certain fugitives upon the demand of Gov. Mifflin of Pennsylvania, he brought the facts before the President, and the act of 1793 was the consequence, whereby the executive of the state was directed to perform the duty answering such demand. Every condition has been met. They who would escape the conclusion, at which we wish to arrive must take the position, not only that in our system the states may prohibit the use of their state agencies to the general government in carrying the supreme law into effect within their boundaries; but this further position, that it is not in the power of the Federal government to demand of anyone in a state to perform a duty essential to the execution of the obligations inscribed in the Constitution.

We may well ask the Supreme Court to pause before ruling to this extent. When we remember that all executive, legislative, and judicial officers in the several states, are required, by the express letter of the Constitution of the United States, to be sworn "to support the Constitution," and that the "laws of Congress made in pursuance thereof are the supreme laws of the land," overriding all state laws coming into conflict with them—that this body of state officers is bound solemnly to render obedience primarily to this supreme law, even in their respective jurisdictions, and though opposed to their state laws, it is difficult to comprehend the wisdom of that policy which teaches that those states can prohibit the use of these agencies in carrying into effect those very laws which the state has consented to observe as the supreme law, and its agents have been sworn to support as paramount.

We submit to the court, that the case of *Prigg* v. *Pennsylvania*, 16 Pet. 539, has been modified by the subsequent decisions of *Moore* v. *The People of Illinois*, 14 How. 13, so far at least as to authorize state legislation, which is ancillary to the effectuation of the obligation to be "carried into effect" by the Federal power. We hope the court will not carry the exclusive action of the Federal power so far as to say that it cannot indicate "the executive authority of a state," as the instrument to perform the purely ministerial act required by the 2d section, 4th article of the Constitution.

V. The duty required by the governor of Ohio in arresting a fugitive from justice, results in an express obligation of his state, which he, as the executive authority of that state, is directed by the act of 1793 to carry out. He has no judgment to exercise touching the point of arrest. He cannot even hear a question on the point of identity of person that a judge might hear on habeas corpus. He cannot consider the question of guilt or innocence.

9 Wend. 221.

We refer to *Clark's Case*, because it is a strong case adjudicated in the better days of the republic, by a patriotic public officer, who strove only to perform his duty under the law.

May every state executive at pleasure violate the Constitution in its most direct mandate and most express obligation? Has the judicial power an arm not strong enough to reach him? If so, the obligations of the Constitution may at any time and under any pretext be avoided; the instrument is a myth.

Governor Dennison has mistaken his power in this matter, by assuming the discretion to judge in regard to the alleged crime. The words of the Constitution are unambiguous. That the crime is to be judged by the law of the state through whose executive the demand is made, appears from the Constitution itself; for the object of the delivery of the fugitive is "that he may be removed to the state having jurisdiction of the crime." To say that the authority on whom the demand is made shall judge of the guilt of the party, or of the fact of the crime, or whether the alleged act is a crime, is to nullify the sense, object, and intent of the framers of the Constitution, and to assume a supervisory power by the executive of a state over the law making and police powers of another state. The police power of the states was reserved, and has never been surrendered to the Federal government.

Moore v. *The People of Illinois*, 14 How., 18; 11 Pet., 139.

The governor of Ohio, in refusing the demand, has not denied his general responsibility under the Constitution and law of the United States to make delivery of a fugitive from justice. His refusal was based upon the allegation that the offense charged in the Kentucky indictment was not crime, according to the signification of that word in the Constitution. To confine the terms to such offense as was denominated crime at the date of the Constitution would give a restrictive operation to that instrument, which would vastly impair its adaptation to the progress and wants of society. It would, in effect, destroy the force of this clause of the Constitution at its inception; and instead of placing the states in bonds of mutual obligation to vindicate the jurisdiction of each other through future years, would make each a supervisor of the police powers of the others, and, by reason of conflicting policies in their progress, would inevitably lead to alienation, confusion, and ultimate discord. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a lapse of ages, the events of which were locked up in the inscrutable purposes of Providence; hence its powers are expressed in general terms.

1 Wheat., 305, 326.

It only remains for the counsel for the demandant to say that the state of Kentucky, in bringing this case before the Supreme Court, pursues the law as it exists, and asks its enforcement if the law can be enforced. If the act of Congress has exceeded the power vested in Congress by the Constitution, and we have been since 1793 acting through instruments over which the government has no control, Kentucky desires, through the Supreme Court, to know the fact, so that Congress may without delay so

treat this important subject as hereafter to assure the faithful and prompt execution of this clause of the Constitution. To it it is a vital question, as to all the other states in fact, whose institutions are similar to its.

Mr. **Christopher P. Wolcott,** against the motion:

I. The government of the United States is one of limited and enumerated powers, derived primarily from the specific grants of the Constitution, which is at once the source and the law of all its being. It is a necessary correlative of this proposition, and one declared by the fundamental law itself, that each state still retains complete, exclusive, and supreme power over all persons and things within its limits, where that power has not been specially granted or restrained by the Constitution, and that in respect to all this mass of undelegated and unprohibited power, the states stand to each other and to the general government as absolutely foreign nations.

Gibbons v. *Ogden*, 9 Wheat., 203, 208; *Brown* v. *Maryland*, 12 Wheat., 419, 443; *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Pet., 251, 252; *Buckner* v. *Finley*, 2 Pet., 586, 590; *New York* v. *Miln*, 11 Pet., 102, 136; *U. S. Bank* v. *Daniel*, 12 Pet., 32, 34; *Rhode Island* v. *Massachusetts*, 12 Pet. 720; *License Cases*, 5 How., 504, 588.

II. The judicial department of the Federal government, sharing of necessity the intrinsic quality which marks that government in its unity, is also one of limited and specific powers.

The authority of the judicial department is restrained, not only by the limitations specially affixed to it, but also by those more general considerations which grow out of the very nature and purpose of a Federal government. Thus the judicial power of the United States cannot extend to a controversy in which a state may—even by a purely civil action—pursue a citizen of another state for his violation of its municipal laws. Though in that instance, the controversy would, as to its subject-matter, be one proper for judicial cognizance in the general sense of that term, and would, also, in respect of its parties, fall within the enumerated cases; yet no tribunal of the United States could entertain it, because all matters of merely internal concern have been kept by the states for their own original, exclusive and sovereign control.

New York City v. *Miln*, 11 Pet. 139; *License Cases*, 5 How. 588.

III. The Supreme Court of the United States, while fettered by each of the conditions so attaching to the whole judicial department—of which it is simply the highest organ—has been otherwise so narrowly confined as to permit it to wield in an original form, only a very scant degree of the scant power confided to the range of the judicial department. Of necessity all judicial power must be exerted in an original or appellate form, and the Constitution has declared the precise cases in which, under either of these forms, the judicial power of the United States may be imparted to the Supreme Court.

The original jurisdiction is expressly limited to—

1. Cases "affecting ambassadors, other public ministers or consuls."

2. Cases "in which a state shall be a party;" and "since the adoption of the 11th Amendment—in which a state shall be the plaintiff or other pursuing party." It is not enough that it may be "consequentially affected or indirectly interested."

Fowler v. *Lindsey*, 3 Dall., 411; *U. S.* v. *Peters*, 5 Cranch, 115, 139; *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 850; *U. S. Bank* v. *Planters' Bank*, 9 Wheat. 904, 906; *Wheeling Bridge Case*, 13 How. 518, 559.

IV. The Constitution does not of itself vest any power of action in the Supreme Court. It simply enables the court—under the regulating control of Congress—to exert judicial authority in the prescribed cases; but the existence in the court, of the power itself and the methods and instruments of its exercise, depend on the affirmative legislative action of Congress. The Supreme Court, in respect of both forms of its jurisdiction, is the organ of the Constitution and the law.

Chisholm v. *Georgia*, 2 Dall., 419, 432, 452; *Marbury* v. *Madison*, 1 Cranch, 137, 173; *Bollman's Case, ex parte*, 4 Cranch, 75, 93, 94; *Wayman* v. *Southard*, 10 Wheat. 1, 21, 22; *New Jersey* v. *New York*, 5 Pet. 283, 290; *Crane's Case, ex parte*, 5 Pet., 190, 193; *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721. 722; *Kendall* v. *U. S.*, 12 Pet., 524, 622; *Christy's Cases, ex parte*, 3 How., 293, 322.

The Congress exercising its power in this behalf has regulated the jurisdiction of this court and its form and mode of proceeding.

1. The original cognizance of this court, as to cases in which a state is a party has been limited to "controversies of a civil nature"—a limitation not expressed by the Constitution, and yet certainly effectual.

The judiciary act, § 13.

2. Power has been given to the Supreme Court to issue the two named writs, the writ of prohibition and the "writ of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States."

Judiciary act, § 13.

The general authority to regulate its modes of proceeding conferred on this court by the "process act," § 2, and to issue "other writs" ancillary to the exercise of its jurisdiction conferred by the judiciary act, § 14, does not enable the court to enlarge the uses of the writ of mandamus. The express grant of this writ, as against a specific class of functionaries, is a clear exclusion of any such authority, and an emphatic prohibition against the use of the writ in any other case or for any other purpose.

Christy, ex parte, 3 How., 293, 322.

V. Arranging in continuous order the ascertained general conditions which limit the existence and exercise of the original jurisdiction of the Supreme Court in all possible cases—excepting only those "affecting ambassadors, other public ministers and consuls," of whom there is now no question—it will be seen that no controversy can gain a foothold here, unless it be—

1. Appropriate for the action of judicial as distinguished from political power.

2. Within the scope of "the judicial power of the United States, as distinguished" from the general mass of the judicial power reserved

by and to the several states for their own exclusive exercise.

3. Instituted by a state as the "entire party" plaintiff on the record—in virtue of such direct legal or equitable interest in the subject-matter as, according to the ordinary rules applied to other parties, entitles it to "move" a case at law or in equity—against a party subject to the control of the court.

4. Of a "civil" as opposed to one of "criminal" nature.

5. Conducted in a form of proceeding consistent with its subject-matter, with the character of its parties and with the regulations prescribed by Congress for the use of that form of proceeding.

But the controversy, if a writ of mandamus can be so called, moved for by the present application, has no one of all these vital characteristics. For—

VI. The subject-matter of the controversy excludes it from discussion or adjudication by any judicial tribunal.

1. It is not appropriate for the action of judicial power, since it only concerns the execution of a compact between the states—independent as to each other—for the extradition of fugitive offenders.

Affecting the states at large as to their exterior relation and their reciprocal national rights and duties, it is in essence a political question. Without express provision committing them under specific regulations to the judicial authority, the performance of national engagements addresses itself to the department wielding the political power and able to weigh political considerations. No such valid provision has been made in respect of this compact.

Marbury v. *Madison*, 1 Cranch, 137, 170; *U. S.* v. *Palmer*, 3 Wheat. 610, 634, 670; *The Divina Pastora*, 4 Wheat. 52, 63; *Foster* v. *Neilson*, 2 Pet. 253, 307, 314; *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *U. S.* v. *Arredondo*, 6 Pet. 691, 735.

2. If fit for judicial cognizance under any circumstances or by any tribunal, the subject of the proceeding is, nevertheless, not within the scope of the judicial power of the United States.

(*a*) The Constitution has not granted any power to any department of the Federal government concerning the reclamation of fugitives from justice as between the states. The provision which it contains in this behalf is a simple engagement made by the states with each other—regulating matters of purely state concern and addressed to the states alone. If, as an original question, this interpretation could be doubted, it has become the fixed one by long usage and acquiescence. Since the foundation of the government, each state has habitually determined for itself the extent of this obligation —many of them (and Kentucky is one—1 Stanton's Rev. Stat. 557) have regulated its discharge by express enactments—but never until now has the authority of the Federal government been invoked to constrain its fulfilment. This practical exposition, acted upon for nearly eighty years, is too strong and obstinate to be shaken or controlled.

VII. The proceeding is not one in which a state is the pursuing party on the record: nor is any state so interested in its subject-matter as to be entitled to pursue here any form of controversy in respect to it; nor is the adverse party one over whom this court can, under any circumstances or by any mode, exercise any control.

1. The writ of mandamus is a prerogative writ issued by the government in its own name to its own functionaries, to redress or prevent a wrong done or threatened to itself as a government. If granted in this case, it will be a proceeding instituted by "the United States of America" against "the governor of Ohio." Though the state of Kentucky may be interested in the performance of that duty, yet the writ will issue upon reasons of public policy, simply to constrain the discharge of a public duty imposed by the authority of the general government and essential to its own peculiar welfare.

2. The commonwealth of Kentucky has not such an interest in the discharge of the asserted duty as entitles it to set the writ in motion. The ground on which it must base its interests in the extradition of Lago, is simply one phase of that general obligation springing out of the simple compact itself, which binds every organized political community to avenge all injuries aimed at the wellbeing or welfare of its society.

3. The claim made for the surrender of Lago must be prosecuted by the executive authority *eo nomine* of the commonwealth of Kentucky. That "authority" alone is empowered by the Constitution to demand the extradition, and by parity of reason can alone institute proceedings for its enforcement. But a suit by or against a state functionary as such, is not a suit by or against the state itself.

Osborn v. *U. S. Bank*, 9 Wheat. 852, 859; *U. S. Bank* v. *Planters' Bank*, 9 Wheat. 904.

4. The official personage against whom the writ is prayed, is not subject in any form or degree to the jurisdiction of this court. No power has been confided to any department of the Federal government to impose a duty upon any functionaries of a state, or to constrain the discharge of their official concerns.

Martin v. *Hunter's Lessee*, 1 Wheat. 304, 336; *Houston* v. *Moore*, 5 Wheat. 1, 22; *Prigg* v. *Pennsylvania*, 16 Pet. 539.

VIII. The controversy raised by the motion is not of a civil nature. It involves no question of the rights of persons or the rights of property. The power of the court is invoked simply in aid of the administration of the Criminal Code of Kentucky, to the end that it may be able to try Lago for an imputed offense against its laws, and, if guilty, to imprison him in its penitentiary.

IX. The original jurisdiction of this court cannot be exercised through the method of the writ of mandamus, and this disability springs as well from the inherent nature of the writ itself as from the regulations prescribed for its use by the legislative power.

1. The writ comes to us from the common law, and this court has judicially determined that the common law remedies in the Federal tribunals are to be according to the principles of that law as settled in England (*Robinson* v. *Campbell*, 3 Wheat. 212), subject, of course, to the modifications made by Congress or under its authority, and also to such limitations as result from the constitution of the court and

the nature of the Federal government. According to these principles, this writ, as tersely defined by Lord Mansfield, is "a high prerogative one, flowing from the King himself, sitting in the court of King's bench, superintending the police and preserving the peace of the country.

Rex v. *Barker*, 1 W. Bl. 300, 352.

Stated in a different form, the writ at common law is issued by a tribunal in which not only the judicial sovereignty but the prerogative of general superintendency resides, and it is employed extrajudicially (*Awdeley* v. *Joye*, Popham, 176) as well as judically. Its judicial use is to supervise the administration of the King's justice by his inferior judicatures, and its extrajudicial function is "to preserve peace, order, and good government," by constraining the prompt and rightful performance of every public duty confided to any public functionary or tribunal by Parliament or the King's charter.

Tapp. *Mand.* §§ 6, 11, 12; Bac. Abr. tit. *Mandamus, a;* Butler's *Nisi Prius*, 195; *Rex* v. *Baker*, 3 Burr. 1266; *Rex* v. *Bank of England*, 2 Barn. & Ald. 622; *Rex* v. *Fowey*, 2 Barn. & C., 596; *Rex* v. *North Riding, &c.*, 2 Barn. & C. 290; *Reg.* v. *E. C. Railway*, 10 Adol. & E. 557; *Kendall* v. *U. S.* 12 Pet. 621.

But this court is one of very special and limited jurisdiction. The judicial sovereignty in its general sense, does not reside here, and it has no prerogative power, no police power, no power to superintend the conduct of public affairs. The court cannot, under the Constitution, be empowered to issue the writ of mandamus save to the inferior judicatures of the United States in the exercise of its appellate jurisdiction.

Marbury v. *Madison*, 1 Cranch, 137, 176; *Kendall* v. *U. S.* 12 Pet. 524, 621.

The judiciary act, as already noticed, in regulating the conditions under which the great common law writs may be issued by this court, has interdicted the employment of this writ, except as it may, agreeably to the "principles and usages of law," be directed against "courts appointed or persons holding office under the sovereignty of the United States." The court has solemnly determined that the Constitution prohibits it from issuing the writ, except to the courts of the Federal government, in the exercise of its appellate jurisdiction.

Marbury v. *Madison*, 1 Cranch, 137, 176; *Kendall* v. *U. S.* 12 Pet. 524, 621.

But the party against whom the writ is now invoked does not come within either of the categories prescribed by the judicial act.

X. The results now attained demonstrate that the controversy which the present application seeks to inaugurate is, in its form and in its essence, in its whole and its every part and element, beyond the utmost sweep of the jurisdiction of this court. The power to compose this national and political strife does not reside in this tribunal; the pursuing party cannot cross its threshold; the party pursued is without the reach of its arms; the subject of the difference has been excluded from its action; and the writ which it is solicited to grant, has been denied to it as a method for the exercise of its original jurisdiction.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar.

Some of them, however, are not now for the first time brought to the attention of this court; and the objections made to the jurisdiction, and the form and nature of the process to *be [*96 issued, and upon whom it is to be served, have all been heretofore considered and decided, and cannot now be regarded as open to further dispute.

As early as 1792, in the case of *Georgia* v. *Brailsford*, 2 Dall. 402, the court exercised the original jurisdiction conferred by the Constitution, without any further legislation by Congress, to regulate it, than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court. The same power was again exercised without objection in the case of *Oswald* v. *The State of Georgia*, in which the court regulated the form and nature of the process against the state, and directed it to be served on the governor and Attorney General. But in the case of *Chisholm* v. *Georgia*, at February term, 1793, reported in 2 Dall., 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel; and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in which these questions, as to the jurisdiction of the court, and the mode of exercising it, are elaborately examined.

Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction, and held that process served on the governor and Attorney General was sufficient. Mr. Justice Iredell differed, and thought that further legislation by Congress was necessary to give the jurisdiction, and regulate the manner in which it should be exercised. But the opinion of the majority of the court upon these points has always been since followed. And in the case of *New Jersey* v. *New York*, in 1831, 5 Pet. 284, Chief Justice Marshall, in delivering the opinion of the court, refers to the case of *Chisholm* v. *The State of Georgia*, and to the opinions then delivered, and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words:

"It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in *suits against [*97 a state, under the authority conferred by the Constitution and existing acts of Congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court, on the failure of the state to appear after due service of process, has been also prescribed."

And in the same case, page 289, he states in full the process which had been established by the court as a rule of practice in the case of *Grayson* v. *Virginia*, 3 Dall. 320, and ever since followed. This rule directs, "that when process at common law, or in equity, shall issue against a state, the same shall be served upon

the governor or chief executive magistrate and the Attorney General of such state."

It is equally well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English Crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall* v. *United States*, 12 Pet. 615; *Kendall* v. *Stokes*, 3 How. 100.

So, also, as to the process in the name of the governor, in his official capacity, in behalf of the state.

In the case of *Georgia* v. *Madrazo*, 1 Pet., 110, it was decided, that in a case where the chief magistrate of a state is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party on the record. This was a case where the state was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the governor in behalf of the state, and was indeed the form originally used, and always recognized as the suit of the state.

Thus, in the first case to be found in our reports, in which a suit was brought by a state, 98*] it was entitled, and set forth in *the bill, as the suit of "*The state of Georgia, by Edward Tellfair, governor of the said state, Complainant*, v. *Samuel Brailsford et al.*;" and the second case, which was so early as 1793, was entitled and set forth in the pleadings as the suit of "*His Excellency, Edward Tellfair, Esquire, governor and commander-in-chief in and over the state of Georgia, in behalf of the said state, Complainant*, v. *Samuel Brailsford et al., Defendants.*"

The cases referred to leave no question open to controversy, as to the jurisdiction of the court. They show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction; and that the court may regulate and mold the process it uses in such manner as in its judgment will best promote the purposes of justice; and that it has also been settled, that where the state is a party, plaintiff or defendant, the governor represents the state, and the suit may be, in form, a suit by him as governer in behalf of the state, where the state is plaintiff, and he must be summoned or notified as the officer representing the state, where the state is defendant. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which everyone is entitled, where it is the appropriate process for asserting the right he claims.

We may, therefore, dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by mandamus is the only mode in which the object can be accomplished.

This brings us to the examination of the clause of the Constitution which has given rise to this controversy. It is in the following words:

"A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the *state from which he fled, be delivered up, [*99 to be removed to the state having jurisdiction of the crime."

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, "treason, felony or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors," as well as treason and felony.

4 Bl. Com. 5, 6, and note 3, Wendell's edition.

But as the word "crime" would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend to acts made offenses by local statutes growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the governor of Ohio refused to deliver Lago, under the advice of the Attorney General of that state.

But this inference is founded upon an obvious mistake as to the purpose for which the words "treason and felony" were introduced. They were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offenses were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offense. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton *on The Law of Nations, 171; [*100 Fœlix, 312; and Martin, Verge's edition, 182. And the English government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum with its dominions. And as the states of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for

extradition between nations altogether independent of each other, but was intended to embrace political offenses against the sovereignty of the state, as well as all other crimes. And as treason was also a "felony" (4 Bl. Com. 94), it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it. For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the government, it must fail unless the states mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state, to repeat the offense as soon as another opportunity offered.

Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American colonies; for we find, by Winthrop's History of Massachusetts, Vol. II. pp. 121 and 126, that as early as 1643, **101*]** by "articles of confederation *between the plantations under the government of Massachusetts, the plantation under the government of New Plymouth, the plantations under the government of Connecticut, and the government of New Haven, with the plantations in combination therewith," these plantations pledged themselves to each other, that, upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made, that he was a prisoner or such an offender at the time of the escape, the magistrate, or some of them, of "the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof." It will be seen that this agreement gave no discretion to the magistrate of the government where the offender was found; but he was bound to arrest and deliver, upon the production of the certificate under which he was demanded.

When the Thirteen colonies formed a confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But, as these colonies had then, by the Declaration of Independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded, so as to include treason and felony—that is, political offenses—as well as crimes of an inferior grade. It is in the following words:

"If any person, guilty of or charged with treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense."

*And when these colonies were about [***102** to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially in the same words, but substituting the word "crime" for the words "high misdemeanor," and thereby showing the deliberate purpose to include every offense known to the law of the state from which the party charged had fled.

The argument on behalf of the governor of Ohio, which insists upon excluding from this clause new offenses created by a statute of the state, and growing out of its local institutions, and which are not admitted to be offenses in the state where the fugitive is found, nor so regarded by the general usage or civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The governor of the demanding state, would probably draw one line, and the governor of the other state another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the states, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never failing subject of dispute and ill will.

The clause in question, like the clause in the Confederation, authorizes the demand to be made by the executive authority of the state where the crime was committed, but does not in so many words specify the officer of the state upon whom the demand is to be made, and whose duty it is to have the fugitive delivered and removed to the state having jurisdiction of the crime. But, under the Confederation, it is plain that the demand was to be made on the governor or executive authority of the state, and could be made on no other department *or officer; for the Confederation [***103** was only a league of separate sovereignties, in which each state, within its own limits, held and exercised all the powers of sovereignty; and the Confederation had no officer, either executive, judicial or ministerial, through whom it could exercise an authority within the limits of a state. In the present Constitution, however, these powers, to a limited extent, have been conferred on the general government with-

in the territories of the several states. But the part of the clause in relation to the mode of demanding and surrendering the fugitive is (with the exception of an unimportant word or two), a literal copy of the article of the Confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the Confederation, must have been in the minds of the members of the convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practised under the Confederation —that is, of demanding the fugitive from the executive authority, and making it his duty to cause him to be delivered up.

Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between states, and order and law within their respective borders, and to its early adoption by the colonies, and then by the confederated states, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion was irresistible, that this compact engrafted in the Constitution included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; that the right given to "demand" implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled.

This is evidently the construction put upon **104***] this article in *the act of Congress of 1793 (1 Stat. at L. 302), under which the proceedings now before us are instituted. It is, therefore, the construction put upon it almost cotemporaneously with the commencement of the government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the Congress which enacted the law.

The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The governor of the state could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department. The executive authority of the state, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the executive authority of the state upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.

This duty, of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the states, each state might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the governor of the state where the fugitive was found is, in such cases, merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the state or of Congress to authorize it. These difficulties presented themselves as early as 1791, in a demand made by the governor *of Pennsylvania [*105 upon the governor of Virginia, and both of them admitted the propriety of bringing the subject before the President, who immediately submitted the matter to the consideration of Congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the Constitution which declares "that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the Congress may by general laws prescribe the manner in which acts, records, and proceedings shall be proved, and the effect thereof." And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between states, and the authentication of official documents—was in the minds of the framers of the Constitution, and had its influence in inducing them to give this power to Congress. And acting upon this authority, and the clause of the Constitution which is the subject of the present controversy, Congress passed the act of 1793, February 12th (1 Stat. at L. 302), which, as far as relates to this subject, is in the following words:

"Sec. 1. That whenever the executive authority of any state in the Union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the executive authority of any such state or territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any state or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged fled, it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear; *but if no such agent [*106 shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such

fugitive to the state or territory making such demand shall be paid by such state or territory.

"Sec 2. And be it further enacted, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the state or territory from which he or she shall have fled; and if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year."

It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress; and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the state where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the state where the crime was committed. It is said in the argument, that the executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every marshal and sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the executive of the state under this law, when the demand is made upon him and the requisite evidence produced. The 107*] *governor has only to issue his warrant to an agent or officer to arrest the party named in the demand.

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other state. And whether the charge against Largo is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the state, and not by the executive authority of the state of Ohio.

The demand being thus made, the act of Congress declares, that "it shall be the duty of the executive authority of the state" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding state. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several states bear to each other, the court is of opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it *possessed this power, it might [*108 overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the state, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the state.

It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over state officers not warranted by the Constitution. But the general government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the state authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the state to carry it into execution.

It is true that in the early days of the government, Congress relied with confidence upon the co-operation and support of the states, when exercising the legitimate powers of the general government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. And laws were passed authorizing state courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the state courts the same authority with the district court of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers were for some years exercised by state tribunals, readily, and without objection, until in some of the states it was declined because it interfered with and retarded the performance of duties which properly belonged to them as state courts; and in other states, doubts appear to have arisen as *to the power of the [*109

courts, acting under the authority of the state to inflict these penalties and forfeitures for offenses against the general government, unless especially authorized to do so by the state.

And in these cases the co-operation of the states was a matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution. And the acts of Congress conferring the jurisdiction merely give the power to the state tribunals, but do not purport to regard it as a duty, and they leave it to the states to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience.

But the language of the act of 1793 is very different. It does not purport to give authority to the executive to arrest and deliver the fugitive, but requires it to be done, and the language of the state law implies an absolute obligation which the state authority is bound to perform. And when it speaks of the duty of the governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the state executive to the compact entered into with the other states when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every state, for every state had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the governor of Ohio refuses to discharge this duty, there is no power delegated to 110*] the general government, either through the judicial department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.

THOMAS MEEHAN and Charles Ballance,
Plffs. in Err.,
v.
ROBERT FORSYTH.

(See S. C. 24 How. 175–179.)

Copy of survey, when evidence—Patent from U. S. gives title—Illinois act of limitations.

A certified copy of survey in the office of the surveyor-general, given by that officer, who is required to keep it, is admissible in evidence.

A patent issued to defendant, by which the United States granted to him and his heirs, subject to the rights of any persons claiming under the act of Congress of 3d March, 1823, is a fee simple title on its face, and is such a title as will afford protection to those claiming under it.

The act of limitations of Illinois protects the claim of a person for lands, which have been possessed by actual residence thereon, having a connected title in law or equity, deducible of record from that state or the United States.

Argued Feb. 18, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment, brought by the defendant in error in the court below.

Judgment was entered for the plaintiff, and the defendant brought the case to this court by writ of error.

The case is stated by the court.

Mr. **C. Ballance,** for the plaintiffs in error:

The plaintiffs in error were clearly and incontrovertibly within the statute of limitations of 1845 and 1839.

Bryan v. *Forsyth*, 60 U. S. (19 How.), 334; *Wright* v. *Matteson*, 59 U. S. (18 How.), 50; *Woodward* v. *Blanchard*, 16 Ill., 431; *Ewing* v. *Burnett*, 11 Pet. 41.

Mr. **Williams,** for defendant in error:

The defendant below held possession of the land subject to the rights of the plaintiff, and consequently his possession was subservient, and not adverse, to the title of the plaintiff.

12 Ill. 332; 13 How. 24; 60 U. S. (19 How.), 338; 15 Ill. 273; 9 Johns. 180; 10 Johns. 440; 20 Johns. 306; 3 Wend. 337; 15 Mass. 492; 9 Mass. 508; 1 Pick. 327; 2 Wend. 166; 557; 5 Cow. 130; 5 Harr. & J. 266.

Mr. Justice **Campbell** delivered the opinion of the court:

This is an action of ejectment commenced in the circuit *court, for the recovery of a [*176 part of two lots of land in the city of Peoria, by the defendant in error against the plaintiffs in error.

The title of the plaintiff in the circuit court (Forsyth) originated in the claim of Antoine Lapance, an inhabitant within the purview of the act of Congress, approved March 3d, 1823 (3 Stat. at L. 786), entitled "An Act to Confirm Certain Claims to Lots in the Village of Peoria, in the State of Illinois," which was surveyed the first of September, 1840, by the surveyor of public lands, and for which a patent issued on the 1st day of February, 1847. The plaintiff produced from the surveyor-general's office a certified copy of the survey, according to which the location of the claim was made. This testimony was objected to, but was received by the court, and we think properly. An original of the plan of survey is retained in the office of the surveyor-general, and a copy given by that officer, who is required to keep it, upon general principles is admissible in evidence. *United States* v. *Percheman*, 7 Pet. 51.

It was agreed on the trial, that the defendant, Ballance, and those under him, had been in possession of the premises more than ten years before the commencement of the suit. This possession was shown by the facts that he had cultivated a portion of the quarter section described in his patent for more than twenty years, and had resided on the quarter section for twelve years, and had paid taxes on this parcel of land as a part of the said quarter section, but not as a separate subdivision. The plaintiff had not paid any of the taxes during that period. The defendant, Ballance, made an entry of the quarter section, of which the lot in controversy forms a part, in 1837, and a patent issued to him in 1838, by which the United

States gave and granted to him and his heirs, subject to the rights of any and all persons claiming under the act of Congress of 3d March, 1823 (3 Stat. at L. 786), before referred to.

The defendant moved the court to instruct the jury, that if they believe from the evidence that said Ballance has had the actual possession by residence on the land in controversy for more than seven years, under the title he has exhibited, the plaintiff cannot recover; and that the words in the patent of Ballance of January 28, 1838, "subject, however, to the rights 177*] *of all persons claiming under the act of Congress of March 3d, 1823, entitled 'An Act to Confirm Certain Claims to Lots in the Village of Peoria, in the State of Illinois,' cannot operate so as to lessen the estate vested by the granting part of the deed."

The court declined to give these instructions, but charged the jury: "That to constitute an adverse possession against the French claimants by the possession of another portion of the quarter section by the defendant, as his tenant, entry and possession must have been under a claim of title inconsistent with that of the French claimants. If the entry and possession were subject to the rights of the claimants existing under the acts of Congress, then such possession as stated could not be adverse, so long as that possession did not actually extend to the lot sued for."

The court further instructed the jury: "That when the defendant made application for a pre-emption, he stated it was made subservient to these French claims; and when the patent was issued by the government to him for this fractional quarter, it was made subject to these claims; therefore, the grant made by the government, as contained in the patent, did not necessarily operate as a conveyance of the entire quarter section to the grantee, but the clause inserted in the patent had the effect of excluding from the operation of the grant that portion of the quarter covered by these French claims; consequently, if at the time of the grant to Ballance there was anyone capable of taking lot 63, under the acts of Congress of 1820 (3 Stat. at L. 605) and 1823 (3 Stat. at L. 786), then lot 63 was excluded by law, and by the terms of the grant, and was excepted (in other words, lot 63 was not granted to Ballance), and he took his title subject to such exclusion or exception."

We think that the circuit court erred in its interpretation of this patent. The patent recites that "full payment" had been made by the grantee for the southwest fractional quarter of section nine, in township eight north, of range eight east, containing 147 43-100ths acres, according to the official plat of the survey of said lands returned to the general land office by the surveyor-general; which said tract has been purchased by Charles Ballance. It 178*] proceeds to *declare that the United States had given and granted the said tract above described, to have and to hold the same to him and his heirs, subject, however, to the rights of any and all of the persons claiming, etc., etc. This saving clause was designed to exonerate the United States from any claim of the patentee, in the event of his ouster by persons claiming under the acts referred to, and cannot be construed as separating any lots or parcels of land from the operation of the grant, or as affording another confirmation of titles existing under the acts of Congress described in it. The possession of Ballance, under this patent, was adverse to that of the claimants under the acts of 1820 (3 Stat. at L. 605), and 1823 (3 Stat. at L. 786), in every case in which their claim was not specifically admitted by him. He was, in no sense, their tenant, nor did the saving in the act create any fiduciary relation between him and any other person, so as to prevent the operation of the statutes of limitations. The patent does not impose upon him any duty to recognize these claims. It only requires him to accept the title of the United States with knowledge that such claims exist, and that they do not intend to deny or to destroy them, nor to defend his title against them.

The case of *Bryan* v. *Forsyth*, 19 How. 334, involved a controversy for a lot in the city of Peoria, similarly situated as that which forms the subject of this suit. The court, in that case, said that a patent with a saving like that we are considering was a fee simple title on its face, and is such a title as will afford protection to those claiming under it, either directly or having a title connected with it, with possession for seven years, as required by the statute of Illinois.

The act of limitations of Illinois (Revised Statutes, 349, § 8) protects the claim of a person for lands, which has been possessed by actual residence thereon, having a connected title in law or equity, deducible of record from that state or the United States.

The title of the defendant, and the possession which he was admitted to have had, fulfilled the requisitions of the law, and the court should have given the instructions asked for, and erred in giving the instructions submitted to the jury.

*Judgment reversed and cause remanded. [*179

RICHARD GREGG and Charles Ballance, *Plffs. in Err.*,
v.
ROBERT FORSYTH.

(See S. C. 24 How. 179-183.)

American State Papers, admissible as evidence—copy deed, evidence—record of suit in partition, evidence—strangers cannot object to—construction of U. S. patent—adverse possession—extent of.

The American State Papers, published by order of the Senate, contain authentic papers which are admissible as testimony without further proof.

A copy of a deed from the public records, the original of which was not in the possession of the plaintiff, is evidence.

A record of a suit of partition under which the plaintiff derived his title as a purchaser should not be excluded because the sale has not been conducted with regularity, and the decree of sale had been rendered against infants, by default, and because it did not prescribe the manner of the sale.

Strangers to these proceedings cannot object to a result of which the parties to the decree have not complained.

A patent from the United States, containing a saving of the rights of any and all persons claiming under the act of Congress of 3d March, 1823, did not by such saving, create any fiduciary relation

between the claimants under such act of Congress, and the patentee.

Possession under such patent is an adverse possession, and enables the patentee to have the benefit of the Illinois act of limitations for seven years.

The residence and possession of land for seven years by a tenant inures to the benefit of the landlord, so as to secure for him the protection of the act.

This protection is not confined to the particular close upon which the claimant resides, but also extends to the entire parcel of land of which the legal possession has been maintained as a consequence of his actual possession and residence.

Argued Feb. 21, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of ejectment, brought in the court below by the present defendant in error.

The trial below resulted in a verdict and judgment for the plaintiff. The defendant brought the case to this court by writ of error.

The facts appear in the opinion of the court.

Mr. **Charles Ballance** for plaintiff in error.

Mr. **Archibald Williams,** for defendant in error:

Upon the question of the statute of limitations, the counsel relied upon the same authorities as in the case of *Meehan* v. *Forsyth.*

Mr. Justice **Campbell** delivered the opinion of the court:

This was an action of ejectment for a lot of land in the city of Peoria, in the state of Illinois, commenced by the defendant in error against the plaintiffs in error.

The title of the plaintiff in the circuit court is shown by a patent of the United States in favor of the legal representatives of Antoine Lapance, who was an inhabitant or settler within the purview of the act of Congress approved 3d March, 1823 (3 Stat. at L. 786), entitled "An Act to Confirm Certain Claims to Lots in the Village of Peoria, in the State of Illinois," which patent bears date the 1st day of February, 1847, and is founded upon an official survey of the 1st of September, 1840. The plaintiff deraigned his title from the patentees. **180*]** In tracing his title he *read a document relevant to the cause from a volume of American State Papers, Public Lands, selected and edited under the authority of the Senate of the United States, by its secretary, and printed by Duff Green. This was objected to, and the question reserved by the defendants. The volumes of the American State Papers, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof.

Watkins v. *Holman,* 16 Pet. 25. The plaintiff read a copy of a deed from the public records, the original of which was not in the possession of the plaintiff, and which, upon inquiry of the persons with whom it had been deposited he was informed had been lost. This testimony authorized the admission of the copy as evidence. The deed in question had been regularly recorded. No suspicion attached to the instrument, and there was no reason to suppose that the better testimony was fraudulently withheld or could have been obtained by further inquiry. *Minor* v. *Tillotson,* 7 Pet. 99.

He also read in evidence a record of a suit of partition in the circuit court of Peoria county, which resulted in a decree of sale of the interests of a number of the parties, under which the plaintiff derived his title as a purchaser. The defendants objected to the record and deed of sale, because the sale had not been conducted with regularity, and the decree of sale had been rendered against infants, by default, and because it did not prescribe the manner of the sale. These, with other objections, were properly overruled by the circuit court. The defendants were strangers to these proceedings; and cannot be allowed to object to a result of which the parties to the decree have not complained.

The title of the defendants consisted of a patent from the United States to the defendant, Ballance, in January, 1838, for a fractional quarter section of land that includes the lot in controversy, and containing a saving of the rights of any and all persons claiming under the act of Congress of 3d March, 1823 (3 Stat. at L. 786), entitled "An Act to Confirm Certain Claims to Lots in the Village of Peoria, in the State of Illinois." He made proof *that he had resided on this quarter [*181 since 1844, and had cultivated portions of it for a long time previously, and had before and since that date let other portions of it to tenants who occupied it under him, and that the particular lot in controversy had been occupied by one of these tenants, who had upon it a distillery. Among other instructions, the defendants requested the court to charge the jury, "that if they should believe from the evidence that said Ballance, being in possession under the title he has exhibited, leased the particular spot of ground in controversy to Abiron S. Cole more than seven years before the commencement of this suit, and that said Cole took possession thereof, and built a steam distillery and other fixtures thereon more than seven years before the commencement of this suit, and that said Cole held possession thereof, and occupied it as a place of business, until he sold said establishment to Slyvanus Thompson, and that Sylvanus Thompson and his son-in-law, Richard Gregg, the defendant, occupied the same until the death of Thompson, and that said Gregg occupied the same until the commencement of this suit, the plaintiff is not entitled to recover in this suit; that it was not necessary for this defense that either the said Cole, Thompson, or Gregg, should have had his dwelling house on the particular lot; it is sufficient if they lived in the vicinity and occupied the lot in controversy as their place of business." The circuit court refused to give these instructions, but charged the jury, "that if Ballance had his house on one part of the quarter, and his improvement extended over and included the lot in controversy, so as to be connected with his residence, and to form part thereof, or it was used in connection therewith, that would, within the meaning of the law, constitute actual residence. If Ballance built on one part of the quarter, and this lot was left vacant and unoccupied and unimproved, that would not, as to that lot, constitute an actual residence.

"If Ballance, his tenants, or those holding under him, actually resided on a lot adjoin-

ing lot 63 for seven years immediately preceding the commencement of this suit, and during all that time occupied lot 63 as a place of business, as part and parcel of the premises so 182*] resided on by them, that would *constitute an actual residence within the meaning of the law as to this lot in controversy. It is proper for the jury to consider the circumstances of the sub-division of the land into lots and blocks by Ballance, in April, 1846, and whether a severance of the holding as to the particular lots and blocks so sub-divided was thereby enacted. When ground is sub-divided in that manner under our law, there can be no doubt that different lots and blocks may be so occupied as to constitute an actual residence in them all; but ordinarily, in case of sub-division, the construction of a house on a separate lot or block, and a residence therein, without any connection with adjoining or neighboring lots or blocks, does not constitute an actual residence as to the whole. It is for the jury to determine whether the facts and circumstances stated by the defendant, Ballance, or those claiming under him, made them actual residents of the lot in controversy, for seven years before the commencement of this suit. If they did, then the defendants are within the protection of the statute; otherwise not."

This court, in the cases of *Bryan* v. *Forsyth*, 19 How. 334, and again in *Meehan* v. *Forsyth*, 24 How. 175, at this term, have decided that the saving in the patent, under which the defendants claim, did not create any fiduciary relation between the claimants under the act of Congress of 1823 referred to in it, and the patentee; and that the possession of Ballance, under his patent, was an adverse possession, unless another relation had been created by contract between them subsequently in the issuing of the patent. The present inquiry is, by what evidence must the actual residence on the land be supported to enable the patentee to have the benefit of the act of limitations for seven years? And it has been generally held, that the residence and possession of land for seven years by a tenant inures to the benefit of the landlord, so as to secure for him the protection of the act; and that this protection is not confined to the particular close upon which the claimant resides, but also extends to the entire parcel of land of which the legal possession has been maintained as a consequence of his actual possession and residence.

Poage v. *Chinn*, 4 Dana (Ky.) 50.

183*] *The case of *Williams* v. *Ballance*, 23 Ill. 193, involved a controversy similar to that before the court.

The inquiry there was as to the validity of the residence and possession of Ballance to support his defense of the statute of limitations, it being the residence and possession established by the testimony in this suit. The supreme court of Illinois inquires whether Ballance occupied the premises described in the patent since 1844, by actual residence thereon. "The fact," says the court, "is that he did, but he did not reside upon every square yard of the premises, nor upon the particular lot. Nor was this necessary. He resided upon the legal sub-division described in the patent, the evidence of his title, and possessed and occupied it by himself and tenants. We think the laying out the land into town lots did not deprive him of the benefit of the statute of limitations of 1835, as to all the fractional quarter, except the particular lot upon which his house stood. He had a right to divide it into as many lots, or portions, or divisions, as he pleased, and put a separate tenant on each, and their occupation would be his possession; and the law only required him to possess and reside upon the premises claimed by his title papers, but the law does not say upon what portion he should reside, and, above all, it does not declare that he should reside upon every portion of it." The instructions of the circuit court are inconsistent with the law as thus laid down by the Supreme Court. In our opinion, the possession established by Ballance in this case was such as placed him under the protection of the statute.

Judgment reversed and cause remanded.

CHARLES BALLANCE, *Appt.*,

v.

ROBERT FORSYTH, Luciene Dumain and Antoine R. Bouis.

(See S. C. 24 How. 183-185.)

Chancery jurisdiction — objection to evidence, too late, after judgment—jurisdiction of Executive Department.

It is not allowable to appeal from the judgment of the circuit court and Supreme Court to a court of chancery upon the relative merits of the legal titles involved in the controversy which they had adjudicated.

Objection to a survey should have been urged upon the trial at law; and it is too late after judgment upon the title to employ it to contest the issuing of the execution.

In the location and survey of claims arising under acts of Congress like those of May, 1820, and March, 1823, the Executive Department of the government has, in general, exclusive jurisdiction, and all questions arising upon their location and survey are administrative in their nature, and must be disposed of in the Land Office.

Argued Feb. 21, 1861. Decided Mar. 14, 1861.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The bill in this case was filed in the court below, by the appellant, for the purposes stated in the opinion of this court.

Judgment was for the defendant, and the plaintiff took this appeal.

Mr. **Charles Ballance** for the appellant.

Mr. **Archibald Williams** for the appellee.

Mr. Justice **Campbell** delivered the opinion of the court:

This is a bill filed by the plaintiff, to enjoin the execution of a judgment in the circuit court, and upon which a writ of error had been taken to this court and affirmed.

The cause in this court was between the same parties, and the decision of the court is reported in 13 How. 19.

The plaintiff sets forth the claims of the respective parties, and insists that his is the superior right, and that he is entitled to have the property. But it is not allowable to him to appeal from the judgment of the circuit court and Supreme Court to a court of chancery upon the relative merit of the legal titles involved in the controversy they had adjudicated.

He further objects to the title of his adversaries. He insists, that in location of their claim under the acts of May 15th, 1820 (3 Stat. at L. 605), and March 3d, 1823 (3 Stat. at L. 786), referred to in the report of the case as the source of their title, there was an erroneous 185*] location and survey, *and that a larger extent of ground was conceded to them than they were entitled to; that the plan of survey did not conform to the requirement of Congress, and that their proofs were not filed in time. If either of these objections is of sufficient force to invalidate the title and to render it void, it should have been urged upon the trial at law, and it is too late after judgment upon the title to employ it to contest the issuing of the execution. But if they are mere irregularities, the court of chancery has no jurisdiction to notice them. It is the settled doctrine of this court, that in the location and survey of claims arising under acts of Congress like those of May 15th, 1820 (3 Stat. at L. 605), and March 3d, 1823 (3 Stat. at L. 786), the Executive Department of the government has, in general, exclusive jurisdiction, and that all questions arising upon their location and survey are administrative in their nature, and must be disposed of in the Land Office.

The plaintiff was aware of the existence of these claims, and of the jurisdiction to which their adjustment was confided.

His patent contains an explicit reservation of the rights of any and all persons claiming under the act of Congress of 3d March, 1823 (3 Stat. at L. 786) entitled, "An Act to Confirm Certain Claims to Lots in the Village of Peoria, in the State of Illinois." If he pretermitted his opposition to their location and survey before the General Land Office, he is concluded by his laches. If his opposition was made unsuccessfully, the decision of that department upon his objections is binding upon him.

Besides these objections, the plaintiff has introduced into the record a claim for the improvements upon the lots recovered by the judgment of the circuit court. It is not at all clear that the amendments to the bill, in which this claim is contained, were filed with leave, and form any part of the bill. It is not charged in them that the plaintiffs in the suits at law have opposed any obstruction to his removal of the improvements, and the entire statement of the bill concerning them is vague and unsatisfactory. We are unable to find in them any ground upon which the suspension of the execution of the judgment can be justified.

The decree of the circuit court is affirmed.

SAMUEL MASSEY, *et al., Plffs. in Err.,*

v.

JOSEPH L. PAPIN.

(See S. C. 24 How. 362-364.)

Equitable title, subject to sale under laws of Missouri—subsequent legal title, subject to mortgage of ancestor.

An imperfect Spanish title, claimed by virtue of a concession, was, by the laws of Missouri, subject to sale and assignment, and subject to be mortgaged for a debt.

Where heirs take lands by descent, with the incumbrance of a mortgage attached, they hold them in like manner that their ancestor held.

The subsequent grant of the lands to the heirs, by act of Congress of 1836, carried the equities of the mortgagee, under a prior mortgage executed by their ancestor, with the legal title of which they took the benefit.

Argued Feb. 26, 1861. Decided Mar. 14, 1861.

IN ERROR to the Supreme Court of the State of Missouri.

This action was commenced by Joseph L Papin against Samuel Massey and a large number of other defendants, in the circuit court of Franklin county, Missouri, by a petition for partition of, and settlement of title to, a certain tract of land. This court rendered a decision determining the respective rights of the parties, and the defendants took the case to the supreme court of Missouri.

The judgment of the lower court was there affirmed, and the defendants brought the case to this court by writ of error.

The case further appears in the opinion of the court.

Mr. **M. Blair,** for plaintiffs in error:

The decision of the court below conflicts with the uniform construction of the law by this court.

See *Strother* v. *Lucas,* 6 Pet. 773; 12 Pet. 453; *Les Bois* v. *Bramell,* 4 How. 59; *Landes* v. *Brant,* 10 How. 370; *Burgess* v. *Gray,* 16 How. 62; *Morehouse* v. *Phelps,* 62 U. S. (21 How.) 294.

These cases decide:

1st. That such claims prior to confirmation have no standing in a court of law in equity.

2d. That the confirmation inures to the party by whom the claim is presented.

The facts, that Mackay, under whom Le Duc claimed, had presented the claim to the old board, and that the late board was restricted to the consideration of claims which had been presented to the old board, is immaterial. In all the cases, the contesting parties claimed under the same person, and the question was whether the confirmation inured to those who had the prior right under the original claimant or to those who presented the claim; and the court decided that those who presented the claim took the title, and all others were barred.

Here Mackay's heirs, and not his assignee, or mortgagee, Le Duc, presented the claim, and Le Duc not only presented no claim himself, but testified for the heirs, thus absolutely precluding the idea that he had any interest in it, unless upon an assumption which would be dishonorable to him, both as a judge and as a man. Nor would such an assumption avail, for this court would not sanction the fraud which it supposes by giving his administrator the land.

Mr. **S. T. Glover,** for the defendant in error:

The bond made by Mackay was operative to convey an estate in equity to the land in question.

2 Sto. Eq. § 175; Newl. Cont. 307.

The confirmation was not to the heirs of

James Mackay, but to Mackay or his legal representatives, and inured to Mackay's assignee, legal or equitable.

8 How. 338.

The deeds did not purpose to convey the land of Delassus. They conveyed only the interest of the grantors.

13 Mo. 380; 20 Mo. 81; 3 Wheat. 452.

If the title to fourteen-thirtieths of the land ever vested in Delassus, the defendants are concluded by plaintiffs' chain of title.

The foreclosure was regular, and if it were not, could not be objected to collaterally.

See 27 Mo. 445.

Mr. Justice **Catron** delivered the opinion of the court:

This case is brought here by writ of error to the supreme court of Missouri.

In 1806, James Mackay presented his claim before the board of commissioners, sitting at St. Louis, to have confirmed to him 30,000 arpents of land. In 1809, the board rejected the claim.

In 1819, Mackay gave a bond in the nature of a mortgage on 14,000 arpents of the land to Delassus. Papin claimed as assignee of the mortgage, which he caused to be foreclosed, and purchased in the land, and took a title from the sheriff. Massey and others claim under Mackay's heirs.

The supreme court of Missouri decided that Papin, claiming under the mortgage of Mackay to Delassus, had a better title than Massey, who claimed under the heirs. And to reverse this decision, this writ of error is prosecuted.

The Board of Land Commissioners of 1809 refused to confirm the claim; they were acting **364*]** on the title as between the United States and the claimant. The government had the power to grant the land in fee, regardless of the opinion of the Board. Accordingly, in 1831 (4 Stat. at L. 561), an act of Congress was passed organizing another Board to examine this description of Spanish claims, which had been rejected by the old Board. The new Board, in October, 1832, recommended the claim for confirmation "to said James Mackay, or his legal representatives." James Mackay had died, and his heirs presented the claim the second time; and it is insisted that the confirmation to them by the act of 1836 rejected the mortgage of Delassus, and that the heirs took the unincumbered legal title discharged of the mortgage.

An imperfect Spanish title, claimed by virtue of a concession, was, by the laws of Missouri, subject to sale and assignment and, of course, subject to be mortgaged for a debt. The heirs of Mackay took the lands by descent, with the encumbrance attached, and held them in like manner that their ancestor held. The grant of the lands to the heirs by the act of 1836 carried the equities of the mortgagee with the legal title, of which he took the benefit—a consequence contemplated by the mortgage itself; and if the assignment had been in its form a legal conveyance of the lands, the grantee would have taken a legal title. And to this effect are the cases of *Bissell* v. *Penrose*, 8 How. 317, and *Landes* v. *Brant*, 10 How. 348.

It is ordered that the judgment be affirmed.

THE BOARD OF COMMISSIONERS OF KNOX COUNTY, *Plff. in Err.*, *v.* WILLIAM H. ASPINWALL, Joseph W. Alsop, Henry Chauncey, Chas. Gould, and Samuel L. M. Barlow.

(See S. C. 24 How. 376-386.)

Mandamus—what is—proper remedy for refusal of county commissioners to levy tax to pay county bonds—circuit court has authority to issue—alternative writ, when not necessary.

The writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy and the duty sought to be enforced is clear and indisputable.

Assuming that a general law of Indiana permits the public property of a county to be levied on and sold for the ordinary indebtedness of the county, yet, where bonds and coupons of the county were issued, under a special act which provides that the commissioners of the county shall assess a tax to pay the interest on the coupons, if the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of mandamus.

The circuit court had authority to issue the writ of mandamus in such case.

It is no reason for setting it aside, that a previous alternative writ had not issued, where the court gave them an opportunity to comply with the law, and their excuse for not doing so was equivalent to a refusal.

Argued Feb. 28, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the District of Indiana.

This case was formerly before this court (62 U. S. 542), when the judgment of the circuit court of the United States for the district of Indiana, in favor of the present defendants in error, in a suit brought by them upon certain coupons of bonds issued by the present plaintiff in error was affirmed. Execution was issued, and on the 3d day of June, 1859, the original plaintiffs, upon their motion, obtained an order that the execution levy should be set aside. A few days before, it had been ordered that a writ of mandamus in the alternative should be forthwith issued commanding the present plaintiff in error to levy a tax for the payment of the judgment or to show cause, etc. This alternative mandamus was quashed. On the 21st of June, the present defendants in error moved for a peremptory mandamus to require the plaintiff in error to levy the tax; and the mandamus was awarded against the resistance of the plaintiff in error, who brought this writ of error.

Mr. **A. G. Porter**, for the plaintiffs in error:

A mandamus was not proper under the circumstances of this case, for the following reasons:

I. For want of jurisdiction.

If the circuit court of the United States has power to issue a writ of mandamus to enforce the payment of a judgment at law, it derives that power from the provisions of the 14th section of the judiciary act of 1789.

"That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other

NOTE.—*Mandamus, when will issue*—see note to 4 L. ed. U. S. 263, and note to 39 L. ed. U. S. 160.

writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

The "exercise of jurisdiction" in any sense in which the writ of mandamus could be called in aid of it, was complete in this case upon the rendition of final judgment. To enforce the payment of that judgment by means of this extraordinary writ, would not be "agreeable to the principles and usages of law." This state of facts simply presents the ordinary case of a party holding a debt of record which cannot be realized by process of execution. And I deny that it follows that a writ of mandamus, in such a case, is in any just sense "necessary for the exercise of jurisdiction," or "agreeable to the principles and usages of law."

The duty, imposed by law on the board of commissioners of the county of Knox, now sought to be enforced, was a duty to levy a tax for the payment of interest coupons, not judgments of a court of law.

The holders of those coupons had a right to go into the state courts and enforce the levying of the tax for their payment by mandamus; but they elected a different remedy.

They chose to sue in the ordinary form in the circuit court, merged their coupons in a judgment at law, and must rely, for the collection of that judgment, on the ordinary and usual writs in use for that purpose.

If, upon the failure of these, they may resort to the writ of mandamus to compel the payment of their judgments, on the ground that such a writ is necessary to the exercise of jurisdiction, why may it not be used in every case to compel the payment of judgments which cannot be collected in the usual way? The words of the statute, then, instead of being understood as words restraining the power to issue the writ in aid and furtherance of ordinary remedies only, will become a grant to the circuit courts, of the power to employ a new and formidable process, in all cases where the common writs of execution fail.

The defendants in error rely on the case of *Wayman* v. *Southard*, 10 Wheat. 50, to show that the words "necessary for the exercise of jurisdiction" apply to proceedings after judgment as well as before.

This is inapplicable to the case at bar.

The learned counsel for the defendants says in his brief, after quoting from the opinion of the court in *Wayman* v. *Southard*: "All that is said above, about writs of execution must be equally applicable to writs of mandamus, when they are necessary to carry a judgment into effect." Granting this, it must appear that in the case at bar a writ of mandamus was necessary to carry the judgment into effect. That is the touchstone proposed by the counsel for the defendant, and tried by that very test. The case is, in my opinion, against them.

In this case no obstruction is put in the way of the ordinary writs which "agreeably to the principles and usages of law," may issue upon judgments at law. All the remedies which any such judgment ordinarily supplies are open to the parties in this case. But they are said to be inadequate; yet it does not appear that ample property could not be found whereon to levy. The parties then propose to seek another remedy—not a means of carrying into effect the judgment already obtained, but a separate and independent proceeding in which they must begin *de novo*, and conduct a new suit through the several stages of pleadings, hearing, and final judgment. The judgment already obtained is not the basis of this new proceeding. The proceedings in mandamus constitute a separate suit in general.

6 Bac. Abr. 453.

Nor, for another reason, had the circuit court jurisdiction to issue the mandamus. That court had no right to interfere with the taxing power of the state of Indiana.

In 7 Humph. 143, it was held that even the domestic tribunals had no such right. It is a part of the political power of the government, according to the opinion of that learned court, with which the judiciary cannot interfere.

II. A mandamus will not be allowed, where there is another adequate and specific legal remedy.

4 Barn. & Ad. 360; 6 Bac. Abr. 431.

In the present case there are two remedies of that character, *viz.:*

1. By execution. By the law of Indiana a judgment against a county is a lien upon the public property thereof, which may be sold upon execution to satisfy the judgment.

1 R. S. 1852, p. 229, § 8.

2. There was a specific and complete remedy by appeal. Where the board of commissioners refuse to perform any duty, an appeal may be taken from such refusal, to the circuit court of the county; and the latter is required upon the fact of such duty being ascertained, to perform such duty or to enforce the performance of it by the board of commissioners.

1 R. S. pp. 228, 229, § 31; see, also, 13 Pet. 279, 404; 6 Bac. Abr. 431, 433; 2 Johns. Cas. 72.

III. The mandamus was not a proper remedy, because by the act of 1849 the board was only required to levy a tax to pay the interest as such.

IV. The mandamus in the present case directs that the tax shall be levied forthwith. The act of 1849 provides that it shall be levied at the time of making the annual levy of county taxes. Under the general statute of Indiana, 1 R. S. 105, providing for the assessment and collection of taxes, any departure from the precise course of proceeding required by the statute renders sales for nonpayment void.

V. The peremptory mandamus ought not to have been issued because it was not preceded by an alternative writ.

See 6 Bac. Abr. 420, 450, 452; 1 Chit. Pr. 808; 12 Pick. Statutes, 189.

Messrs. **S. F. Vinton** and **Samuel Judah**, for defendants in error:

Two inquiries arise in this case:

Does the Constitution confer on Congress the power to authorize the circuit courts to issue the writ of mandamus when necessary for the satisfaction of their judgment?

2. If it does, has Congress conferred on them that authority?

The last clause of the 8th section of the 1st article of the Constitution confers on Congress authority to make all laws which may be necessary and proper for carrying into execution

the powers vested in the government, or any department or officer thereof, the 11th section of the judiciary act of 1789, by virtue of this clause, confers upon the circuit courts of the United States, jurisdiction in certain cases where the suit is between a citizen of the state where the suit is brought and a citizen of another state. The circuit court then has conferred upon it by this law, jurisdiction over the controversy between these parties, and that same 8th clause of the Constitution empowers Congress to make all laws which may be necessary and proper for carrying that jurisdiction into full execution and effect. Consequently, if a writ of mandamus be necessary and proper, the circuit court is authorized to issue the writ.

See *Wayman* v. *Southard*, 10 Wheat. 50.

Assuming, then, that Congress has power to make laws for carrying into execution all judgments which the Judicial Department has power to pronounce, we proceed to the second question.

The judiciary act of 1789, after having conferred on the several courts of the United States their respective jurisdictions over the subjects subjected to their cognizance and upon which they may pronounce judgment, proceeds, in the 14th section, to provide for carrying them into full and complete execution.

Under this section. the power of the circuit courts and of all other courts of the United States is limited to the issue of writs for the sole purpose or object of exercising their jurisdictions; but for the accomplishment of that object and purpose, the power is given to issue "all writs," whether of mandamus, or any other writ not specially provided for by the statute, which may be necessary and are agreeable to the principles and usages of law.

A construction was given to this 14th section, in respect to the extent of the power conferred by it on the circuit courts to issue writs in the above mentioned case of *Wayman* v. *Southard*, 10 Wheat. 50.

In that case it was insisted by one of the parties that the power conferred by that section was limited to process anterior to the rendition of the judgment.

The court say there is no reason for supposing that the general term "writs" is restrained by the words "which may be necessary for the exercise of their respective jurisdictions to writs of original process," or to process anterior to judgments. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. It is, therefore, no unreasonable extension of the words of the act to suppose an execution necessary for the exercise of jurisdiction."

All that is said above about writs of execution must be equally applicable to writs of mandamus, when they are necessary to carry a judgment into effect.

This decision establishes two propositions, which have an important bearing on the case now before the court—

1st. That the jurisdiction of the circuit court over a case continues until its judgment is satisfied.

2d. That it has power to issue such writs, both before and after judgment, as may be necessary for the exercise of its jurisdiction, and are agreeable to the principles and usages of law.

From these propositions it would seem to follow, as a necessary corollary, that if in any case the writ of mandamus was necessary for the satisfaction of the judgment, the case itself was one where, by the principles and usages of law, the writ would issue, then the 14th section confers on the court power to issue it for that special purpose.

The question of the extent of power given by the circuit courts by this 14th section to issue writs of mandamus first came up for decision in this court in the case of *McIntire* v. *Wood*, 7 Cranch, 504.

That was an application to the circuit court of the United States in Ohio for a writ of mandamus to compel a register of a land office to issue to the plaintiff a final certificate of purchase of a tract of land. The court laid down the rule that the power of the circuit courts to issue the writs is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Now, in the present case, the right of the defendants in error, who are citizens of New York, to sue in the circuit court, arises under the Constitution and the 11th section of the judiciary act, and the inference from what is said by the court in the above case is, that the 14th section covers the whole ground of the 11th section and no more, and provides for carrying into execution all the jurisdiction given by the latter section. If this be so, it is plain that the circuit court has jurisdiction and power to issue the writ of mandamus in this case.

See, also, *Kendall* v. *U. S.* 12 Pet. 615; *Marbury* v. *Madison*, 1 Cranch, 138; 12 Pet. 621; *McCulloch* v. *Maryland*, 4 Wheat. 316.

The common law writ of mandamus has always been recognized in the practice acts of the state of Indiana, and such are substantially the provisions in the revised statutes of 1843, p. 539.

See, also, Revision of 1852, 2d vol., pp. 197, 198.

We contend, therefore, that by the act of Congress, by the common law, and by the practice of the courts of Indiana, the circuit court for the Indiana district had power to issue a mandamus in this case, because necessary for the exercise of its jurisdiction, to enforce its jurisdiction by the satisfaction of its judgment.

There is no novelty in the fact of this case—a judgment by a court of competent jurisdiction without power of enforcing satisfaction by the ordinary writs of execution. Nor is there any novelty in applying the mandamus as a remedy in the place of the ordinary execution in such case. This thing has been done under precisely such circumstances.

Reg. v. *St. Catharine's Dock Co.* 1 Nev. & Man. 121; 4 Barn. & Ad. 360; *Wormwell* v. *Hailstone*, 6 Bing. 676.

So, if a corporation neglects to raise, by the exercise of its legal power, the assets to satisfy a judgment, the court would compel them by mandamus.

Reg. v. *Victoria Park Co.* 4 Perry & D. 639; 1 Q. B. 292; *King* v. *Payn*, 6 Adol. & E. 404; 1 N. P. 524; *King* v. *London*, 5 Barn. & Ad. 233, 237.

So, a peremptory writ may be issued in the first instance as well as in England.

Queen v. *Mayor of Eye*, 9 Adol. & E. 676; *Reg.* v. *Fox*, 2 A. & E. (N. S.) 246.

As under the present Indiana statute, 2 Rev. Stat. 52, 198, § 741.

So in a clear case in Kentucky, 11 B. Mon. 143.

In this case there was no question to examine. The case had been tried and judgment rendered, and the rights of the parties all settled. The duty of the commissioners was declared by law. They had no discretion. There was nothing left to try.

Ang. & Ames, Corp. § 729, notes, p. 809.

Mandamus in Indiana is a civil remedy. The use of the name of the King or state is only nominal.

Brown v. *O'Brien*, 2 Ind. 431.

383*] *Mr. Justice **Grier** delivered the opinion of the court:

The plaintiffs in error were defendants in a suit by Aspinwall and others, in which a judgment was recovered for interest coupons on bonds issued by the corporation. The cause was removed to this court, and may be found reported in 21 How. 539. The judgment of the circuit court was affirmed, and the record remitted.

In order to enforce the execution of this judgment, the plaintiffs moved for a mandamus to the commissioners, to compel them to levy a tax to satisfy the judgment. The record shows that the board of commissioners appeared in the circuit court and resisted the motion, on several grounds but chiefly that the court had no jurisdiction to issue a mandamus in this case.

The act of assembly of Indiana, which authorized the issue of the bonds and coupons which were the subject of the litigation, may be found in the former report of the case. 21 How. 542.

It appears that by the 3d section of this act it is made the duty of the commissioners, for the purpose of paying the interest due on the bonds, "at the levying of the county taxes for each year, to assess a special tax, sufficient to realize the amount of the interest to be paid for the year."

This the commissioners had not done, and refused to do so, on notice and request of the defendants in error.

Now, it is not alleged nor pretended but that, if this judgment had been obtained against the corporation in a state court, the remedy now sought could have been obtained; for it must be admitted, that, according to the well established principles and usage of the common law, the writ of mandamus is a remedy to compel any person, corporation, public functionary, or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. That this case comes completely within the category is too clear for argument; for, even assuming that a general law of Indiana permits the public property of 384*] the county to be levied *on and sold for the ordinary indebtedness of the county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated. It is especially incorporated into the contract, that this corporation shall assess a tax for the special purpose of paying the interest on these coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of mandamus.

Why should not the circuit court of the United States be competent to give to suitors this only adequate remedy?

By the common law, the writ of mandamus is granted by the King's bench, in virtue of its prerogative and supervisory power over inferior courts. The courts of the United States cannot issue this writ by virtue of any supervisory power at common law over inferior state tribunals. They can derive it only from the Constitution and laws of the United States.

The jurisdiction of these courts is, by the Constitution, extended to "controversies between citizens of different states." Congress has authority to make all laws which shall be necessary and proper for carrying this jurisdiction into effect. The jurisdiction of the court to give the judgment in this case is not disputed; nor can it be denied, that by the Constitution, Congress has the power to make laws necessary for carrying into execution all its judgments. See *Wayman* v. *Southard*, 10 Wheat. 22. Has it done so?

By the 14th section of the judiciary act of 1789 (1 Stat. at L. 73), it is enacted "that courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles of the common law."

Now, the "jurisdiction" is not disputed, and it is "necessary" to an efficient exercise of this jurisdiction, that the court *have au- [*385 thority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to perform, and by the performance of which alone the plaintiff's remedy can be effected. The fund to pay this judgment, by the face of the contract, is a special tax laid and to be collected by defendants. They refuse to perform a plain duty. There is no other writ which can afford the party a remedy, which the court is bound to afford, if within its constitutional powers, except that afforded by this writ of mandamus.

It is "agreeable to the principles of the common law," and, consequently, within the category as defined by the statute.

A court of equity is sometimes resorted to as ancillary to a court of law in obtaining satisfaction of its judgments. But no court, having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice. It is no objection, therefore, to the use of this remedy, that the party might possibly obtain another by commencing a new litigation in another tribunal.

We are of opinion, therefore, that the circuit court had authority to issue the writ of mandamus in this case.

It is no reason for setting it aside, that a previous alternative writ had not issued. The notices served on the commissioners gave them every opportunity of defense that could have been obtained by an alternative mandamus. There was no dispute about facts which could affect the decision. The court gave them an opportunity to comply with the demand of the plaintiffs; their excuse for not doing so was, palpably, "a mere colorable adjournment or procrastination of the performances of the act, for the purpose of delay." It is equivalent to a refusal. Having refused to perform the duty which the law imposed upon them on the proper day, without even the pretense of a reason for such conduct, the peremptory mandamus was very properly awarded, commanding the duty to be performed "forthwith."

The judgment of the circuit court is, therefore, affirmed, with costs.

ARNOLD MEDBERRY, John Lawhead, Robt. H. Nugen and Abner J. Dickinson, *Plffs. in Err.*,

v.

THE STATE OF OHIO.

(See S. C. 24 How. 413–415.)

Jurisdiction to review state judgments—question decided must appear in pleadings, or exceptions, or by certificate—that state act was in conflict with state Constitution, furnishes no ground of review.

In order to give jurisdiction under the 25th section of the judiciary act, it must appear from the record of the case, either in express terms or by clear and necessary intendment, that one of the questions which this court has jurisdiction to re-examine and decide was actually decided by a state court.

This may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose.

Where it does not appear that there was any complaint that a state act was contrary to the Constitution of the United States, and the only question presented to the court, and decided by them, was, whether the provisions of the state act were consistent with those of the new state Constitution, this court has no jurisdiction.

Argued Mar. 1, 1861. Decided Mar. 14, 1861.

IN ERROR to the Supreme Court of the State of Ohio.

This action was commenced by the present plaintiffs in error, in the court of common pleas of Franklin county, Ohio, praying damages for the breach of a certain contract.

Judgment was for the plaintiffs.

The Attorney General of the state brought error to the Supreme Court, and the judgment of the court of common pleas was reversed.

State v. *Medberry*, 7 Ohio St. 522.

The present writ of error is brought to review this judgment of reversal.

A motion was made to dismiss the writ of error, as stated in the opinion.

Messrs. **C. P. Wolcott** Atty. Gen. of Ohio, and **E. M. Stanton** for the defendants in error.

Mr. **G. E. Pugh** for the plaintiffs in error.

*Mr. Justice **Grier** delivered the opin- [*414
ion of the court:

The defendant in error moves to dismiss this case for want of jurisdiction, because the record does not present any question which this court has authority to re-examine, by the 25th section of the judiciary act (1 Stat. at L. 73).

The construction of this section has been so often before this court, and the cases are so numerous which define and establish the conditions under which we assume jurisdiction, that it would be tedious to notice them, and superfluous to repeat or comment upon them.

For the purposes of this case, it is only necessary to say, "that it must appear from the record of the case, either in express terms or by clear and necessary intendment, that one of the questions which this court has jurisdiction to re-examine and decide was actually decided by the state court."

This may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone we can resort to ascertain the subject-matter of the litigation.

In this case, the declaration counts upon a contract made by the plaintiffs with the board of public works of Ohio, in 1855, for keeping a portion of the canal in repair for five years. It avers performance and readiness to perform, and that those officers, acting under and by authority of an act of assembly of Ohio, entitled "An Act Making Appropriations for the Public Works for 1857," "in violation and in open disregard of such contract, did wrongfully hinder and prevent," etc.

The Supreme Court gave judgment for the defendants on a demurrer to this declaration.

It is not averred in the pleadings, or anywhere on the record, that this or any statute of Ohio was void, because it impaired the obligation of contracts.

The only legitimate inference to be drawn from the face of this record is, that the Supreme Court decided that the board of public works had no authority to make such contract. If we go out of the record to search for the reasons, we find no *evidence that there [*415
was any complaint that the act of 1857 was contrary to the Constitution of the United States, or that the court gave their judgment for the defendant on account of any of its provisions. It is not referred to, except for the purpose of showing that the plaintiffs might bring their suit against the state for damages. The contract declared on was made by virtue of an act of assembly of 1845. In 1851, the people of Ohio formed a new Constitution. This contract was made in 1855.

The only question presented to the court, and decided by them, was, whether the provisions of the act of 1845 were consistent with those of the new Constitution.

This is a question of which this court has no authority to take judicial cognizance.

The writ of error is, therefore, dismissed.

NOTE.—*Jurisdiction of U. S. Supreme Court to declare state law void, as in conflict with state constitution; to revise decrees of state courts as to construction of state laws. Power of state courts to construe their own statutes*—see note to 7 L. ed. U. S. 679, and note to 12 L. ed. U. S. 169.

JAMES D. PORTER *et al., Plffs. in Err.,*
v.
BUSHROD W. FOLEY.

(See S. C. 24 How. 415–420.)

Where record does not show a question decided by state court, reviewable here, case will be dismissed—whether state act was within authority of legislature, not reviewable.

Where the record does not show that any question arose or was decided by the state court, which this court has authority to re-examine by virtue of the 25th section of the judiciary act, the writ of error must be dismissed.

Where the only question in the case was, whether an act of assembly of Kentucky, authorizing an executor to sell the real estate of minors, was a valid exercise of power by the legislature, this court has no authority to re-examine the case.

Argued Feb. 25, 1861. Decided Mar. 14, 1861.

IN ERROR to the Court of Appeals for the State of Kentucky.

This was a petition filed by the plaintiffs in error in the circuit court of Kenton county, Kentucky.

The plaintiffs connected themselves with a grant from the commonwealth of Virginia to James Welsh. The defendant claimed under the same title, but sought to prove title in himself through the acts of the legislature of Kentucky, of Nov. 10 and Nov. 26, 1823.

The jury, under the direction of the court, found a verdict for the defendant. The Kentucky court of appeals affirmed this judgment, and the original plaintiffs brought the case to this court by writ of error.

A motion was now made to dismiss the case for want of jurisdiction, as stated in the opinion of the court.

Messrs. **James Harlan, D. Mooar,** and **James O'Hara** for defendants in error.

Mr. **N. Headington** for plaintiffs in error.

420*] *Mr. James **Grier** delivered the opinion of the court:

The record of this case does not show that any question arose or was decided by the state court, which this court has authority to re-examine by virtue of the 25th section of the judiciary act.

Without entering into a tedious analysis of the case, it is sufficient to state, that the chief or only question in it was, whether an act of assembly of Kentucky, authorizing an executor to sell the real estate of minors, was a valid exercise of power by the legislature.

The counsel for plaintiff objected to the admission of the deed made in pursuance of such authority, "because said act and supplement were unconstitutional and void."

This objection was very properly construed by the court as having reference to the validity of the act of the legislature of Kentucky, not as contrary to any provision of the Constitution of the United States, but as raising the question whether the legislature had a power under the Constitution of that state, by general or special enactment, to authorize the sale of real estate of infants. The court decided that it had such power; and if it had, it is abundantly evident that there is no article nor clause in the Constitution of the United States which could interfere with it.

Let the writ of error be dismissed.

NOTE.—*What questions the Federal Supreme Court will consider in reviewing the judgment of state courts*—see note to 63 L. R. A. 571.

WILLIAM C. REDDALL, *Plff. in Err.,*
v.
WM. H. BRYAN, Alfred L. Rives, Wm. H. Piles, John Cameron, Jas. Payne, Chas. Hutchinson and John Moore.

(See S. C. 24 How. 420–423.)

Order affirming refusal of injunction, not final judgment.

Where the circuit court of a state refused an injunction, and from the order of refusal the plaintiff appealed to the state court of appeals, and that court reaffirmed the order of the circuit court and remanded the case, and from this decision of the state court of appeals, the case is here upon writ of error, the appeal to this court cannot be sustained.

The case is still pending, and there is no final decree; nor is there in the plaintiff's bill any right claimed under the laws of the United States; on the contrary, the claim is against the rights asserted by the United States, and exercised by the agents of the government under its authority.

Argued Mar. 1, 1861. Decided Mar. 14, 1861.

IN ERROR to the Court of Appeals of the State of Maryland.

This was a bill in equity filed by the present plaintiff in error, in the circuit court for Montgomery county, Maryland, for certain alleged trespasses, and asking injunction against further trespasses.

The circuit court refused the injunction, as did also the court of appeals of Maryland, on appeal.

From the last decision the case was brought to this court on writ of error.

This was a motion to dismiss, under the circumstances stated in the opinion.

Messrs. **J. S. Tyson** and **C. F. Mayer** for plaintiffs in error.

Mr. Atty. Gen. **Stanton** for defendants in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

This is a writ of error to revise the decree of the court of appeals in Maryland, affirming a decree of the circuit court for Montgomery county, in that state.

This case, as it appears on the record, is this:

The bill in equity of the plaintiff in error, filed in the circuit court for Montgomery county, in Maryland, alleges that the defendants have trespassed on land of his in Montgomery county, in Maryland, digging it up and

NOTE.—*What is "final decree" or judgment of state or other court, from which appeal lies*—see notes to 5 L. ed. U. S. 302; 17 C. C. A. 238; 28 C. C. A. 482.

erecting abutments and structures for an aqueduct, and so breaking up and dividing the land as to render it incapable of tillage, and inflicting great and irreparable damage upon the complainant; and that the defendants meditate, for completing the aqueduct, still further damage, of the same aggravated character, to the land, by digging to great depths of twelve to fifteen feet, and at other points raising embankments and building walls, and in conducting through the land a large and constant stream of water, for the sole use of the aqueduct.

The bill further states that the defendants claim to thus act under authority of the Executive of the United States, unsanctioned, however, as the bill alleges, by any action of Congress, and for supplying water to the cities of Washington and Georgetown, and under color of an act of the legislature of Maryland (session of the year 1853, chapter 179), purporting to authorize the United States "to purchase land **422***] in Maryland *for so supplying water, through construction of dams, reservoirs, buildings, and other works," and in case of sale not being agreed by owners, to allow the United States to adversely appropriate to herself the land, by condemnation and on valuation, to be effected in manner as provided in case of the Chesapeake and Ohio Canal Company's occasions for land and materials for that company's works.

The bill also avers that no such purchase was authorized by Congress, nor any attempt ever made on behalf of the United States toward an agreement for the purchase of complainant's lands, and insists that these pretended sanctions of the act of the Maryland legislature, and of the United States Executive, are repugnant to the Constitution of the United States and of Maryland, and that the land is thus intruded on for no public purpose of Maryland, nor for any connected with the United States as such, and of a Federal character, nor even so declared in the Maryland act of legislature, or in any action of Congress. And the bill prays injunction, to prevent the trespass and encroachments complained of from being carried on. The circuit court refused the injunction, and from the order of refusal, the plaintiff appealed to the court of appeals. That court affirmed the order of the circuit court and remanded the case.

From this decision of the court of appeals, the case is here upon writ of error.

It is evident, from this statement, that the appeal to this court cannot be sustained. In the first place, the decree of the court of appeals merely affirms the decree of the inferior court, and remands the case. It is, therefore, still pending, and there is no final decree. And although the state of Maryland in her own courts may authorize an appeal from such an interlocutory order, it cannot affect the jurisdiction of this, which is governed by the act of Congress, and that act authorizes the writ of error only in cases where there is a final decree or judgment.

In the second place, we do not see in the plaintiff's bill any right claimed under the laws of the United States. On the contrary, the claim is against the rights asserted by the **423***] United *States, and exercised by the agents of the government under its authority; and even if there had been a final decree by the dismissal of the bill, in addition to the refusal of the injunction, we perceive no ground upon which the writ of error could be maintained under the 25th section of the act of 1789. 1 Stat. at L. 73.

It is, therefore, dismissed for want of jurisdiction.

JOSEPH A. SHEIRBURN, *Plff. in Err.*,
v.
JACOB DE CORDOVA *et al.*

(See S. C. 24 How. 423–426.)

Recovery of land—legal title necessary.

In the courts of the United States, suits for the recovery of land can only be maintained upon a legal title, not upon an incipient equity.
Fenn v. Holme, 61 U. S. affirmed.

Submitted Feb. 26, 1861. Decided Mar. 14, 1861.

IN ERROR to the District Court of the United States for the Western District of Texas.

This was an action of trespass brought by the present plaintiff in error, in the court below, to try title to a tract of land.

Defendants pleaded—

1st. The general issue.

2d. Possession under title and color of title.

3d. The plaintiff's title consisted in a location which had been abandoned.

The trial resulted in a verdict and judgment for the defendants, and the plaintiff sued out this writ of error.

The point on which the case turned appears in the opinion of the court.

Messrs. **W. G. Hale** and **C. Robinson** for the plaintiff in error.

Mr. **George W. Paschal** for defendants in error:

Mr. Justice **Campbell** delivered the opinion of the court:

This was a suit by the plaintiff to recover a parcel of land in the county of Guadaloupe, in the state of Texas. The title of the plaintiff consists of certain entries of head rights embracing the land in dispute. One of these is in these words: Joseph A. Sheirburn, assignee of Victor Ed. Gaillon, enters one third of a league of land, situated on a noted island, about six miles above the town of Walnut Springs, and extending on the main land on the northeast side of the Guadaloupe river for quantity; the said location is also a short distance below a very elevated mound on the west of the river. Certificate 222. Harrisburg county, October 16, 1838. In January, 1853, the plaintiff applied to the district surveyor of Guadaloupe county for the survey of this and other land embraced in the entries, who declined to execute the surveys, but it is admitted that the entries cover the land in controversy. The defendants relied upon a Mexican grant, issued in 1831, in favor of Antonio Maria Esnourizar, for eleven leagues of land, and which embraces the same land. The district court pronounced this grant to be a valid appropriation of the land described in it, and the plaintiff alleges that there is error in that decision.

By a statute of Texas, "all certificates for head rights, land scrip, bounty warrants, or any

other evidence of right to land recognized by the laws of this government, which have been located or surveyed, shall be deemed and held as sufficient title to authorize the maintenance of actions of ejectment, trespass, or any other 426*] legal remedy given by law." Hart. *Dig. art. 3,230. The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn* v. *Holme*, 21 How. 481, that a further discussion is unnecessary.

Judgment of the district court, affirmed.

ALFRED TRACY, Surviving Partner of Edwd. Tracy, *Plff. in Err.*,
v.
WM. HOLCOMBE.

(See S. C. 24 How. 426, 427.)

Final judgment—order for new trial, is not.

Where the case has been brought here by writ of error directed to the supreme court of a state, and it appears that the judgment which it is proposed to revise is a judgment reversing the decision in the court below, and awarding a new trial; held, that there is no final judgment in the case, and the writ must be dismissed for want of jurisdiction.

Submitted Mar. 8, 1861. Decided Mar. 14, 1861.

IN ERROR to the Supreme Court of the state of Minnesota.

The only point considered is stated in the opinion.

Messrs. **I. A. Rockwell** and **P. Phillips** for plaintiff in error.

427*] *Mr. Chief Justice **Taney** delivered the opinion of the court:

This case has been brought here by writ of error, directed to the supreme court of the state of Minnesota. But upon looking into the transcript, it appears that the judgment, which it is proposed to revise, is a judgment reversing the decision of the court below, and awarding a new trial.

There is, therefore, no final judgment in the case, and the writ must be dismissed for want of jurisdiction in this court.

JAS. H. SUYDAM, *Plff. in Err.*,
v.
WM. H. WILLIAMSON.

(See S. C. 24 How. 427-435.)

State laws govern as to title and transfer of real property—this court will follow state rule of property, even if contrary to its own opinions.

The cases of Williamson v. Berry, 49 U. S. (8 How.) 495, 549; Williamson v. The Irish Presbyterian Church, 49 U. S. (8 How.) 565; and Williamson v. Ball, 49 U. S. (8 How.) 566, examined.

Where the subject of the dispute is real property situated within a state, her laws exclusively govern in respect to the rights of the parties, the modes of the transfer, and the solemnities which should accompany them.

The power to establish Federal courts, and to endow them with a jurisdiction, affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign.

Where a contrary opinion to that expressed by this court has prevailed in the courts of a state, and become a rule of property there, this court, without re-examining their own opinion, or making any attempt to account for or to reconcile the difference, will apply the rule adopted in such state, to the determination of controversies existing there.

Submitted Mar. 5, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the Southern District of New York.

This was an action of ejectment brought by the present defendants in error in the court below, to test the validity of a deed from Thomas B. Clark to Peter McIntyre, made under and by virtue of certain acts of the legislature, and orders of the court of chancery of the state of New York.

Judgment was rendered in favor of the plaintiffs, and the defendants brought the case to this court.

The facts of the case appear in the opinion of the court.

Mr. **N. Dane Ellingwood**, for the plaintiff in error:

This court, in some cases, possesses exclusive, and in others concurrent, jurisdiction. In cases of concurrent jurisdiction, in order to avoid a conflict of judicial authorities between the Federal and state tribunals, this court has uniformly adopted and followed the decisions of the state courts of last resort:

1st. In cases where the title to land is involved, this court is governed by the *lex rei sitæ*.

12 Wheat. 153; 1 Pet. 570; 6 Pet. 291; 5 Pet. 151, 398; 2 How. 76; 11 How. 297; 5 Cranch, 234, 421; 9 Cranch, 87, 164, 456; 10 Wheat. 152, 202; 14 How. 488; 15 How. 421; 16 How. 276; 59 U. S. (18 How.) 595; 61 U. S. (20 How.) 1.

2d. Even where titles to land are not involved, it appears that this court has followed the decisions of the state courts of last resort.

Bank of Hamilton v. *Dudley*, 2 Pet. 492; *Bank of U. S.* v. *Daniel*, 12 Pet. 45; *Nesmith* v. *Sheldon*, 7 How. 812.

This court respects the decisions of the state tribunals upon their local statutes in the same manner as the state courts are bound by the decisions of this court in construing the Constitution, laws and treaties of the Union.

Elmendorf v. *Taylor*, 10 Wheat. 153.

The decisions of the courts of the state of New York upon the question at issue may be found in *Towle* v. *Forney*, 14 N. Y. 425; *Cochran* v. *Van Surlay*, 20 Wend. 377; Williamson

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NOTE.—*What is "final decree" or judgment of state or other court, from which appeal lies*—see notes to 5 L. ed. U. S. 302; 17 C. C. A. 238; 28 C. C. A. 482.

NOTE.—*State laws and decisions govern U. S. courts as to title and transfer of real estate by grant or devise, and as to contruction of state statute*—see note to Clark v. Graham, 5 L. ed. U. S. 334; note to Elmendorf v. Taylor, 6 L. ed. U. S. 290; and note to Jackson v. Chew, 6 L. ed. U. S. 583.

v. *Ball*, 59 U. S. (18 How.) 495, 549, 565, 566; *Jackson* v. *Van Dalfsen*, 5 Johns. 43; *Clark* v. *Davenport*, 1 Bos. 96, 100, 105, 113, 121.

Mr. **David Dudley Field**, for defendant in error:

It is immaterial whether or not the state courts of New York persist in the adherence to the erroneous decision of *Cochran* v. *Van Surlay*, 20 Wend. 365.

If they are not willing to re-examine the grounds of that decision, that is no reason why this court should recede.

The decision here was made after great deliberation with the decision of *Cochran* v. *Van Surlay* before it. Property has since been bought and sold on the faith of the opinion here delivered, and the judgment by this court pronounced. Every principle by which our law of precedents is justified, tends against the reopening of the case in this court.

If the rules of adherence to a decision once delivered is deliberately relaxed in this august tribunal, where shall we find stability in our judicial institutions?

Lane v. *Vick*, 3 How. 464; *Rowan* v. *Runnels*, 5 How. 139; *Pease* v. *Peck*, 59 U. S. (18 How.) 595.

[Counsel then argued against the force of the decision of *Towle* v. *Forney*, 14 N. Y. 423, on the ground that it was not orally argued, that one of the ablest judges, Selden, dissented, and that the court merely followed the previous case of *Cochran* v. *Van Surlay*, without attempting to justify the decision. The cases in this court referred to are those of *Williamson* v. *Berry*, 8 How. 495; *Williamson* v. *Irish Presb. Ch.* 8 How. 565; *Williamson* v. *Ball*, 8 How. 566; *Suydam* v. *Williamson*, 65 U. S. (24 How.) 427.]

428*] *Mr. Justice **Campbell** delivered the opinion of the court:

This was an action of ejectment in the circuit court, for certain lots of land in the city of New York, by the defendants in error, against the plaintiff in error. The plaintiff in the circuit court claimed, under a devise in the will of Mary Clarke, who died in the year 1802, by which she gave to trustees therein named that part of the farm upon which she resided, and which she owned, called Chelsea, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, during his natural life; and from and after the death of said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke, living at his death, in fee. The property in dispute is a portion of this estate. Thomas B. Clarke died in 1826, and the plaintiffs have the title to this property of his three children, who were living at his death.

The defendant's title is deduced from Thomas B. Clarke, who disposed of the property under the authority of certain acts of the legislature of the state of New York, and orders of the court of chancery of that state.

In March, 1814, T. B. Clarke represented to the legislature the existence and terms of the will of Mary Clarke, and that the trustees named in the will were consenting to such acts of the legislature of the state as it might deem proper to pass for his relief, and also requested, with their sanction, that another trustee might be substituted in their stead; and further represented, that the estate could not be so improved and made productive as to fulfil the object of the testator; that he had married and had a family of five children, and that some other disposition of the estate was essential for the support of his family and himself. The legislature thereupon passed an act for the discharge of the trustees named in the will, and empowered the court of chancery to appoint one or more trustees to execute and perform the trusts and duties specified in the will and in their act. The act authorized the subdivision of a special portion of the farm into city lots, and their sale within a convenient time thereafter, with the assent of said *Clarke, and for the investment and [*429 application of the income of the proceeds of the sales.

In March, 1815, upon the petition of Thomas B. Clarke, representing that he could not procure a suitable person to execute the trusts of the act of 1814, and that no other person was interested in the property besides his family and himself, an act was passed authorizing Clarke to become trustee, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Clarke might apply the whole of the interest and income of the said property to the maintenance and support of his family, and the education of his children; and that no sale should be made until the said Clarke should have procured the assent of the Chancellor of the state to such sale, who shall, at the time of his giving such assent, direct the mode in which the proceeds of sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke, as trustee; and further, that it shall be the duty of the said Clarke to render an account annually, to the Chancellor, of the principal, the interest being applicable as the said Clarke might think proper, for his own use and benefit, and the maintenance and support of his children.

After the passing of this act, the Chancellor, upon the petition of Clarke, made sundry orders for the sale of the lots and the appropriation of the proceeds of sale, under the directions of a master of the court. In one of these orders the Chancellor directed that so much of the net proceeds to arise from the sales be applied, under the direction of one of the masters of the court, for the payment and discharge of the debts now owing by the petitioner, and to be contracted for the necessary purposes of his family.

In March, 1816, the legislature of New York further enacted that the said Clarke, under the order heretofore granted by the Chancellor, or under any subsequent order, might mortgage or sell the premises which the Chancellor permitted or might permit him to sell as trustee under the will of Mary Clarke, and to apply the money so raised by mortgage or sale to the *purposes required or to be required [*430 by the Chancellor, under the acts theretofore passed for his relief.

In March, 1817, the Chancellor authorized Clarke to sell the southern half of the property included in the devise, and to convey any part or parts of the said estate in payment and sat-

isfaction of any debt due and owing from the said Clarke, upon a valuation to be agreed on between him and his respective creditors: provided, nevertheless, that every sale and mortgage, and conveyance in satisfaction, that may be made by the said Thomas Clarke, shall be approved by one of the masters of the court, and that a certificate of approval be indorsed upon every deed or mortgage to be made in the premises; and that the said Clarke be authorized to receive and take the moneys arising from the premises, and apply the same to the payment of his debts; and invest the surplus in such manner as he may deem proper, to yield an income for the maintenance and support of his family.

In October, 1818, Thomas B. Clarke executed a deed to Peter McIntyre for a number of lots, including those described in the declaration, in which he recited that he had been empowered to sell, or mortgage, or convey, in satisfaction of any debt due from him to any person, the property devised by Mary Clarke, as aforesaid; and that Clarke was indebted to McIntyre in a large sum of money; and that in consideration of the premises, and of $3,750. the receipt of which he acknowledged, he granted, etc., etc., in fee simple to McIntyre.

The master in chancery indorsed upon the deed an approval, that "having examined the within deed, he approved it in manner and form," and contemporaneously conveyed to McIntyre an interest he held as trustee for Clarke.

Upon the trial, it appeared that the sale was made upon the consideration of some debts of Clarke, that McIntyre assumed to pay; of occasional advances of small sums of money to Clarke, and payment of bills, in which the children were interested; of some two or three years' board of Clarke and a portion of his children, and two notes for about fifteen or sixteen hundred dollars. It was shown that others **431*]** of the children *were neglected by Clarke, and subsisted through the bounty of friends and relatives.

The defendant connects himself with the title of McIntyre as a purchaser at a sale of the property, under a decree of foreclosure of his mortgage, in 1844, by the court of chancery in New York.

The plaintiffs impugn the proceeding under which the conveyance to McIntyre was made, and the sufficiency of the consideration to support the conveyance. They contend that every material question in this case is *res judicata* in this court, having been adjudged in the cases of *Williamson* v. *Berry*, 8 How. 495, 549; *Williams* v. *The Irish Presbyterian Church*, 8 How. 565; and *Williamson* v. *Ball*, 8 How. 566. They insist that it is not material whether the court of appeals of New York persist in their adherence to their decision in the case of *Cochran* v. *Van Surlay*, 20 Wend. 365. If they are not willing to re-examine the grounds of that decision, that is not a reason why this court should recede. The decision here was made, after great deliberation, with the decision in *Cochran* v. *Van Surlay*, before it. Property has since been bought and sold upon the faith of the opinion here delivered, and the judgment, by this court pronounced. Every principle by which our law of precedents is justified, tends against the reopening of the case in this court.

The litigation in respect to the property conveyed by Clarke, under the authority derived from the acts of the legislature, and the orders of the Chancellor, commenced before the death of Clarke. *Sinclair* v. *Jackson*, 8 Cow. 543.

The case of *Clarke* v. *Van Surlay* was tried at the New York circuit in 1833, and was decided in the supreme court in 1836. 15 Wend. 436. It was removed to the court for the correction of errors, and was affirmed in that court, but with much division in the court, in 1838. *Cochran* v. *Van Surlay*, 20 Wend. 365.

The decree of foreclosure and sale, under which the defendant claims, was rendered in 1840, and the sale took place in 1844. The purchaser, subsequently to the sale, objected to complying with his purchase, because of a notice from the *devisees of Mary Clarke, [*432 that they were claimants of the property, and forbade his entering upon the same. The Vice-Chancellor, upon the motion requiring the purchaser to comply, and the Chancellor, upon appeal from his order, compelled the purchaser to complete his purchase. The reasons for this order do not appear. But the Vice-Chancellor and Chancellor might have said, that it had become the settled law of the state that such a title was valid, and could have rested upon the authority of the case of *Clarke* v. *Van Surlay*.

In 1851 the case of *Towle* v. *Forney*, 4 Duer, 164, came before the superior court of the city of New York, and involved the title to one of the lots conveyed to McIntyre by Clarke, and sold under the decree of foreclosure. That case was determined in that court, and its judgment affirming the validity of that title was sanctioned in the court of appeals (14 N. Y. 426) subsequently to the decisions reported in 8 Howard in this court. The court of appeals, in answer to the argument derived from the adjudication in this court, say, that perhaps there may be a difference between the cases which were determined in this court in 1851 and that case, but that the more suitable answer is, that as between the judgments of their own courts, and those of the courts of the United States, their own are binding where there is a conflict between them, except in cases arising under the Constitution and laws of the United States, when the judgments of the Supreme Court of the United States are of controlling authority. That court declares that the judgment in *Clarke* v. *Van Surlay* is a determination of the court of last resort in this state, not only upon all the questions of law in the case under consideration, but upon the identical title under which the plaintiff in the reported case, and the defendant in the present case, claimed to own the premises in controversy in the respective suits. . . . In such a case, there being no pretense of collusion, and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest, or who may become interested in the question, as well as upon the parties to the particular action. *Towle* v. *Forney*, 4 Duer, 164; S. C. 14 N. Y. 426; *Clarke* v. *Davenport*, 1 Bosw. *96; S. C. affirmed [*433 on appeal. And the question is now presented to this court, whether they should adhere to their

own opinion as expressed in the cases in 8 Howard, or acknowledge the authority of the courts of New York to settle finally the contest upon this title.

The subject of the dispute is real property situated within the state of New York, and her laws exclusively govern in respect to the rights of the parties, the modes of the transfer, and the solemnities which should accompany them. *Communis et recta sententia est, in rebus immobilibus servadum esse jus loci in quo bona sunt sita.* Every sovereign has the exclusive right to command within his territory; and the laws which originate rights to real property are commands addressed to the members of the state, requiring them to abstain from any interference with the proprietary right they recognize or establish; and in respect to this subject the sovereignty of New York has not been impaired by her adoption of the Federal Constitution. The power to establish Federal courts, and to endow them with a jurisdiction to determine controversies between certain parties, affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign. The title of the devisees of Mary Clarke was devested by authority conferred by the legislature of the state, which was exercised subject to the oversight of her own tribunals. The persons affected by this authority were natives of the state—children under the superintending care of the parental jurisdiction of the state. It was in the constitutional exercise of this supreme and exclusive jurisdiction that this title was disturbed. It behooves every other state to enforce or maintain rights which have thus originated in laws operating within their legitimate sphere, and which defeat no policy of their own; and the jurisprudence of this court attests the care with which this court has observed the general obligation (of which this is a particular instance), in its administration throughout the Union.

In *Jackson* v. *Chew*, 12 Wheat. 162, this court say:

"The inquiry is very much narrowed by applying the rule which has uniformly governed [*434] this court, that where any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals."

In *Beauregard* v. *New Orleans*, 18 How. 497, the court say:

"The judgments of the supreme court of Louisiana, upon the validity of the sales impunged in this bill, were given more than twenty years ago. They have formed the foundation upon which the expectations and conduct of the inhabitants of that state have been regulated. They have quieted apprehension and doubt respecting a title to an important portion of a large and growing city. They have invited a multitude of transactions and engagements in which the well-being of hundreds, perhaps thousands, of the citizens of that state depend. In this bill there are several hundreds of defendants. The constitution of this court requires it to follow the laws of the several states wherever they properly apply; and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title to lands. Upon cases like the present, the relation of the courts of the United States to a state is the same as that of her own tribunals. They administer the laws of the state, and to fulfil that duty they must find them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the states and the Union would be productive of the greatest mischief and confusion."

In the case of *Arguello* v. *United States*, 18 How. 539, this court determined that the colonization regulations of Mexico, of 1824 and 1828, did not prohibit the settlement of the littoral or coast leagues by natives, under the authority of the governor of California, and without the consent of the central government in Mexico. The same question was presented in the case of *League* v. *Egery*, 24 How. 264, at this term, from the district court of the United States in Texas, in reference to the coast leagues in that state. This court found a contrary opinion had prevailed in the courts of that state, and had become a rule of property there, and without re-examining their own opinion, or making any attempt to account for or to reconcile the difference, without any hesitation applied the rule adopted in Texas to the determination of controversies existing there. [*435]

The cases reported in 8 Howard, referred to, came before this court upon a division of opinion between the experienced judges of the circuit court of the southern district of New York. The authority of *Clarke* v. *Van Surlay* was thus impugned in that tribunal. The decision in the court of errors was far from being unanimous; nor was the dissent in that tribunal feeble or equivocal.

The majority of this court were convinced that the questions might be examined anew, and that their answers were accordant with the opinion of the minority in the court of errors. But in the present case there is no room for doubt as to what the settled opinion of the courts of New York is in reference to this title and, therefore, no occasion for any hesitation concerning the obligation we have to perform. The circuit court decided adversely to the defendant.

Its judgment is reversed, and the cause remanded for further proceedings.

JACOB E. CURTIS, *Plff.*,
v.
THE COUNTY OF BUTLER.

(See S. C. 24 How. 435-450.)

County bonds, when valid—when signed by a majority of the commissioners, are valid.

Power was given in the Pennsylvania act of the 9th February 1853, and by the agreement of subscription and terms of payment, to the commissioners of Butler county, to make the county bonds upon which the suit is brought in payment for subscription to capital stock of a railroad company, and to bind the county to pay them.

These bonds having been signed by but two of the said commissioners are binding on the county where the act declares that two of the commission-

NOTE.—*Bonds; power to issue; in aid of railroads*—see note to 37 L. ed. U. S. 145.

ers shall form a board for the transaction of business, and when the act in terms makes the bonds valid if made by a majority of the commissioners of the respective counties.

Argued Feb. 26, 1861. Decided Mar. 14, 1861.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Western District of Pennsylvania.

This was an action of debt brought in the court below by the plaintiff, Jacob E. Curtis, on certain coupons claimed to have been attached to bonds issued by the county of Butler to the Northwestern Railroad Company, in payment of an alleged subscription of that county to the capital stock of the railroad company.

The defendant pleaded *nil debet*. Upon the trial the plaintiff gave in evidence.

1. The 7th section of the act of incorporation of the railroad company, the substance of which, so far as it appertains to this case, is stated in the opinion.

2. Bond No. 1, purporting to have been issued by the county of Butler for stock in the Northwestern Railroad Company, signed by two of the commissioners of Butler county.

3. The petition of the railroad company to the grand jury and commissioners of Butler county for the subscription, and the presentment of the grand jury requesting the subscription.

4. The coupons of the bonds.

5. Evidence to show that the coupons were signed by Thomas Robinson, and that he was the clerk of the commissioners at the date of the bond.

It was admitted that the county of Butler was one of the counties through which the railroad was intended to pass, and if ever made, would pass.

The defendant gave in evidence the subscription and agreement between the commissioners of the county of Butler and the Northwestern Railroad Company, consisting of a resolution passed by the board of directors of the railroad company, and a subscription on the part of the county, signed by three commissioners. The defendant further gave evidence tending to show that these bonds had been disposed of by the company at less than their par value, and that the plaintiff had notice of the agreement with the county as to the payment of interest by the company, etc., and that notice had been given to the plaintiff to show how he came by these instruments.

The jury, under the instructions of the court, found a verdict for the plaintiff, subject to the opinion of the court as to the legal authority of the commissioners to bind the people of the county of Butler by the securities declared upon. The defendant requested the court to instruct the jury that no power was given by the act of assembly of February 9th, 1853, or by the agreement of subscription, or terms of payment to the commissioners, to make the instruments on which the suit is brought and bind the county to pay them, and that if such power was given, it could not be exercised by two of the three commissioners. Upon this question the judges of the circuit court were divided in opinion.

Mr. **Edwin M. Stanton,** for plaintiff:

Two questions are involved in the certificate of division of opinion.

1. Had the commissioners of Butler county legal authority to issue the bonds given in evidence?

2. If they had was such power well exercised by two out of the three commissioners?

The first question resolves itself into a construction of the act of the Pennsylvania general assembly, for the incorporation of the Northwestern Railroad Company.

That the legislature of Pennsylvania possessed the constitutional authority, at the time of the passage of this act, to delegate to the county of Butler the power to execute binding securities, has been settled by the supreme court of the state.

Sharpless v. *Mayor, etc., of Philadelphia*, 21 Pa. 147; *Commonwealth* v. *Commissioners of Allegheny Co.* 32 Pa. 218.

The very act in question has been before the supreme court of the state, and its validity conceded.

Assuming, therefore, authority on the part of the legislature to delegate to the county and its proper officers the power to execute and issue such instruments as are the foundation of this suit, we come to the question, whether such a power has been actually conferred in the present instance.

1. It is admitted that Butler county comes within the scope of the act; it is one of "the counties through parts of which the said railroad may pass."

2. It is admitted that this county, through its officers, "the commissioners, or a majority of them," is authorized to subscribe to the capital stock of the railroad company, and "make payment on such terms and in such manner as may be agreed upon by said company and the county." It is, however, claimed that the "power" to make such payment on such terms and in such manner as may be agreed upon by the company and the proper county does not necessarily imply that such securities as bonds with coupons attached to them may be given.

An examination of the terms and phraseology of the act, however, clearly shows that the power to issue bonds was intended to be conveyed. In this very section it is provided that "whenever bonds of the respective counties are given in payment of subscriptions," etc., and that "no bonds shall be given for less than one hundred dollars," etc. Here we have a legislative construction of the act, showing that the authority to issue bonds in the name of the county was intended to be conferred.

In the actions of all the parties concerned, we find a similar construction put upon the act. Nobody ever supposed that the county could make payment of her subscription in any other manner than by her credit pledged by her bonds. The same astuteness that we now find employed in the endeavor to repudiate these obligations was then engaged in advising and procuring their execution. But the defendant's own construction of the law in making these obligations will now be applied by courts of justice in enforcing their fulfilment. *In the Co. of Lawrence* v. *The Northwestern R. Co.*, 32 Pa. 144, the supreme court granted an injunction on terms implying and recognizing

the validity of the bonds before that time negotiated by the company.

Of the "terms and manner of payment agreed upon by the said company and the proper county," the best, and, to affect the plaintiff, the only evidence is to be found in the bonds themselves. Hence the agreement of 18th August, 1853, put in evidence by the defendant, was superseded by the agreement of the 1st July, 1854, evidenced by the bonds; and any provision of the earlier agreement inconsistent with the terms of the bond cannot avail as a defense against a bona fide bearer of the bonds.

2d. But suppose a fair construction of the terms of the act of 9th Feb., 1853, shows authority in the county and its proper officers to issue its instruments given in evidence, a second question arises under the facts as stated in the certificate of division of opinion, namely: whether bonds, signed by two of the three commissioners, would be binding.

It has not been seriously contended that the commissioners were not the proper officers to execute the bond.

Act 15th April, 1834, Purdon's Digest, 176.

Now, by the 19th section of the act of April, 1834, it is enacted as follows: "Two of the commissioners aforesaid shall form a board for the transaction of business, and when convened in pursuance of notice or according to adjournment, shall be competent to perform all and singular the duties appertaining to the office of county commissioners." See Purdon's Digest, p. 176.

In *The Commissioners of Allegheny Co.* v. *Lecky*, 6 S. & R., 166—a case that arose before the act of 1834 was passed—it was unanimously held that all powers conferred upon the commissioners might be legally executed by two.

8 Watts, 128; 5 Binn. 481.

It may be further remarked that signing the bonds was not a duty of a deliberative nature. It was merely carrying into effect the previous deliberations of the board and their agreement with the company.

Mr. **J. S. Black** for the defendant.

445*] *Mr. Justice **Wayne** delivered the opinion of the court:

This case has been sent to us upon a certificate of division upon two points, which occurred between the judges upon the trial of it in the court below: 1. Had the commissioners of Butler county legal authority to issue the bonds given in evidence? 2. If they had, was such power or authority well exercised by two out of the three commissioners of the said county, or were the bonds signed by two of them binding?

The act under which the bonds were issued was passed 9th February, 1853. The 1st section enumerates the persons by name who were to become commissioners to open books, receive subscriptions of stock, and to organize a company by the name, style, and title of the Northwestern Railroad Company, with all the powers, and subject to all the duties, restrictions, and regulations, prescribed by an act regulating railroad companies, approved the 19th of February, 1849, "so far as the same are not allowed and supplied by the provisions of this act."

By the 2d section of the act, the capital stock of the company was to be divided into twenty thousand shares, of $50 each, with the privilege to be increased, if the exigencies of the company shall require it, to any sum not exceeding $2,000,000, as the president and directors of said company may deem expedient. By the 3d section the company have the right to build and construct a railroad from some point on the Pennsylvania or Allegheny railroad, at or west of Johnstown, by the way of Butler to the Pennsylvania and Ohio state line, at some point on the western boundary line of Lawrence county, etc., etc., to connect with any railroad now or which might be thereafter constructed at either end, or at any intermediate point on the line or route thereof. For doing this, the company was authorized to borrow money to an amount not exceeding the capital stock of the company, upon bonds to be issued by it whenever the president and directors might deem it expedient to do so. The rate of interest upon the bonds was not to exceed seven per cent, and they were to be convertible into the stock of the company, whenever the holders of it and the *company might [*446 agree to have that done. The 6th section of the act we need not speak of, as it relates to matters unconnected with the questions certified, or from which there is not any impeachment of the correct action of the company.

But the 7th section, the counties through parts of which the railroad may pass, were authorized to subscribe to the capital stock of the company, "and to make payments on such terms and in such manner as may be agreed upon by the company and proper county." But the amount of the subscription of any county was not allowed to exceed ten per cent of the assessed valuation thereof (for taxes), and before any subscription could be made for any county, the amount of each was to be determined and approved by a grand jury of the county. Upon the report of a grand jury being filed, the county commissioners were to carry it into effect, accordingly. Then, whenever bonds of the respective counties were given in payment of subscriptions, the commissioners were prohibited from selling them at less than par; and such bonds the state exempted from taxation until the clear profit on the business of the railroad amounted to six per cent on the cost thereof; and it was declared that the subscription of the counties was to be held to be valid when made by a majority of its commissioners. With this analysis of the act, under which the bonds sued upon were issued, we proceed to consider the points submitted to us.

In the first place, after a careful examination of the act to which this act was made subordinate, we do not find that anything was done by the commissioners inconsistent with it, or bearing upon the points certified.

We think that the county commissioners had authority from the legislature to execute the bonds, and pledge the faith, credit, and property of the county, to pay them. Authority was given by the 7th section of the charter. It declares that the county shall have power to subscribe to the capital stock of the railroad company, and to make payment in such manner and upon such terms as may be agreed upon between the county and the company.

It cannot be denied that this was an authority to the county *to make a contract of [*447

subscription, and that it contemplates a payment for it prospectively "by bonds which, when made in the name of any county, were to be held valid, if made by a majority of the commissioners of the respective counties." The power to subscribe, the manner of payment, the limitation upon the amount of subscription, the mode of carrying that out through the intervention of a grand jury's approval and report, the allowance of bonds to be given in payment, the restriction of the same upon the railroad company to which they were to be transferred, not to sell the bonds at less than par, the hindrance upon the issue of bonds of less than $100, the exemption of them from taxation upon a contingency until the clear profits of the railroad shall amount to six per cent upon the cost of it, are significant of what was intended. All of those particulars in this section of the statute are to be considered together in the construction of it.

No one questions that the legislature, then, had the power to incorporate such companies, and to allow the counties of the state to become interested in them upon the faith of county securities, for the transportation of persons and things in all the vehicles used for commerce and the carrying trade, either by water, or by land upon ordinary artificial roads. And that associations of persons might be incorporated for the construction of the latter, either by money already subscribed, or by money to be raised or borrowed by certificates of indebtedness, with certificates of interest attached, separable from the former, for the payment of interest, payable at particular times.

The objection now, as we understand it, is not that the legislature had not such a power. But it is said, in the exercise of it, that the railroad company, and the counties through which the road might be constructed, had mistaken the terms upon which the counties might subscribe to the capital of the railroad company, as to the manner for the payment of the subscription; in other words, that the counties in issuing bonds with coupons had mistaken the special authority given to them by the 7th section of the act, and had made a different contract, which could not be judicially enforced.

448*] *That section is as follows: "That the counties through parts of which said railroad may pass shall be authorized to subscribe to the capital stock of the railroad company, and to make payment on such terms and in such manner as may be agreed upon by said company and the proper county; provided, that the amount of subscription by said county shall not exceed ten per cent of the assessed valuation thereof, and that before any such subscription shall be made, that the amount thereof shall be fixed and determined by one grand jury of the proper county, and approved by the same; and that upon the report of such grand jury being filed, the county commissioners may carry the same into effect *by making, in the name of the county*, the subscription directed by the grand jury: provided, that whenever the bonds of the respective counties are given in payment of subscriptions, that the same shall not be sold by the railroad company, at less than par value, and no bonds shall be in less amount than one hundred dollars, and that such bonds shall not be subject to taxation until the clear profits of said railroad company shall amount to six per cent upon the cost thereof; and that all subscriptions made or to be made in the name of any county shall be held and deemed valid if made by a *majority* of the commissioners of the respective counties."

Now, we freely subscribe to the rule that neither privileges, powers, nor authorities, can pass by an act of incorporation, unless they be given in unambiguous words, and that an act giving special privileges must be construed strictly. That in such a case, where a sentence is capable of having two distinct meanings, that a construction must be given to it most favorable to the public. But in applying these principles to this case, it must be done with reference to the subject-matter contemplated by the legislature, as a whole, and not allow its manifested intention and design to be defeated by denying to the counties the only means of paying their subscription, by which the main object could be accomplished.

Why was it that the legislature, in drawing the section, directed that the subscriptions of the counties should be made upon terms and in manner as the railroad and the counties *might agree upon; that it limited the [*449 amount of subscription upon an assessed valuation of the property of the county; that it contemplated a taxation contingently upon the bonds of the counties, respectively, that they were to be given in payment of subscriptions, unless it had been its clear intention that the subscriptions were to be paid for by county bonds, when both company and county should make such a contract.

This, in our view, is not a case of ambiguity in the power given, but one of as clear designation as could have been expressed. Nor was it a case in which the legislature imposed a public burden. It was no more than giving to the people of the county a right to tax themselves for an anticipated advantage to arise from an expenditure of their own money in the construction of a railroad. It was the concern of the county; the same as it would have been if the county had been legislatively empowered to tax themselves to clear out a river for a better navigation, or for the cutting of a canal. Whether the allowance for the issue of bonds for either of those purposes will be judicious, depends upon the subject and the regulations which the legislature may impose for their execution.

In our best judgment, applied as it has been to the 7th section of the act to incorporate the Northwestern Railroad Company, in connection with a full consideration of the rules for the construction of the powers of corporations, we have been unable to find anything in the 7th section equivocal or doubtful as to the power given to the counties to make and to pay for their subscriptions to the railroad company, and nothing wrong as to that company having received them according to its charter.

We therefore answer to the first point certified to this court, "that power was given in the act of the 9th February, 1853, and by the agreement of subscription and terms of payment, to the commissioners of Butler county, to make the instruments upon which the suit is brought, and to bind the county to pay them."

We will now proceed to the second point cer-

tified to this court: and if any power was given 450*] to issue bonds payable to *bearer, with coupons attached, it could not be exercised by two out of the three commissioners of the said county; and that these bonds having been signed by but two of the said commissioners are not binding on the county.

We have examined the acts relating to who are designated to exercise the corporate powers of the county. By the act of the 15th April, 1834, the commissioners are to do so; and it is now claimed, as there are three, that all of them should have signed the bonds to make them binding upon the county. But by the 19th section of the act, it is declared that two of the commissioners shall form a board for the transaction of business, and when convened in pursuance of notice or according to adjournment, shall be competent to perform all and singular the duties appertaining to the office of county commissioners. Purdon's Digest, 176.

Before the act of 1834 was passed, it was held in the case of *The Commissioners of Allegheny County* v. *Lecky*, 6 Serg. & R. 166, that all powers conferred upon the commissioners might be legally executed by two, without the concurrence of the third. The same ruling will be found in *Cooper & Grove* v. *Lampter Township*, 8 Watts, 128; 5 Binn. 481. But why cite authorities, when the act in terms makes the bonds valid if made by a majority of the commissioners of the respective counties?

We, therefore, answer the second point certified, that the bonds upon which suit is brought, being signed by two out of the three commissioners, are binding upon the county of Butler.

BENJAMIN T. PHELPS and Joseph S. Gumm,
Plff. in Err.,
v.
LYCURGUS EDGERTON, William H. Dunn and John G. Wright.

Writ of error for delay. Cause dismissed with ten per cent damages.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Messrs. **T. L. Dickey** and **J. A. Rockwell** for plaintiffs in error.

Messrs. **L. Trumbull** and **B. C. Cook** for defendants in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

Upon examining the record in this case, the court is of opinion that the writ of error was sued out merely for delay, and therefore affirm the judgment, with 10 per cent damages, according to the second section of the 23d rule of this court.

WATSON FREEMAN, Marshall U. S., etc.,
Plff. in Err.,
v.
JABEZ C. HOWE, John H. Wilkins and William Minot, Jr.

(See S. C. 24 How. 450–461.)

The jurisdiction which has first attached in the seizure and sale of property will prevail—marshal's right to hold is question for Federal court, not for state court—equity action in Federal court, to restrain suit at law in same court, is not an original action and is maintained without reference to residence of the parties.

In the case of conflicting authorities under a state and Federal process, on which property has been seized, the question as to which authority shall for the time prevail, does not depend upon the rights of the respective parties to the property seized, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.

This rule applies to an attachment issued by the U. S. Circuit Court.

Where property has been seized under the process of attachment, from the U. S. circuit court and is in the custody of the marshal, the right to hold it is a question belonging to the Federal court, under whose process it was seized, to determine, and there is no authority, under the process of the state court, to interfere with it.

It belongs to the Federal courts to determine the question of their own jurisdiction, the ultimate arbiter being the supreme judicial tribunal of the nation.

A bill filed on the equity side of a Federal court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it has arisen, and is maintained without reference to the citizenship or residence of the parties.

Argued Mar. 5, 1861. Decided Mar. 14, 1861.

IN ERROR to the Supreme Judicial Court of the Commonwealth of Massachusetts, within and for the County of Middlesex, in the District of Massachusetts.

The case is stated by the court.

Mr. **Henry M. Parker**, for plaintiff in error:

1. Persons and property "in the custody of the law" of a state are withdrawn from the process of the courts of the United States (unless Congress has otherwise specifically enacted), and in like manner persons and property in the custody of the law of the United States are not subject to any state process.

The Oliver Jordan, 2 Curt. C. C. 414; *Taylor* v. *The Royal Saxon*, 1 Wall. Jr. 311; see, also, *Cropper* v. *Coburn*, 2 Curt. C. C. 465, 469; *Ex parte Robinson*, 6 McLean, 355.

2. An attempt was early made to draw a distinction in favor of the United States in matters of admiralty jurisdiction.

Certain Logs of Mahogany, 2 Sumn. 589.

But even in admiralty matters, the earlier doctrine has been definitely overruled.

Taylor v. *Carryl*, 61 U. S. (20 How.) 597; 12 Harris, Pa. 264.

Mr. **Henry C. Hutchins**, for defendant in error:

Replevin was properly brought in this case. The attachment made by the marshal was a collateral proceeding, to secure payment of the judgment that might be recovered in the suit wherein the attachment was made. He was directed by his writ to attach property of the defendant named in the writ, and his writ only afforded him a justification for attaching such property, and he took the property of a stranger—that is, of the defendants in error. The defendants in error had no remedy except in the state court. They must bring their suit

NOTE.—*Concurrent jurisdiction of tribunals*—see note to 6 L. ed. U. S. 152, and note to 22 C. C. A. 356.

there or not at all. They were citizens of Massachusetts, as was also the marshal, and the property replevied was there situated. There was no conflict of jurisdiction, and none could possibly arise.

1 Kent, Com. 411, 7th ed. 410, 5th ed.; *Slocum* v. *Mayberry*, 2 Wheat. 1; *Hanna* v. *Steinberger*, 6 Blackf. 520; *Bruen* v. *Ogden*, 6 Halst. 370; *Teal* v. *Felton*, 12 How. 284; *Dunn* v. *Vail*, 7 Mart. 416; *Clements* v. *Berry*, 11 How. 398; *Taylor* v. *Royal Saxon*, 1 Wall. Jr. 311; *Freeman* v. *Robinson*, 7 Ind. 321.

This was not a proceeding *in rem*, nor like the case where a marshal has a prisoner in his custody. In those cases the custody of the thing or of the prisoner lies at the very foundation of the jurisdiction in the suit and, therefore, to take from his custody, by process from a state court, the thing or the prisoner, would be to deprive the United States Court of its jurisdiction, and to draw in question the validity of the authority exercised under the United States.

But this suit, in which the marshal attached these cars, was brought to recover a debt, and no question could possibly arise in that suit whether the property attached by the marshal belonged to the defendant therein or not; no form of pleading could bring this question before the court, and the suit would and did proceed to judgment independently of the fact whether property was attached or not. The only question in that suit was, whether the defendant was indebted to the plaintiff as alleged therein.

The case of *Taylor* v. *Carryl*, 61 U. S. (20 How.) 588, is not in point. The opinion of the majority of the court in that case proceeded upon the ground that the process from the state court and that from the United States Court were both proceedings *in rem*, and of course that which was prior in time had precedence, and the property could not be taken from the possession of the state court, because possession of the property was essential to its jurisdiction.

Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the supreme court of Massachusetts.

The case was this: Selden F. White, of the state of New Hampshire, in 1856 instituted a suit in the circuit court of the United States for the district of Massachusetts against the Vermont & Massachusetts Railroad Company, a corporation under the laws of Massachusetts, to recover certain demands claimed against the defendants. The suit was commenced in the usual way, by process of attachment and summons. Freeman, the marshal, and plaintiff in error, to whom the processes were delivered, attached a number of railroad cars, which, according to the practice of the court, were seized and held as a security for the satisfaction of the demand in suit in case a judgment was recovered. After the seizure, and while the cars were in the custody of the marshal, they were taken out of his possession by the sheriff of the county of Middlesex, under a writ of replevin in favor of Howe and others, the defendants in error, issued from a state court. The plaintiffs in the replevin suit were mortgagees of the Vermont & Massachusetts Railroad Company, including the cars in question, in trust for the bondholders, to secure the payment of a large sum of money which remained due and unpaid.

The defendant, Freeman, in the replevin suit, set up, by way of defense, the authority by which he held the property under the circuit court of the United States, which was overruled by the court below, and judgment rendered for the plaintiffs. The case is now before us on a writ of error.

I. The suit in this case has been instituted and carried on *to judgment in the court [*454 below under a misapprehension, of the settled course of decision in this court in respect to the case of conflicting processes and authorities, between the Federal and state courts; and also in respect to the appropriate remedy of the plaintiffs for the grievances complained of.

As it respects the effect to be given to the processes of the courts, whether state or Federal, the subject was so fully and satisfactorily examined in the case of *Taylor* v. *Carryl*, 20 How. 583, the last of the series on the subject, we need only refer to it, as all the previous cases will there be found.

The main point there decided was, that the property seized by the sheriff, under the process of attachment from the state court, and while in the custody of the officer, could not be seized or taken from him by a process from the district court of the United States, and that the attempt to seize it by the marshal, by a notice or otherwise, was a nullity, and gave the court no jurisdiction over it, inasmuch as, to give jurisdiction to the district court in a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under the process.

In order to avoid the effect of this case, it has been assumed that the question was not one of conflict between the state and Federal authorities, but a question merely upon the relative powers of a court of admiralty and a court of common law in the case of an admitted maritime lien. But no such question was discussed by Mr. Justice Campbell, who delivered the opinion of the majority of the court, except to show that the process of the district court in admiralty was entitled to no precedence over the process of any other court, dealing with property that was, in common, subject to the jurisdiction of each. On the contrary, he observed, at the close of the opinion, that the view taken of the case rendered it unnecessary "to consider any question relative to the respective liens of attaching creditors, and of seamen for wages, or as to the effect of the sale of the property as chargeable, or as perishable, upon them."

The minority of the court took a different view of the question supposed to be involved in the case. It is succinctly *stated by the [*455 Chief Justice, at the commencement of his dissenting opinion. He observes: "The opinion of the court treats this controversy as a conflict between the jurisdiction and rights of a state court and the jurisdiction and rights of a court of the United States, as a conflict between sovereignties, both acting by their own officers within the sphere of their acknowledged powers. In my judgment, this is a mistaken view of the question presented by the record. It is not a

question between the relative powers of a state and the United States, acting through their judicial tribunals, but merely upon the relative powers and duties of a court of admiralty and a court of common law in the case of an admitted maritime lien;" and hence the conclusion was arrived at, that the power of the admiralty was paramount. The majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a state and Federal process, and in order to avoid unseemly collision between them, the question as to which authority should, for the time, prevail, did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.

Another distinction is attempted by the defendants in error. It is admitted that in the case of a proceeding *in rem*, the property seized and in the custody of the officer is protected from any interference by state process. But it is claimed that the process of attachment issued by a common law court stands upon a different footing, and the reasons assigned for the distinction are, that in the one case the property seized is the subject of legal inquiry in the court, the matter to be tried and adjudicated upon, and which, in the language of the counsel, lies at the foundation of the jurisdiction of the court; but that, in the other, the property seized, namely: under the attachment, is not the subject-matter to be tried, like the property which is the subject of a libel *in rem*, as the process is, simply, for the recovery of a debt, without any lien or charge upon the property, except that re-[*456] sulting from the *attachment to secure the debt, and that the question of lien upon the property is a collateral one, which the Federal court could not hear and decide in the action before it; and further, that the question of liability of the railroad company was upon certain bonds, the trial and judgment upon which would not be affected by the possession or want of possession of the property seized by the marshal.

The idea which seems to prevail in the mind of the learned counsel on the part of the defendant in error is, that there is something peculiar and extraordinary in a proceeding *in rem* in admiralty, and in the lien upon which it is founded, that invests them with a power far above the proceedings or liens at common law, or by statute; and that, while the seizure of the property in the one case, by the marshal, protects it from all interference by state process, in the other no such protection exists.

The court is not aware of any such distinction. In the case of a proceeding *in rem* in admiralty, the lien or charge, which gives the right to seize the property, results from the principles of the maritime law. In the proceeding by attachment in a court of common law, the lien results from statute or common law; and in both cases, unless the party instituting the proceedings sustains his demand to secure which the lien is claimed, the property is discharged. In both, the property is held contingently, dependent upon the result of the litigation. In the admiralty, in the case of collision, upon a bill of lading, or charter-party, for salvage, etc., etc., the main questions litigated are not the questions of lien, but fault or not in the collision, the fulfilment or not of the contract in the bill of lading, or charter-party, or the right to salvage.

The same observations are alike applicable to all cases of attachment in courts of common law, where the lien is given by statute.

It is true, in a proceeding *in rem*, any person claiming an interest in the property paramount to that of the libelant, may intervene by way of defense for the protection of his interest; but the same is equally true in the case of a proceeding by *attachment in a court of [*457] common law, as will be shown in another branch of this opinion.

Some stress has also been placed upon the idea, that the forcible dispossession of the marshal, of the property under the attachment, would not affect the jurisdiction of the court, or interrupt the proceedings in the suit; but the same is equally true as respects the proceedings *in rem* in the admiralty. The forcible dispossession of the marshal, of the property once seized, would not affect the jurisdiction, or prevent a decree in the case.

Another and main ground relied on by the defendants in error is, that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property under the Federal process, and which it belongs to the Federal, not the state courts, to determine. This is now admitted; for though a point is made in the brief by the counsel for the defendant in error, that this court had no jurisdiction of the case, it was given up on the argument. And in the condition of the present case more than this is involved; for the property having been seized under the process of attachment, and in the custody of the marshal, and the right to hold it being a question belonging to the Federal court, under whose process it was seized, to determine, there was no authority, as we have seen, under the process of the state court, to interfere with it. We agree with Mr. Justice Grier, in *Peck* v. *Jenness*, 7 How. 624, 625. "It is a doctrine of law too long established to require citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." "Neither can one take the property from the custody of the other by replevin, or any other process; for this would *produce a con- [*458] flict extremely embarrassing to the administration of justice."

The case of *Slocum* v. *Mayberry*, 2 Wheat. 2, has been referred to as holding a different doctrine from that maintained by the plaintiff in error in the present case.

We have examined the case attentively, and are satisfied that this is a misapprehension.

There was no interference there with goods seized under the process of a Federal court, and in the custody of the marshal, nor any attempt to draw questions involved in a suit instituted in a Federal court into a state court for decision. It is quite apparent, from the opinion of the court, if this had been the question before it, what would have been its decision.

Chief Justice Marshall observed: "Any intervention of a state authority which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of this jurisdiction, would, unquestionably, be a violation of the act; and the Federal court having cognizance of the seizure, might enforce a redelivery of the thing by attachment or other summary process against the parties who should devest such a possession. The party supposing himself aggrieved by a seizure cannot, because he considers it tortious, replevy the property out of the custody of the seizing officers, or of the court having cognizance of the cause." The reason why the replevin of the cargo in the state court was maintained was, that the vessel only was seized by the officer, and not the cargo, and the latter was not, therefore, within the protection of the principle announced.

Reference was made, also, on the argument in the present case, to an opinion expressed by Chancellor Kent, in his Commentaries, Vol. I., p. 410, as follows: "If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the Federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the 459*] *state courts have jurisdiction to protect the person and the property so illegally invaded."

The error into which the learned Chancellor fell, from not being practically familiar with the jurisdiction of the Federal courts, arose from not appreciating, for the moment, the effect of transferring from the jurisdiction of the Federal court to that of the state the decision of the question in the example given; for it is quite clear, upon the principle stated, that the jurisdiction of the former, and the validity and effect of its process, would not be what the Federal, but what the state court, might determine. No doubt, if the Federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the Federal or state, possesses, the power to determine the question of jurisdiction or validity of the process? The effect of the principle stated by the Chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the Federal court, as a moment's consideration will show. It would draw after it into the state courts, not only all questions of the liability of property seized upon mesne and final process issued under the authority of the Federal courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne, and imprisonment upon final process of the person in both civil and criminal cases, for in every case the question of jurisdiction could be made; and until the power was assumed by the state court, and the question of jurisdiction of the Federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another. But we shall not pursue this branch of the case further. We regard the question as settled, at least as early as *United States* v. *Peters*, 5 Cranch, 115, familiarly known as *The Olmstead Case*, and which is historical, that it belongs to the Federal courts to determine the question of their own *jurisdiction, the ultimate arbiter, the [*460 supreme judicial tribunal of the nation, and which has been recently reaffirmed, after the most careful and deliberate consideration, in the opinion of the present Chief Justice, in the case of *The United States* v. *Booth*, 21 How. 506.

II. Another misapprehension, under which the counsel for the defendant in error labors, and in which the court below fell, was in respect to the appropriate remedy of the plaintiffs in the replevin suit for the grievance complained of. It was supposed that they were utterly remediless in the Federal courts, inasmuch as both parties were citizens of Massachusetts. But those familiar with the practice of the Federal courts have found no difficulty in applying a remedy, and one much more effectual than the replevin, and more consistent with the order and harmony of judicial proceedings, as may be seen by reference to the following cases: *Pennock* v. *Coe*, 23 How. 117; *Gue* v. *Tide Water Canal Co.* 24 How. 257, decided this term; *Clarke* v. *Mathewson*, 12 Pet. 164; *Dunn* v. *Clarke*, 8 Pet. 1; 5 Cranch, 288.

The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.

The case in 8 Pet. 1, which was among the first that came before the court, deserves, perhaps, a word of explanation. It would seem from a remark in the opinion, that the power of the court upon the bill was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law.

In the case of *Pennock* v. *Coe*, 24 How. 257, the bill was filed by the mortgagee of the railroad company, in trust for the bondholders, answering to the position of the plaintiffs in the replevin suit in the case before us. *Gue* v. *Tide Water Canal Company*, decided at this term, is an instructive case upon this *subject, in [*461 which the Chief Justice suggests the difficulties of a court of law dealing with this description of property, with a proper regard to the rights of all concerned.

In that case the bill was filed on the equity side of the circuit court of the United States for the district of Maryland, to restrain a sale of the defendant's property on execution. Gue, the judgment creditor, was a resident of Pennsylvania.

We shall not look into the questions raised upon the mortgage, whether executed by the proper authority, or if it was, whether it covered after acquired property, as not material to the case before us. The latter question was fully examined in this court in the case above referred to, of *Pennock* v. *Coe*.

Neither shall we inquire into the questions raised under the attachment laws of Massachusetts, as they are unimportant in our view of the case.

Upon the whole, after the fullest consideration of the case, and utmost respect for the learning and ability of the court below, we are constrained to differ from it, and reverse the judgment.

THACKER B. HOWARD, *Plff. in Err.*,
v.
FRANCIS BUGBEE.

(See S. C. 24 How. 461-465.)

State law, for redemption from mortgage sale, is void as to prior mortgage.

A law of a state authorizing a judgment creditor of a mortgagor at any time within two years after the sale under a mortgage, to redeem the land from the purchase, on paying the purchase money, with interest, and charges, as to a mortgage executed before the passage of the law providing for the redemption, is inoperative and void, as impairing the obligation of the contract.

Bronson v. Kinzie, 42 U. S. 311; affirmed, 43 U. S. 612; 44 U. S. 716.

Argued Feb. 26, 1861. Decided Mar. 14, 1861.

IN ERROR to the Supreme Court of the State of Alabama.

This bill was filed in the court of chancery in Alabama, by Bugbee, present defendant in error, under the circumstances stated in the opinion.

On the first hearing of the bill, it was dismissed by the Chancellor. This decree, on appeal, was reversed by the supreme court of the state. A second decree was rendered by the court of chancery in conformity with the opinion of the supreme court. This decree was affirmed on appeal by the supreme court of Alabama, and from this decree of affirmance Howard now prosecutes his writ of error.

Mr. **P. Phillips**, for the plaintiff in error:

The statute of Alabama, approved Jan. 1, 1842, Clay's Dig. 502, authorizes a redemption in two years after the sale, under the decree by bona fide creditors of defendant.

The supreme court of Alabama has decided that this statute applies to sales under mortgages executed prior to the passage of the act, and the question is, whether this statute thus construed impairs the obligation of a contract within the meaning of the Constitution. The *lex loci contractus* at the time of the execution of the mortgage is a part of the contract.

Sto. Com. ch. 34, § 1378.

By the terms of the mortgage, the estate became absolute on default of payment; yet the mortgagor had the right to redeem after default, because such was the law at date of the contract. So, for the same reason, the mortgagee had the right, after default and in the absence of the offer to redeem, to have the premises sold absolutely, to pay the debt. The statute in question provides for a sale subject to redemption in two years. The mortgage in effect stipulates for an absolute sale after default. The statute, therefore, does not merely change the remedy, but impairs the obligation of the contract.

Bronson v. *Kinzie*, 1 How. 316.

The right of the legislature to exempt certain articles of necessity from execution is stated in this case to be "considered as properly belonging to the remedy." This, however, has been denied by very high authority.

Quackenbush v. *Danks*, 1 Den. 28; 3 Den. 594; 1 Com. 129; *Thorne* v. *San Francisco*, 4 Cal. 131.

The statute under consideration is, in all respects, like that which in *Bronson* v. *Kinzie*, 1 How. 316, was held to be unconstitutional. There the question was, whether the mortgagee was not entitled to an absolute sale, regardless of the statute. Here the question is, whether the purchaser under such a sale can be deprived of his right to the fee simple, by virtue of the redemption provided by the statute.

The case of *Gantly* v. *Ewing*, 3 How. 716, in which the statute was determined to be unconstitutional, was, as in this, a contest with the purchaser, and only differs from it in the fact that the obnoxious statute was passed after the decree, but before the sale, while in this case it was passed before the decree.

See, also, *McCracken* v. *Haywar*, 2 How. 612.

Mr. **C. C. Clay**, Jr., for defendant in error:

The case presents the constitutionality of the act of the Alabama legislature, approved January 1, 1842, so far as the same affects mortgages previously executed. The argument of the appellant is: the redemption statute of Alabama, if applied to pre-existing contracts, is a law impairing the obligation of contracts.

The distinction between rights and remedies, between those statutes which confer a right and those which furnish a remedy for the enforcement of that right, is well marked. The one inheres in and follows the contract, wherever it may go; the other is dependent on the local legislation of the place where the parties seek to enforce the right.

People v. *Tibbets*, 4 Cow. 384; *Baugher* v. *Nelson*, 9 Gill. 299; *U. S. Bank* v. *Longworth*, 1 McL. 35; *Pratt* v. *Jones*, 25 Verm. 303; *Searcy* v. *Stubbs*, 12 Ga. 437; *Paschal* v. *Perez*, 7 Tex. 384; *Hope* v. *Johnson*, 2 Yerg. 125; *Maltby* v. *Cooper*, 1 Morr. Ia. 59; *West* v. *Creditors*, 1 La. Ann. 365; *Newton* v. *Tibbatts*, 2 Eng. (Ark.) 150; *Rockwell* v. *Hubbell*, 2 Doug. Mich. 197.

It is also well drawn in the able dissenting

opinion of Justice McLean, in the case of *Bronson* v. *Kinzie*, 1 How. 311, 322.

The statute of 1842 takes away no right. It leaves the debt unimpaired—leaves the debtor's property subject to the debt, and only modifies the form of enforcing the decree.

The obligations of the present contract were:

1st. The promise to pay the debt.

2d. The pledge of lands as security.

It was no part of the contract that the law for the collection of that debt should continue as it then was. This was a question of legislative discretion, not within the control of the debtor. The terms of the contract neither expressed nor implied that the remedy should not be changed. The most that can be affirmed on this head is, that the parties impliedly stipulated that the mortgagee should be armed with the legal process in force, when he should invoke it to enforce the collection of his demand. This was not one of the obligations of the contract, but an incident which the law imparted to it.

To hold otherwise would be to cramp the legislature and lead to the most embarrassing results. Counsel argued against adhering to the case of *Bronson* v. *Kinzie*. He contended, however, that there was a distinction between that case and the one at bar, and in support of that position, quoted, at some length, from the opinion of the supreme court of Alabama in the present case.

The argument of appellant is, that by the act of 1842, two years are added to the time within which the mortgagee can obtain complete satisfaction of his demand. In the first place I deny this. The policy and tendency of redemption statutes are to enlarge the chances of collection. But conceding this to be so, does the fact that, in the change of judicial proceedings, a remedy less summary has been provided, impair the obligation of the contract? What additional length of time will have this effect? If two years' delay will violate the Constitution, will two months do the same?

The form of the remedy is no part of the binding stipulations of the contract, and will be changed at the will of the legislature, provided that under the pretense of modifying the remedy, all substantial remedy be not taken away.

464*] *Mr. Justice **Nelson** delivered the opinion of the court:

This is a writ of error to the supreme court of the state of Alabama.

The case was this:

Enoch Parsons executed a mortgage of the premises in controversy, on the 9th December, 1836, to Sarah Tait, to secure the payment of $13, 246.66. The last instalment fell due in January, 1841. In March, 1846, proceedings were instituted in the court of chancery to foreclose the mortgage for default in payment; and in September, 1848, Howard, the appellant, became the purchaser of the premises, under the decree of foreclosure, and held a deed of the same duly executed by the proper officer.

In January, 1842, the legislature of the state of Alabama passed an act authorizing a judgment creditor of the mortgagor, or of his estate, at any time within two years after the sale under a mortgage, to redeem the land from the purchase on paying the purchase money, with a certain per cent interest, besides charges.

Bugbee, the appellee, and plaintiff in the court below, having recovered a judgment against the estate of Parsons in 1843, tendered within the two years the purchase money, interest and charges, to Howard, and also a deed of the premises to be executed; all of which were refused. This bill was filed in the court of chancery in Alabama by Bugbee to compel Howard to receive the money in redemption of the sale and execute the deed.

The main ground of the defense in that suit was, that the mortgage from Parsons under which the defendant derived title, having been executed before the passage of the act providing for the redemption, the act, as respected this debt, was inoperative and void, as impairing the obligation of the contract.

The court of chancery so held and dismissed the bill. But on appeal to the Supreme Court, that court reversed the decree below, and entered a decree for the complainant. The case is now here on a writ of error to the Supreme Court.

The only question involved in this case was decided in *Bronson* *v. *Kinzie*, 1 How. [*465 311. It was there held, after a very and careful extended examination by the court, through the Chief Justice, that the state law impaired the obligation of the mortgage contract, and was forbidden by the Constitution. This decision has since been repeatedly affirmed. 2 How. 612; 3 How. 716.

It is due to the judges of the court below to say, that they felt bound by a decision of their predecessors, which they admitted to be in direct conflict with the case of *Bronson* v. *Kinzie*, and that the two decisions could not be reconciled.

We are entirely satisfied with the soundness of the decision in the above case, and with the grounds and reasons upon which it is placed, and shall simply refer to them as governing the present case.

Decree below, reversed. Case remitted with directions to enter decree for the plaintiff in error.

WILLIAM H. BELCHER and Charles Belcher,
Plffs. in Err.,
v.
WM. A. LINN.

(See S. C. 24 How. 508–526.)

Acts, of tribunal or officer having jurisdiction, are binding—question of power in the officer, or fraud, may be raised—duties—appraisers—export duty, when added to invoice price, to determine value—misdescription may be corrected or disregarded—detention of goods necessary to appraisal—no allowance for leakage or deterioration.

When power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or its discre-

NOTE.—*Ambiguity in written instrument, when explainable by parol. Its effect upon the instrument*—see note to Atkinson v. Cummins, 13 L. ed. U. S. 228.

tion, the acts so done are, in general, binding and valid as to the subject-matter.

The only questions which can arise between an individual and the public, or any person, denying their validity, are as to power in the officer and fraud in the party.

Payment of duties cannot be avoided because the importation is misdescribed either in the invoice or the entry, or in both, at the same time.

Appraisers are required to appraise, estimate, and ascertain the true market value of the importation, no matter what name may be affixed to it by the importer.

Where green sugar was subject to the export duty, but molasses was not, if the importations ought to have been classed with the former, then the importer ought to have paid the export duty, and the determination of the appraisers was not an unreasonable one that, where no export duty had been paid, it was necessary to add a sum to the invoice valuation equal to the export duty to which it would have been subjected, if it had been correctly invoiced, in order to bring the dutiable value up to the actual market value or wholesale price in the foreign market.

It was competent for the appraisers to correct a misdescription in the invoice and entry, or disregard it, so as to perform their duty as required by law.

Any dispute as to the nature of the produce imported, and its consequent classification in the invoice and entry, were questions of fact within the jurisdiction of the appraisers, and their decision is final and conclusive.

Appraisement of the goods is required by law, and as the detention of the goods is the necessary consequence of that requirement, it cannot be held that it affords any ground of action.

Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the customhouse, without any allowance whatever for ordinary leakage and deterioration.

Argued Mar. 7, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This was an action of *assumpsit*, commenced by the present plaintiffs in error in the court below, against William A. Linn, collector of the port of St. Louis, to recover an alleged excess of duties which had been paid, under protest, on six cargoes of sugar, or concentrated molasses, imported from Cuba and entered at New Orleans in May and June, 1853. The court charged the jury, that upon the whole evidence in the case, the plaintiffs could not recover. Verdict and judgment were, therefore, entered for the defendant, and the plaintiffs brought the case to this court by writ of error.

The case further appears in the opinion of the court.

Messrs. **P. Phillips** and **Reverdy Johnson** for the plaintiffs in error.

Messrs. **J. S. Black** and **E. M. Stanton** for the defendants in error.

516*] *Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Missouri. The suit was commenced on the 16th day of September, 1854. It was an action of *assumpsit*, and the declaration contained a count for money had and received, together with three special counts, which are set forth at large in the transcript. Plaintiffs were merchants residing at St. Louis, in the state of Missouri, and the defendant was the surveyor of that port appointed under the act of March 2d, 1831 (4 Stat. at L. 480), upon whom, by that law, were devolved the duties of collector, and the suit was instituted by the present plaintiffs against the defendant as such collector, to recover an alleged excess of duties which they had previously paid under protest on six cargoes of merchandise invoiced, among other things, as concentrated molasses. Other causes of action were also set forth in some of the special counts, to which reference will hereafter be made. Defendant pleaded that he never undertook and promised in manner and form as the plaintiffs had declared against him, and upon that issue the parties went to trial. All of the merchandise on which the duties were exacted and paid was imported from Matanzas, in the Island of Cuba, and was consigned to the plaintiffs, who were doing business at St. Louis. Under the laws of the United States, merchandise cannot be imported direct from a foreign port to the port of St. Louis, but all such importations are required to be first entered at the customhouse in New Orleans. Some brief reference to the usual course of proceeding in such cases, as required by law and the regulations of the Treasury Department, becomes indispensable, in order that the precise nature of the controversy may be fully understood. Upon the arrival, at New Orleans, of a vessel from a foreign port, having on board merchandise exported from a foreign port, and consigned to a merchant at St. Louis, it is required, if the merchandise is subject to an import duty under the laws of the United States, that an entry of the same shall be made at the customhouse in New Orleans, in the same manner as required in case of entry for consumption, and the officers of the customs at that *port then proceed to ascertain [*517 and assess the duties to be paid to the United States, precisely in the same way as if the merchandise had been destined for that market; whereupon a bond, called a transportation bond, is given by the importer or his agent to the United States, conditioned that the packages described in the invoice, with marks corresponding thereto, shall, within a specified time, be delivered to the surveyor and acting collector of the port of St. Louis. Notice of the proceedings ought then to be given by the collector of the port where the duties were ascertained and assessed to the acting collector of the port to which the merchandise is destined; and when the packages are received at the port of destination, they are placed in the custody of the acting collector of that port, who receives the duties, giving notice of that fact to the collector of the port where they were ascertained and assessed, and the collector of the latter port is then authorized by law to cancel the transportation bond given by the importer. Six vessels arrived at New Orleans, from Matanzas, in May and June, 1853, having on board merchandise shipped from the latter port, and consigned to the plaintiffs, and it appeared that certain portions of their respective cargoes were invoiced as concentrated molasses. Pursuant to the usual course of proceedings in such cases, the plaintiffs, on the arrival of the vessels at New Orleans, made separate entries of the respective cargoes, as required by law, at the customhouse of that port, in order that the duties due to the United States might be ascertained and assessed. In making the entries, however, they followed the invoice, describing the merchandise

in question as concentrated molasses, and carrying out the dutiable value accordingly, without making any addition in the entry to the cost and value of the article on account of its peculiar character. One of the entries was made on the 10th day of May, 1853, and the last two were made on the 6th day of June, in the same year. Conforming to the requirements of law, the collector of the port submitted the matter to the local appraisers to appraise, estimate, and ascertain, the dutiable value of the merchandise, 518*] and they added one *half real per *arroba*, equal to six and one fourth cents for every twenty-five pounds Spanish weight, to the invoice valuation of the merchandise. From that decision the plaintiffs appealed, and called for an appraisal of the actual value of the goods in the foreign market by merchant appraisers. They, the plaintiffs, tiffs informed the collector on the 11th day of June, 1853, that they should appeal, and on the 14th day of the same month the collector notified them that the appeal was allowed, but stated that he should not appoint appraisers until he heard from the department, as he desired the aid of a general appraiser. Considerable delay ensued; but on the 28th day of September, of the same year, the collector, acting under the instructions of the Secretary of the Treasury, and the plaintiffs, entered into a written agreement, to the effect that they would substitute samples in the place of the merchandise, and submit the matters in dispute in all the cases to the determination of the board of general appraisers to be convened at the city of New York as soon as practicable, stipulating, at the same time, to abide by the appraisement of the board "in the same manner, and to the same extent, as if it had been made by merchant appraisers regularly appointed according to law." Accordingly, the general appraisers heard the several appeals, and on the 19th day of October, 1853, made a report in writing. Concentrated molasses constituted a portion of the cargo in five of the cases appealed, and it appeared by the report of the general appraisers that in all those cases they made an addition to the invoice value of that portion of the merchandise embraced in the entry. Of the five, it will be sufficient to give one as an example of the rest. It is as follows: "To add export duty on 522,338 lbs., at 87½ cts. per 500 lbs." Their reasons for making the addition are fully stated in their report. After stating that they had examined the samples, they say: "The board assume that both the concentrated *melada* and concentrated molasses are sugar in a green state, and they are borne out in this view of the case by the invoices themselves, the concentrated molasses in every case being invoiced per *arroba* as sugar, and not per keg as molasses; the casks are also charged as sugar casks. The concentrated molasses is 519*] *not susceptible of being gauged, which is another evidence that its proper classification is sugar."

Plaintiffs proved that the goods were assessed at New Orleans, according to that appraisement, and that they afterwards paid the duties under protest, to the defendant at St. Louis. They protested against the including in the computation of the dutiable value of the goods any sum whatever for export duty, averring in the protest that no such duty was paid by them, or demanded by the authorities at the place of exportation. Testimony was also introduced by the plaintiffs tending to show that concentrated molasses was well known in the foreign market; that it was not at that time regarded as sugar; that it was not subject to the sugar duty; that no such duty was demanded or paid; and that the invoice price represented the fair market value. Their witnesses were cross-examined by the defendant, and from the cross-examination it appeared that the plaintiffs, in 1852, set up a sugar boiling establishment at Matanzas, and that among the products manufactured by them was the article invoiced as concentrated molasses, which it seems is *melada*, or syrup boiled down to a denser consistency, and is manufactured by boiling the *melada*, and thus evaporating the watery portions until the point of crystalization is reached. Concentrated molasses, as the witnesses state, is a recent manufacture, and was unknown in the foreign market until about the time plaintiffs commenced to produce it from their establishment. When the article first appeared, the authorities, for a short time, allowed it to be exported without exacting any duty; but it was soon classed with green sugars, and charged with an export duty of eighty-seven and a half cents for every twenty *arrobas* of twenty-five pounds Spanish weight. Like sugar, it is sold, invoiced, and valued by weight, and not by measure, like the ordinary article of molasses. On the other hand, the defendant called and examined one of the general appraisers. Among other things, he testified that—

"The board did make alterations from the invoice price or value by adding eighty-seven and a half cents for each five hundred pounds, invoice weight, and two reals or twenty-five *cents to each barrel, in order to raise [*520 the same to the actual market value, or wholesale price, at the period of exportation in the principal markets of the country from which the same had been imported.

"The sums in figures set out opposite these several entries were additions made by the board to the invoice value of the merchandise. The 87½ cents for each 500 pounds was added to make the market value of the sugars called 'concentrated molasses,' and 25 cents to each barrel was added to make the market value of the barrel.

"The term, 'to add export duty on,' was used as expressive of the principle upon which this sum was added, and not as conveying the supposition or belief that an export duty had been paid by the importers, or even that such an export duty was legally due to the Cuban government; but it was added upon the principle that if the sum of 87½ cents per each 500 pounds was not payable for export duty, the value of the merchandise was thereby increased just that sum in the foreign market. Sugars being the basis of the appraisement, and 87½ cents per each 500 pounds being the export duty on the same, that sum was added to make the true foreign market value at the period of exportation."

To all this testimony the plaintiffs objected, but it was admitted by the court, and the plaintiffs excepted.

Thirteen points were then presented by the plaintiffs for instruction to the jury, all of which the court refused to give, and on the prayer of the defendant the jury were instructed, that "on the whole evidence the plaintiffs cannot recover." Under the rulings and instructions of the court the jury returned their verdict in favor of the defendant, and the plaintiffs excepted to the refusal of the court to instruct the jury as requested, and to the instructions given, that they, the plaintiffs, were not entitled to recover. On this branch of the case two questions are presented for decision: 1. Whether the addition was lawfully made to the invoice valuation of the merchandise described in the entry as concentrated molasses. 2. Whether the testimony of the general appraiser, as to the action of the board in making the appraisement, was properly admitted.

521*] *1. It is provided by the act of the 3d of March, 1851, to the effect that the collector, in all importations subject to an *ad valorem* duty, shall cause the actual market value or wholesale price of the importation at the period and place of exportation to be appraised, estimated and ascertained, and to such value or price shall be added all costs and charges, except insurance, including in every case a charge for commissions at the usual rates; and by the true construction of the act, and, indeed, by its very words, that appraisement, estimation and ascertainment, when regularly made, becomes and is the true value of the importation at the place where the same was entered, "upon which the duties shall be assessed." By the 8th section of the act of July 30th, 1846 (9 Stat. at L. 42), it is also provided, that it shall be the duty of the collector, within whose district dutiable goods may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated and ascertained, in accordance with the provisions of existing laws, and if the appraised value thereof shall exceed ten per cent or more the value declared on the entry, then, in addition to the duties imposed by law on the provisions of existing laws, and if the appaid, a duty of twenty per centum *ad valorem* on such appraised value. But a proviso is added, that under no circumstances shall the duty be assessed upon an amount less than the invoice value; any law of Congress to the contrary, notwithstanding. Importers are required to make an entry of their respective importations, which should always be accompanied by the invoice; and when the invoice is received, the packages for appraisement are designated on the invoice by the collector, who orders one in ten of them to the public store for the purposes of the appraisal. Examination of the selected packages is then made by the local appraisers; and if, in their opinion, the invoice value is too low, they increase it, and notify their doings to the collector; and if no appeal is taken from their appraisement by the importer, their decision in the premises is final and conclusive as to the dutiable value of the importation. Every importer, however, under those circumstances, has the right to appeal to merchant

522*] appraisers. *Merchant appraisers formerly consisted of two merchants, one chosen by the importer and one by the collector; but under existing provisions of law, the collector may select a government appraiser, so that in the larger ports the board usually consists of a merchant selected by the importer, and a permanent appraiser selected by the collector. 9 Stat. at L. 630. On the appeal, the merchant appraisers, so called, examine the packages ordered to the public store, appraise, estimate, and ascertain the actual market value or wholesale value thereof, at the period of exportation to the United States, in the principal markets of the country from which the goods were imported, and certify the value so appraised, estimated, and ascertained, to the collector; and in the absence of fraud, their decision is final and conclusive, and their appraisement in contemplation of law becomes, for the purposes of calculating and assessing the duties due to the United States, the true dutiable value of the importation. Act August 30, 1842, § 17, 5 Stat. at L. 564; Appraisement act, March 3, 1851, § 1, 9 Stat. at L. 631. As was said by this court, in *Bartlett* v. *Kane*, 16 How. 272, the appraisers are appointed with powers, by all reasonable ways and means, to appraise, estimate and ascertain the true and actual market value and wholesale price of the importation. The exercise of these powers involves knowledge, judgment, and discretion. We hold, as was held in that case, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and it exercise is confided to his or their discretion, the acts so done are, in general, binding and valid as to the subject-matter. The only questions which can arise between an individual and the public, or any person, denying their validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal or other revision is provided for by some appellate or supervisory tribunal prescribed by law. *United States* v. *Arredondo*, 6 Pet. 691; *Rankin* v. *Hoyt*, 4 How. 327; *Stairs* v. *Peaslee*, 18 How. 524. One of the questions presented in the case last cited was, whether, in *esti- [*523 mating the dutiable value of a certain article called cutch, the appraisers should have taken the value at the market of Calcutta, or London and Liverpool, or Halifax, at the period of exportation from the latter port; and the Chief Justice, speaking for the whole court, held, that in estimating the value of the cutch, it was the duty of the appraiser to determine what were the principal markets of the country from which it was exported into the United States, and that their decision that London and Liverpool were the principal markets for the article, was conclusive. Applying these principles to the present case, it follows, we think, wholly irrespective of the parol testimony, that the value of the importations certified to the collector constituted the true and actual dutiable value of the merchandise embraced in the respective entries made by the importers, and there is nothing in the statement accompanying the report, when considered in connection with the report itself, that is in any manner inconsistent with the view here taken as to the legal effect of their action in the premises. On the contrary, it is difficult to misconstrue their report. They determine, in the first place, that the article de-

scribed in the invoice and entry as concentrated molasses, was, in point of fact, a species of green sugar, and that the invoice and entry were erroneous, not only with respect to the value affixed to the article, but also as to its description. Payment of duties cannot be avoided because the importation is misdescribed either in the invoice or the entry, or in both, at the same time. Appraisers are required to appraise, estimate and ascertain the true market value of the importation, no matter what name may be affixed to it by the importer, and he cannot be benefited in the estimation of the duties here by the fact that, by accident or otherwise, he succeeded in exporting the packages from the foreign country without being subjected to the usual and lawful exactions there imposed. New manufactures naturally and constantly give rise to new questions in regard to revenue; but it cannot operate to benefit the plaintiffs in this controversy, that the subordinate authorities, at the place of exportation, were for a time misled or deceived as to the real character of the product in question, 524*] or that they *mistook the true nature of their duty. Green sugar was subject to the export duty, but molasses was not; still, if the importations in question ought, in fact, to have been classed with the former, then it is clear that the importer, as matter of legal obligation, ought to have paid the export duty, and the determination of the appraisers was not an unreasonable one; that it was necessary to add a sum to the invoice valuation equal to the export duty to which it would have been subjected, if it had been correctly invoiced, in order to bring the dutiable value up to the actual market value or wholesale price in the foreign market. Both the report and the statement annexed to it must be taken *in pari materia*, and considered together; and when so construed, they do not appear to differ in any respect from the explanations given them in the testimony of the general appraiser. Without regard to that testimony, it is not possible to hold that the board added the export duty to the several importations, regarding the article as molasses, because they expressly state in the outset that they assume that concentrated molasses is sugar in a green state, and proceed to give their reasons for the conclusion, deducing the reason given from the various invoices, which, as they affirm, bear them out in that view of the case. It is clear, therefore, that the appraisers did not add the eighty-seven and a half cents to the invoice valuation as an export duty on molasses, and it is conceded that sugar in a green state was by law subject to the export duty; so that putting the parol testimony in question out of the case, still the plaintiffs are not entitled to recover.

2. But suppose it to be otherwise, and that the words, "to add export duty on," as contained in the statement annexed to the report, are to be separately considered; still, it is difficult to see how the admission can be of any service to the plaintiffs. They must still maintain that the importations were, in fact, molasses, and that the export duty was added by the appraisers to the invoice valuation of molasses, as such, else they have no standing in court, for they do not deny that if the produce in question was really sugar in a green state, that it was competent for the appraisers to correct the *misdescription in the invoice [*525 and entry, or disregard it, so as to perform their duty as required by law. Unless they have that right, then the grossest frauds may be committed by an importer with perfect impunity; and if they have that right, as clearly they must, then it follows that any dispute as to the nature of the produce imported, and its consequent classification in the invoice and entry, were questions of fact within the jurisdiction of the appraisers, and their decision is final and conclusive. On the other hand, if it be admitted that the words "to add export duty on" are ambiguous and of doubtful signification, then the case would be one where parol testimony would be admissible to explain the ambiguity, by showing what was done by the appraisers, and the manner in which tne value of the importations was appraised, estimated, and ascertained. *U. S.* v. *Southmayd*, 9 How. 638; *Greely* v. *Thompson*, 10 How. 228; *Greely* v. *Burgess*, 18 How. 413; *Sampson* v. *Peaslee*, 20 How. 574; *Rankin* v. *Hoyt*. 4 How. 335.

3. Plaintiffs also claimed, in some of the counts of the declaration, to recover back certain duties alleged to have been illegally exacted of them by the defendant, on certain barrels exported empty by them from the United States to Matanzas, and brought back filled with concentrated molasses. That claim, however, is not pressed in the case, because the same claim is embraced in another case, which is also before the court.

4. Another claim is to recover damage on account of the delay which ensued in completing the appraisement, and the consequent leakage and loss of the concentrated molasses; but we are not able to see any just ground for the claim, on the facts disclosed in the record. Appraisement of the goods is required by law, and as the detention of the goods is the necessary consequence of that requirement, it cannot be held, under the circumstances of this case, that it affords any ground of action against the defendant. Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the customhouse, without any allowance whatever for ordinary leakage and deterioration. *Marriott* v. *Brune*. 9 How. 619; *Law-* [*526 *rence* v. *Caswell*, 13 How. 488.

For these reasons we are of the opinion that there is no error in the record, and the judgment of the circuit court is, therefore, affirmed, with costs.

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*WILLIAM H. BELCHER and Charles [*533
Belcher, *Plffs. in Err.*,
v.
WM. A. LINN.

(See S. C. 24 How. 533-535.)

Barrels, manufactured in and exported from U. S., and brought back filled with molasses, are liable to duty.

Molasses barrels, manufactured here and exported to a foreign port, and there filled with molasses, and then imported with their contents to this country, were not brought back in the same condition as when exported, within the true intent and meaning of the act of Congress.

The words "the same condition" mean not only that the identity of the article exported is pre-

served, but that its utility for its original purpose is unchanged.

Barrels filled with molasses and imported here formed a part of the charges of importation, and the value of the same should be added to the wholesale price of the importation, in order to ascertain the true basis on which to assess the duty.

Argued Mar. 8, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This action was commenced by the present plaintiffs in error, in the court below, to recover of the defendant, collector of the Port of St. Louis, an alleged excess of duties upon certain barrels. Verdict and judgment were for the defendant, under the direction of the court, and the plaintiffs brought the case to this court by writ of error.

The case further appears in the opinion of the court.

It was argued by the same counsel and at the same time as the preceding case, between the same parties.

Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Missouri. The suit in the court below was brought by the present plaintiffs against the defendant as the surveyor and acting collector of the customs of St. Louis, to recover the amount of certain duties alleged to have been illegally exacted of the plaintiff, and paid by him to the defendant under protest. As alleged in the declaration, the duties were assessed on the value of a large number of barrels, manufactured by the plaintiffs in the United States, exported empty to Matanzas, in the Island of Cuba, and brought back in 1853, filled with concentrated molasses or sugar. It was an action of *assumpsit*, and the declaration contained the usual counts for money had and received, together with a special count detailing all the circumstances on which the claim was founded. Defendant appeared, and the parties went to trial upon the general issue. At the close of the evidence, five prayers for instructions to the jury were presented by the plaintiffs, but the court refused to give any one of them; and at the request of the defendant, instructed the jury that, on the whole evidence in the case, the plaintiffs could not recover against the defendant. Whereupon the jury returned their verdict in favor of the defendant, and the plaintiffs excepted, and sued **534***] out this writ of error to reverse *the judgment rendered on the verdict. Under the circumstances of this case, as exhibited in the transcript, it will not be necessary to refer with much particularity to the evidence, as the sole question raised in the record is, whether the duties imposed upon the barrels by the appraisers were lawfully exacted. Satisfactory proof was introduced by the plaintiffs, showing that all the barrels were manufactured by the plaintiffs in the United States, and that they were exported empty to the foreign market, and there filled with concentrated molasses, or sugar in a green state, which was destined for the market of St. Louis. One of the plaintiffs' witnesses testified that the barrels, when they were received at the sugar boiling factory of the plaintiffs in Matanzas, were empty, but when sent from thence to the United States, they were filled with the different products of that establishment. Such of the barrels as were designated to receive molasses were filled at the bung without being unheaded, but it was necessary to take out one head from those which were to be filled with concentrated molasses, and all such of course had to be recoopered. And the same witness states, that in some instances it was necessary, after the barrels were placed in the sugar boiling factory, to add new hoops, but in all other respects the barrels were filled and sent back in the same condition in which they were received. Unless the barrels were brought back in the same condition in which they were when exported, then it is clear that they could not be admitted to entry free of duty; and so, if the value of the barrel in which a dutiable article or product is imported is one of the proper charges which are required by law to be added to the actual market value or wholesale price of the importation, then it is equally clear that the same conclusion must follow. In the case of *James Knight et al.* v. *Augustus Schell* (next case), decided at the present term, both of those questions were determined against the plaintiffs in this suit. That case was determined upon full consideration, and we are all satisfied that the decision of the question was correct, and that the reasons given for the decision are all applicable to this case and, therefore, they need not be repeated. It is impossible to hold that *molasses barrels, [*535 manufactured here and exported to a foreign port, and there filled with molasses, whether it be the ordinary article or that denominated concentrated, and then reimported with their contents to this country, were brought back in the same condition as when exported, within the true intent and meaning of the acts of Congress. Contrary to the views of the plaintiffs, we think the words, "the same condition," mean not only that the identity of the article exported is preserved, but that its utility for its original purpose is unchanged. On this point, we adopt the view taken by the defendant, because it appears to be more consonant with the language of the provision under consideration, and with the obvious intent of Congress in passing it. Suppose it be so; then it almost necessarily follows, even within the principle assumed by the plaintiffs, that barrels filled with molasses and imported here formed a part of the charges of importation. They admit that such is the general rule, but seek to establish an exception which would include the present case. Now, unless the barrels were brought back in the same condition as when exported, then the reason on which the supposed exception is founded fails; and it is difficult to see why the present case does not fall within the admitted general rule. Outside packages belonging to the merchant were required to be estimated and their value added to the actual cost of importation at a very early period; and without referring to the subsequent acts of Congress and the regulations of the department, which were cited in the briefs of the counsel, the better opinion is, we think, that charges include, in general, the value of the sack, package, box, crate, barrel, hogshead, bale, cask, all outside coverings belonging to the merchant, or, so to speak, the integument of the

importation; and that the value of the same, to be estimated at the usual cost to the importer, should properly be added to the actual market value or wholesale price of the importation, in order to ascertain the true basis on which to assess the duty.

For these reasons we are of the opinion that the rulings and instruction of the circuit court were correct and the judgment is, accordingly, affirmed, with costs.

JAMES KNIGHT, Jas. H. West and Robert Sargeant, *Plffs.*,
v.
AUGUSTUS SCHELL.

(See S. C. 24 How. 526–533.)

Barrels manufactured in and exported from U. S., and brought back filled with molasses, are liable to duty.

Barrels manufactured in the United States, and exported empty, and afterwards brought back to the United States filled with molasses purchased in Cuba, were not brought back "in the same condition as when exported," according to the true intent and meaning of the acts of Congress.

Casks, including barrels, as well as hogsheads, exported from the United States empty, and returned filled, have almost invariably, since the passage of the tariff act of the 20th of July, 1846, been included among the dutiable articles, although of American manufacture.

Submitted Mar. 8, 1861. Decided Mar. 14, 1861.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of New York.

This was an action brought by Knight and others, merchants and partners in business, residing in the city of New York, in the court below, against Augustus Schell, collector of the port of New York, to recover back a sum of money paid by the plaintiffs as duty upon a quantity of barrels manufactured by them in the city of New York, and sent by them from the port of New York to Cuba, and there filled with molasses, and brought back to New York thus filled. No change was made in the barrels, except such as implied by their having been filled with molasses. On the return of the barrels, the collectors claimed that the barrels were dutiable, and declined to allow them to be entered duty free, insisting that the filling of them with molasses changed their condition within the meaning of the act of July 30, 1846, and the act of March 3, 1857. He exacted duties on the barrels at the rate of 24 per centum upon their value at Cuba, which was paid by the plaintiffs under protest. The plaintiffs having complied with the provisions of section 5 of the last mentioned act, brought this action to recover back the money so paid within the time limited by said section. The defendant pleaded the general issue, and the action was brought to trial at the April term, 1860. The judges of the circuit court were divided in opinion upon the question whether the barrels were, under the above circumstances, entitled to entry duty free.

Mr. **J. T. Williams**, for the plaintiffs:

The acts of Congress of July 30, 1846, and March 3, 1857, provide that goods, wares, and merchandise, the growth, product, or manufacture of the United States, exported to a foreign country, and brought back to the United States in the same condition as when exported, shall be exempted from duty.

The question is, did the filling of the barrels with molasses change their condition? The object of the tariff law in question is obviously the protection of home industry. There were but two classes of articles that could reasonably have been referred to; first, articles of personal apparel, toilet furniture, books for personal reading, tools, and implements of mechanical art; second, articles as boxes, barrels, bags, etc., taken out to be filled and brought back.

The first class was not the one referred to in the provision under consideration, because it was already exempted from duty by the act of 1799, and as to such articles it is of no importance of what growth or where manufactured. The provision in question, then, was intended to apply to the class of articles to which the barrels in controversy belong.

It remains to inquire, then, did Congress contemplate that the articles of this class should be brought back in the same empty condition in which they were exported? Did Congress intend to say to the manufacturer, that, for the purpose of encouraging you to manufacture at home, we provide that in case you so manufacture them here and carry them to Cuba empty and bring them back in the same empty condition, they shall, on their return, be entered duty free; but if you fill them with molasses at Cuba, you shall pay duty upon them at 24 per cent of their value at Cuba?

It is not easy to see how it can be said that the condition of a barrel is changed by filling it with molasses. It is true that they are besmeared with their contents; some of it has penetrated the seams of the wood; they are more or less worn; but this results, inevitably, from the use to which they are put. Anything carried out for any purpose must suffer similar change from being applied to the purpose for which it was sent out. The sending out and bringing back would be an idle expense unless the articles were put to some use, and even if put to no use whatever, the articles must, by the very voyage, be more or less worn, and in that respect their condition is changed.

Mr. **Edwin M. Stanton**, Atty. Gen., for the defendant:

There are two answers to the claim for the plaintiffs.

First. The act of 1799 contemplates, and the act of 1857 expressly declares, that the barrels or casks brought back must be in the same condition as when exported, and not in the condition of vessels containing (and only used and imported as and for containing) another and a dutiable commodity. The declaration itself avers that the casks were brought back in the same condition as when exported, although it adds the words "with their contents."

Second. The act requiring all charges to be added, specially enumerating "putting up and packing," makes no exception of charges for barrels manufactured in this country, as distinguished from barrels manufactured abroad.

See act of 1823, §§ 4, 7; 3 Stat. 729.

Mr. Justice **Clifford** delivered the opinion of the court:

This case comes before the court on a certificate of division of opinion from the circuit court of the United States for the southern district of New York. It was an action of *assumpsit* brought by the present plaintiffs against the defendant, as the collector of the port of New York, to recover back certain duties paid by the plaintiffs under protest, upon certain barrels, in which molasses was imported into the United States from Matanzas.

It was proved, on the trial, that the plaintiffs, in the year 1859, imported from Matanzas 728 barrels of molasses by the brig Irene, 301 barrels of molasses by a vessel called The Yumuri, and 120 barrels of molasses by a vessel called The Trovatore; that the barrels containing the molasses were manufactured by the plaintiffs at Newburg, in the state of New York, and shipped from the port of New York empty to Matanzas, where they were filled with molasses, and returned in the three vessels above named to the port of New York; that the barrels were made up and completed in every respect before they were shipped to Cuba. They were returned, most of them, in the same vessels that carried them out from New York, and all of them in the same condition in which they were shipped or carried out from New York, except being filled with molasses.

They were filled with molasses at Cuba. When the barrels were brought back from Cuba filled with molasses, in the vessels above referred to, the collector claimed that the barrels themselves were dutiable, and that they were not entitled to entry duty free. He claimed a duty upon them at the rate of 24 per centum of their value at Cuba, and refused to allow them to be entered, unless such duty was paid; that **529***] the *plaintiffs paid to the defendant that portion of the duties which was upon the separate value of the barrels under protest, claiming that the barrels were not legally subject to the payment of any duty, but were exempt from duty by virtue of the provisions of the 47th section of the act of Congress of March 2, 1799, 1 Stat. at L. 627, and of schedule I. of the existing tariff.

The plaintiffs thereupon, having complied in all respects with the provisions of section 5th of the act of March 3, 1857 (11 Stat. at L. 199), entitled "An Act Reducing the Duties on Imports, and for Other Purposes," brought this action to recover back the sum so paid under protest, as duties upon the separate value of the barrels, within the time prescribed in said act for bringing the same.

Upon the foregoing facts, the question arose whether barrels manufactured in the United States and exported empty, and afterwards brought back to the United States filled with molasses, purchased in Cuba, were brought back "in the same condition as when exported," according to the true intent and meaning of the acts of Congress in that behalf; and the opinion of the judges being opposed on that question, it was certified to this court for decision. By the act of the 2d of March, 1799, it is provided, that on any goods, wares, or merchandise, of the growth or manufacture of the United States, which may have been exported to some foreign port or place, and brought back to the United States, and upon which no drawback bounty or allowance has been made, no duty shall be demanded. 1 Stat. at Large, 662. Among other things, the 9th section of the act of the 30th of August, 1842 (5 Stat. at L. 560), provides that all goods, wares, and merchandise, the growth, produce, or manufacture of the United States, exported to a foreign country and brought back to the United States, shall be exempt from duty. Dutiable articles, and those exempt from duty, are arranged in schedules by the act of the 30th of July, 1846 (9 Stat. at L. 49), and the schedule of the latter class embraces goods, wares, and merchandise, the growth, produce, or manufacture of the United States, exported to a foreign country, and brought back to the United States in the same condition as when exported. To entitle the article to entry free *of duty, it must [*530 also appear that it is one on which no drawback or bounty has been allowed. It will be observed, that the prior acts of Congress did not require that the goods should be brought back in the same condition as when exported, in order to entitle the importer to claim that they should be admitted to entry as included in the free list. That language is retained in the act of March 3d, 1857 (11 Stat. at L. 199), without any alteration or amendment; so that although it may appear that the goods were the growth, produce, or manufacture of the United States; that they were exported to a foreign country, and brought back to the United States; still, unless it also appears they were so brought back in the same condition as when exported, the collector of the port is not authorized to admit them to entry, free of duty.

Molasses barrels exported empty, when new, to Matanzas, and there filled and, with their contents, brought back to the United States, cannot truly be said to be in the same condition as when they were exported. Oftentimes, when emptied of their contents, they are unfit for a second voyage, and seldom or never afterwards have the same market value as when they were new. When filled in the foreign port, the barrels have been applied to the commercial use for which they were manufactured; and when shipped with their contents, brought back to the United States, and are offered with their contents by the importer for entry at the customhouse, they have then, in respect to the revenue laws of the United States, acquired a new character. For all the purposes of appraisement, with a view to ascertain the dutiable value of the importation, the barrels, if filled, are regarded, with their contents, as packages; and it is the duty of the collector, by the express words of the statute, to order one in ten of the packages to the public store. Examination of the selected packages is then made by the local appraisers; and in case of appeal, the same packages are required to remain in the public store, and frequently constitute the only attainable basis of the subsequent adjudication by the merchant appraiser. Such packages are ordered to the public store in the same condition as when imported, and it is not possible to doubt *that Congress intended to include, [*531 in the words "one in ten of the packages," the covering of the importations, if belonging to the

merchant, as well as the contents within it. Confirmation of these views, if any be needed, may be found in the almost unbroken practice of the Treasury Department. Take, for example, the Treasury Circular of the 26th of November, 1846, and it will be found that it fully justifies the conclusion to which we have come.

By that circular the several collectors were informed that—

"The principle upon which the appraisement is based is this: that the actual value of articles on shipboard at the last place of shipment to the United States, including all preceding expenses, duties, costs, charges, and transportation, is the foreign value upon which the duty is to be assessed. The costs and charges that are to be embraced in fixing the valuation, over and above the value of the article at the place of growth, production, or manufacture, are—

"The transportation, shipment, and transhipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water carriage, to the vessel in which shipment is made to the United States. Included in these estimates is the value of the sack, package, box, crate, hogshead, barrel, bale, cask, can, and covering of all kinds, bottles, jars, vessels, and demijohns." Mayo, Comp. 350, 351.

Casks, including barrels, as well as hogsheads, exported from the United States empty, and returned filled, have almost invariably, since the passage of the tariff act of the 20th of July, 1846, been included among the dutiable charges, although of American manufacture, on the ground that, when so filled and brought back, they were not in the same condition as when exported, within the meaning of the provision of that act. Mayo, Comp. 407. That construction has been affirmed by the Treasury Department, since the passage of the appraisement act of March 3d, 1851 (9 Stat. at L. 629), as will appear by reference to the Treasury Circular adopted shortly after its passage. By that circular the Department declares that—

532*] *"The law enjoins that there shall be added 'all costs and charges, except insurance, and including, in every case, a charge for commissions at the usual rates.' These charges are as follows, to wit:

"They must include 'purchasing, carriages, dyeing, bleaching, dressing, finishing, putting up and packing,' *together with the value of the sack, package, box, crate, hogshead, barrel, bale, cask, can, and covering of all kinds, bottles, jars, vessels, and demijohns.*"

Without pursuing the discussion further, suffice it to say, that we are all of the opinion that the question under consideration must be answered in the negative, and we accordingly direct that it be certified to the court below, as the opinion of this court, that barrels manufactured in the United States, and exported empty to Cuba, and afterwards brought back to the United States filled with molasses purchased in Cuba, were not brought back "in the same condition as when exported," within the true intent and meaning of the acts of Congress in that behalf.

ORDER.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the point or question upon which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel; on consideration whereof, it is the opinion of this court that barrels, manufactured in the United States and exported empty to Cuba and afterwards brought back to the United States filled with molasses purchased in Cuba, are not brought back in the same condition as when exported, according to the true intent and meaning of the acts of Congress in that behalf. Whereupon, it is now here ordered by the court that it be so certified to the said circuit court.

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*PIERRE A. BERTHOLD, Alfred C. Bernondy and Marklat Thompson, *Plffs. in Err.*, [*536

v.

EDWARD GOLDSMITH.

(See S. C. 24 How. 536-544.)

Partnership, what is—participation in profits—servant or special agent is not partner, although paid from profits—one employed to negotiate sales, not a partner.

Partnership is a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.

While every partnership is founded on a community of interest, every community of interest does not constitute a partnership.

Whenever there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then the case is one of actual partnership.

It is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation.

Participation in the profits will not alone create a partnership between the parties themselves as to the property, contrary to their intention.

Actual participation in the profits as principal creates a partnership as between the parties and third persons, whatever may be their intention in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits.

Actual partnership, as between a creditor and the dormant partner, is considered by the law to subsist where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents to that relation.

That rule, however, has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as compensation for his services.

Unless the supposed dormant partner is in some way interested in the profits of the business, as principal, he cannot bring suit as a partner.

Where one employed by a partnership to negotiate sales had no interest in the property, and it was to remain for sale in the custody, and control of commission merchants who stood responsible for the proceeds, and he did not rely upon the profits for his compensation, although he was to have one half the profits with a guaranty of $1,800 a year, he was not a partner.

NOTE.—*Partnership; when a community of profits creates a partnership; exceptions*—see note *infra*, 249, and note to 36 L. ed. U. S. 836.

Argued Feb. 28, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the District of Missouri.

This was an action of *assumpsit*, brought in the court below by Goldsmith, the present defendant in error.

Judgment was rendered for the plaintiff, and the defendants brought the case to this court by writ of error.

The case further appears in the opinion of the court.

Mr. **M. Blair** for the plaintiffs in error.

Messrs. **Badger & Carlisle** for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the district of Missouri. The declaration in this case was filed on the 2d day of September, 1858, by the present defendant, who was the plaintiff in the court below. It was an action of *assumpsit*, and the declaration contained five counts. Without attempting to give any very precise analysis of the declaration, it will be sufficient to say that the plaintiff alleged, that on the 29th day of August, 1857, at the special instance and request of the defendants, he sent and consigned to them sundry cases and boxes of cigars of great value, in order that they might sell and dispose of the same for him, on their guaranty of sales, for a certain commission or reward, and that the defendants, in consideration thereof, undertook, and then and there promised, to sell and dispose of the cigars on his account, and to be answerable to him for the due payment of the sums for which the same should be sold, and pay over the proceeds to him. And the complaint is, that they not only neglected and refused to perform their promises in that behalf, but that they disposed of the consignment to their own use. De-538*] fendants appeared and *demurred to the declaration, but the court overruled the demurrer, and the parties subsequently went to trial upon the general issue. Testimony was introduced on both sides, and after the arguments were closed, the defendants presented to the court certain prayers for instruction, which were refused. And under the instructions given by the court, the jury returned their verdict in favor of the plaintiff for the sum of $3,000. Exceptions were duly taken by the defendants, not only to the refusal of the court to instruct the jury as requested, but also to the instructions given, and the question to be decided is, whether, upon the facts disclosed in the record, there was any error in the action of the court. It appears from the evidence that the plaintiff was a merchant, residing at Baltimore, in the state of Maryland, and that the defendants were commission merchants, doing business at St. Louis in the state of Missouri. For the purposes of this investigation, it is conceded that the cigars were sent by the plaintiff, and that they were duly received by the defendants, and there is no dispute as to the quantity or their value. Some of the cigars were forwarded by railroad, but the largest invoice was shipped, in bond, with the understanding that the defendants would make the necessary advances for the duties and other charges. Accordingly, they received the cases and boxes containing the cigars at the customhouse, and paid the duties and freight. All of the cigars were sent and received under the terms and conditions specified in a certain letter from the plaintiff to the defendants, to which more particular reference will presently be made. Prior to the date of that letter, it had been agreed between the plaintiff and one H. F. Hook, that the latter should go to St. Louis, and if practicable, make an arrangement there with some responsible commission house to accept consignments of cigars from the plaintiff, and sell and dispose of them on his account. It seems that Hook wanted employment, and the plaintiff wanted to extend his business. They accordingly agreed to make an effort of that kind, and if successful, that Hook should have half the profits, with a guaranty from the plaintiff that his compensation should amount to $1,800. Pursuant to that understanding, *Hook [*539 went to St. Louis and made an arrangement with the defendants, and communicated the terms and conditions of it to the plaintiff. By the terms of this arrangement, the defendants were to sell for a commission of two and a half per cent, and were to guaranty the sales for a like commission. They were to receive the goods in bond, at the customhouse, make the necessary advances for duties and charges, and accept drafts drawn by the plaintiff against the consignments. Having learned the nature of the proffered terms, the plaintiff, on the 28th day of August, 1857, wrote to the defendants, the letter to which reference has already been made. Referring in express terms to that arrangement, he informed the defendants by that letter that he had consigned to them an invoice of cigars, and requested them to render to him, when the cigars were sold, an account of the sales; and what is more, he therein stated to the defendants that if they were willing to make advances on such goods, he would consign to them, in a short time, additional invoices to a large amount; and in conclusion, employed the following language: "All shipped to your house by me; I will hold you responsible." Full proof is exhibited in the record, that all the cigars in controversy were sent and received under the arrangement referred to in that letter, and the person who made the arrangement with the defendants testified that it was never changed. He remained in St. Louis to negotiate sales, and he also testified that he managed the whole business and conducted the correspondence with the plaintiff. Defendants dissolved their partnership on the 1st day of January, 1858, so that it became desirable for them to get rid of their consignments; and on the 15th day of the same month, all of the cigars not previously sold were turned over to another firm, pursuant to an order drawn on them by the person who negotiated the arrangement. That step was taken without consulting the plaintiff, and without his knowledge, and ten days later the defendants wrote to the plaintiff and declined to render an account of sales, affirming that they had made none, and assuming, in effect, that the person who negotiated the arrangement was the general agent of the plaintiff with respect to the cigars; *and [*540

they informed the plaintiff, in the same letter, that he, the supposed agent, on withdrawing the consignment, had paid back to them what money they had advanced on the same. Much other testimony was introduced on the one side or the other, but the statement already given exhibits the material facts necessary to be considered in this stage of the investigation.

Two theories were assumed by the defendants at the trial, and the prayers for instruction were all based upon the one or the other of those theories. It was insisted, in the first place, that the person who negotiated the arrangement and finally withdrew the consignment, was a partner with the plaintiff in the whole transaction; and if not, then, second, that he was the agent of the plaintiff and, as such, had authority to withdraw the consignment and acquit the defendants from all further responsibility. But the presiding justices instructed the jury, in substance and effect, that the defendants were responsible for the cigars consigned under the letter of instructions, whether sold directly by themselves as factors of the plaintiff, or by Hook, as authorized to negotiate sales, provided the cigars were received into their possession; that the defendants were authorized by the letter to sell the cigars in the usual course of business, and if they found that Hook was also authorized to negotiate sales, then the sales by him in the usual way were also valid, and that the defendants, by the letter, were to make the advances, have two and a half per cent commissions on sales, and two and a half per cent on guaranty of sales, and were to account to the plaintiff. Among other things, they also instructed the jury, that there was no evidence to show any authority from the plaintiff to turn the cigars over to an auctioneer to be sold, and that the plaintiff, therefore, was entitled to recover the net proceeds of the cigars sold, either by the defendant or Hook, if the latter was authorized to negotiate sales, and the market value at St. Louis of the residue, less the charges paid for freight, storage, insurance, drayage, and duties. Both of the defenses set up in the court below are still insisted upon in this court, but we think neither of them can be sustained, and that the instructions given to the jury were correct.

541*] *1. Partnership is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. But partnership and community of interest, independently considered, are not always the same thing; for the first, as between the partners themselves, is founded upon the copartnership agreement which prescribes the relation they bear to each other, and of itself creates the community of interest; but the last may exist, notwithstanding there has been no agreement between the parties. Part owners of a ship, for example, are uniformly treated as tenants in common, and not as partners, although it cannot be denied that there is a community of interest between them in every part of the vessel, and each is entitled to a share of her earnings in proportion to his undivided interest, and must also share the loss. Joint owners of merchandise may consign it for sale abroad to the same consignee; and if each gives separate instructions for his own share, it is well settled law that these interests are several, and that they are not to be treated as partners in the adventure. Numerous illustrations of the principle are to be found in the decisions of the courts, of which we will give but one more at the present time. Where a broker or other agent purchases goods for several persons, each agreeing to take a certain portion of the entire parcel, it is clear, if there is no arrangement that the goods shall be sold on joint account, that the transaction does not amount to a partnership although there is, undeniably, a community of interest in the goods so purchased. These examples will be sufficient to show that while every partnership is founded on a community of interest, it is, nevertheless, incorrect to suppose that every community of interest necessarily constitutes the relation of partnership within the meaning of the commercial law. Whenever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves and, of course, it is *so as to [*542 third persons. All of the decided cases, however, agree that it is seldom or never essential that both of these ingredients should concur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership; and, under some circumstances, that conclusion will follow, although the sale of the property for the joint interest may not be contemplated by the parties. On the other hand, it is equally clear that there may be such a community of interest in the profits, without regard to loss, and without any community of interest whatever in the property, as will establish that relation. Participation in the profits, however, will not alone create a partnership between the parties themselves as to the property, contrary to their intention. But merchants and traders are often justly held to be partners as to third persons, where they are not to be deemed such, expressly or impliedly, as between themselves. Judge Story distributes the cases in which a liability exists as to third persons into five classes, and it is obvious that the present case does not fall within any principle of that classification. Story, Part. § 542; Greenl. Ev. § 482. He admits, however, that the pressure of the general doctrine is most severely felt in that class of cases where all the parties charged, as partners, are to share the profits between them, but the losses are to be borne exclusively by one of their number. Actual participation in the profits as principal, we think, creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits. Every man who has a share of the profits of a trade or business ought also to bear his share of the loss, for the reason, that in taking a part of

the profits, he takes a part of the fund of the trade on which the creditor relies for payment. *Grace* v. *Smith*, 2 W. Bl. 998; *Waugh* v. *Carver*, 2 H. Bl. 235. Actual partnership, as between a creditor and the dormant partner, is 543*] considered by the law to subsist *where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents to that relation. *Bond* v. *Pittard*, 3 Mees. & W. 357. That rule, however, has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services.

Merchants are obliged to have clerks, and oftentimes find it necessary to employ brokers or special agents to effect sales, and it is no more detrimental to their creditors that such employees should be paid out of the profits of their trade than from any other source of income within their disposal. Unless the supposed dormant partner is in some way interested in the profits of the business, as principal, it is plain that he cannot bring suit as a partner, and go into equity and compel an account; nor can it be held that he has any such lien on the profits as a court of equity may enforce; and if not, then his condition is the same as that of an ordinary creditor, and he must pursue his remedy against his employer. *Denny et al.* v. *Cabot et al.*, 6 Met. 90; *Vanderburgh* v. *Hull*, 20 Wend. 70. Repeated decisions have recognized this distinction, and although it may happen, as heretofore, that cases will arise on the one side or the other of the line, approaching in their facts so near to each other that the difference between them may appear to be unsubstantial, yet the distinction itself, we think, is well founded in reason, and that the only difficulty is in the application of the principle on which it rests. *Hallet* v. *Desban*, 14 La. Ann. 535.

No such difficulty, however, arises in this case. Defendants knew the exact relation which Hook sustained to them and to the plaintiff, and they had the letter of the plaintiff in their possession, informing them that he should hold them responsible for the cigars. They knew what the arrangement was, and that the goods had been sent by the plaintiff and received by them, on the terms and conditions specified in 544*] that letter. *Irrespective of the guaranty, it is difficult to see how Hook could have any interest in the profits as a partner with the plaintiff. He had no interest in the property, and by the arrangement which he himself negotiated, the cigars were to remain for sale in the custody and control of the defendants, as commission merchants, and they stood responsible to the plaintiff for the proceeds. But he did not rely upon the profits for his compensation, for unless one half the profits exceeded $1,800 a year, he would neither be benefited nor injured by the success or failure of the adventure, except so far as the latter result might have a tendency to induce his employer to dispense with his services. Little or nothing was ever realized from the enterprise and, of course, no excess of profits over the amount of the guaranty was ever earned. It is quite obvious, therefore, that the theory of the defendants on this branch of the case cannot be sustained.

2. It is insisted by the defendants that Hook was the agent of the plaintiff and, as such, that he had authority to withdraw the cigars from their custody and control, and turn them over to the other firm. On that point, the presiding justice instructed the jury that there was no evidence in the case to support that theory, and, after a careful examination of the evidence exhibited in the transcript, we entirely concur in that view of the case; *and the judgment of the circuit court is, therefore, affirmed, with costs.*

JOHN J. WHEELER, *Plff. in Err.*,

v.

ANDREW J. NESBITT, Jerome Carding, Frederick Binkley, James D. Trimble, Wilson J. Mathis and Robert McNeely.

(See S. C. 24 How. 544–553.)

Proof necessary in action for malicious prosecution — charge unfounded — want of probable cause — malice — may be proved by circumstances—onus probandi *is on plaintiff—what is probable cause—question of fact—detention of plaintiff in prison, which is result of his own request for delay, and of his neglect to give security, is no ground of complaint.*

To suppose an action for a malicious criminal prosecution the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in acquittal.

He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant, in making or instigating it, was actuated by malice.

The burden of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars, the defendant has no occasion to offer any evidence in his defense.

Malice alone is not sufficient to sustain the action; because a person actuated by the plainest malice may, nevertheless, prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge.

Want of reasonable and probable cause is as much an element in the action as the evil motive, and though the averment is a negative one it must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge.

Either of these allegations may be proved by circumstances.

NOTE.—*Malicious prosecution—action for causing a criminal prosecution.*

An action on the case lies for a false and malicious prosecution for any crime, whether capital or not, by which the party may be put in peril of his life, suffer in his liberty, reputation or property; whether the prosecutor proceed so far as actually to exhibit an indictment on which the party was acquitted, or not. Roll. Abr. 112; Churchill v. Siggers, 3 El. & B. 937.

It must appear that the motive for prosecuting the original action, whether civil or criminal, was malicious, and the action without probable cause. Cro. Eliz. 70, 134; Leon. 107; Kelw. 81; Moo. 600;

Want of probable cause is evidence of malice, but it is not the same thing; and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description.

The plaintiff must show that the defendant acted from malicious motives in prosecuting him, and that he had no sufficient reason to believe him to be guilty. If either of these be wanting, the action must fail.

Want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained.

The *onus probandi* is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution.

Probable cause is the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

Whether the prosecution was or was not commenced from malicious motives, is a question of facts, and it is for the jury to determine whether the inference of malice is a reasonable one from the facts assumed in the instruction.

If there was probable cause for the arrest of the defendant, he can be lawfully detained a reasonable time till the warrant was issued and executed.

Where plaintiff was detained in prison for the space of seven days, as the necessary consequence of his own request for delay, and the neglect on his part to offer any satisfactory security for his appearance at the time appointed for the examination; held, no ground of complaint.

Argued Feb. 25, 1861. Decided Mar. 14, 1861.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

This was an action of trespass on the case commenced by Wheeler, the present plaintiff in error, in the court below, against the present defendants in error, for false imprisonment.

The trial resulted in a verdict and judgment for the defendants, and the plaintiff brought the case to this court by writ or error.

It appears that the plaintiff was arrested on a charge of horse stealing; that the only grounds of suspicion against him were that he, in company with two companions, Irishmen, were found to have in their possession four fine horses; that both he and his companions were indifferently clad, and were all strangers in that locality. The fact was that these horses belonged to Wheeler, and that he merely permitted the two Irishmen to ride one each, as they happened to be going in the same direction as himself.

The case further appears in the opinion of the court.

Mr. **W. L. Underwood,** for plaintiff in error:

The *gravamen* of the plaintiff's complaint against the defendants, is, first, that they conspired; second, in a malicious prosecution: third, whereby he was falsely imprisoned.

As to the first point, counsel cited Bouv. L. Dict., tit. Conspiracy; *Rex* v. *Rispal*, 3 Burr., 1320; Chit. Cr. L. 1142; 2 Stark. Ev. 401, 403; 3 Chit. Cr. L. 1139, 1143.

2. The *gravamen* of the action is, that the plaintiff has improperly been made the subject of legal process, to his damage.

2 Greenl. Ev. 99.

There are two grounds necessary to support an action for malicious prosecution — malice and the want of probable cause. The latter is the gist of the action.

Morgan v. *Hughes*, 2 T. R. 225.

Malice is not to be considered in the sense of hate or spite against an individual. Want of caution, in occasioning injury to others, is sufficient.

See 2 Greenl. Ev. 453; *Brooks* v. *Warwick*, 2 Stark.; Bouv. L. Dict., tit. Malice; 1 Camp. 200, note a; *Sutton* v. *Johnstone*, 1 T. R. 493.

Acquittal by the magistrate is prima facie evidence of want of probable cause.

2 Greenl. 455; *Williams* v. *Norwood*, 2 Yerg. 329; *Hickman* v. *Griffin*, 6 Mo. 37; *Merriam* v. *Mitchell*, 13 Me. 439.

Suspicion and conjecture do not amount to probable cause.

Stone v. *Stevens*, 12 Conn. 219; *Holburn* v. *Neal*, 4 Dana, 123.

The charge of the court below was erroneous under the above authorities.

Mr. **P. Phillips,** for the defendants in error:

The plaintiff must show that the defendants acted from malicious motives, and that he had no sufficient reason to believe him to be guilty. If either be wanting, the action must fail.

Johnstone v. *Sutton*, 1 T. R. 544; *Mitchell* v. *Jenkins*, 5 Barn. & Ad. 594; *Herman* v. *Brook-*

Danv. 212; Salk. 15; Cook v. Walker, 30 Ga. 519; Dickinson v. Maynard, 20 La. Ann. 66; Heyne v. Blair, 62 N. Y. 19; Medcalf v. Brook. L. Ins. Co. 45 Md. 198; Burris v. North, 64 Mo. 426; Scott v. Shelor, 28 Gratt. 891; Glaze v. Whitley, 5 Or. 164; Willis v. Knox, 5 S. C. 474; Harkrader v. Moore, 44 Cal. 144; Dietz v. Langfitt, 63 Pa. 234; Burnap v. Albert, Taney, 244; 4 Burr. 1974; 1 Mason, 24; Stew. Adm. 115; Cotton v. James, 1 Barn. & Ad. 133; Besson v. Southard, 10 N. Y. 236; Ganea v. Southern Pac. R. Co. 51 Cal. 140.

It must also appear, in every case, that the original suit is ended, and that it terminated in favor of the defendant in the original suit, either by acquittal, abandonment or final judgment in his favor, before the commencement of the action for malicious prosecution; otherwise the point would come to be tried too soon and disorderly. Doug. 205; Yelv. 117; 2 Term, 225; Str. 114; Hob. 114; 10 Mod. 245; W. Jones. 93; Sinclair v. Eldred, 4 Taunt. 7; O'Brien v. Barry, 106 Mass. 300; Brown v. Randall, 36 Conn. 56; Cardinal v. Smith, 109 Mass. 158; Hall v. Fisher, 20 Barb. 441; Hamilburgh v. Shepard, 119 Mass. 30; Gillespie v. Hudson, 11 Kan. 163; Feltt v. Davis, 49 Vt. 151; Batcheldor v. Frank, 49 Vt. 90; Hibbing v. Hyde, 50 Cal. 206; Moulton v. Beecher, 1 Abb. N. C. 192, 52 How. Pr. 182.

A *nolle prosequi* by the Attorney General is not such a termination of a criminal suit as will authorize an action. An acquittal must be shown. Finding of an indictment is some evidence of probable cause. 6 Mod. 261; 10 Mod. 219; Gilb. Cas. 185; Cardival v. Smith, 109 Mass. 158; Bacon v. Towne, 4 Cush. 217; Parker v. Farley, 10 Cush. 279; Bacon v. Waters, 2 Allen, 400; Bull. N. P. 14; Driggs v. Burton, 44 Vt. 124; see *contra*, Moulton v. Beecher, 1 Abb. N. C. 193; 52 How. Pr. 182; Chapman v. Woods, 6 Blackf. 504; Yocum v. Polly, 1 B. Mon. 358; Richter v. Koster, 45 Ind. 440; Rice v. Ponder, 7 Ired. 390; Brown v. Randall, 36 Conn. 56; 4 Am. Rep. 35.

Where the complainant withdraws the prosecution and the accused is thereupon discharged, or the magistrate discharges on examination, or the grand jury fail to find an indictment, or the prosecuting attorney discharges without the action of the grand jury, it is equivalent to an acquittal, and is a sufficient termination of the suit. Williams v. Norwood, 2 Yerg. 329; Johnson v. Martin, 3 Murph. 348; Sayles v. Briggs, 4 Met. 421; Cardival v. Smith, 109 Mass. 158; 12 Am. Rep. 682; Brown v. Randall, 36 Conn. 56; 4 Am. Rep. 35; Driggs v. Burton, 44 Vt. 124; Secor v. Babcock, 2 Johns. 203; Jones v. Givin, Gilb. 185, 220; Morgan v. Hughes, 2 Term. 225; Freeman v. Arkell, 2 B. & C. 494; Mitchell v. Williams, 11 M. & W. 205; Bacon v. Waters, 2 Allen, 400; Schoonover v. Myers, 28 Ill. 308.

It has been held that a verdict on the merits is not necessary; a dismissal or abandonment of a criminal prosecution before trial is a sufficient ter-

erhoff, 8 Watts, 241; *Ewing* v. *Sanford*, 19 Ala. 615.

Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense with which he is charged.

Munns v. *Dupont*, 3 Wash. C. C. 31; *Foshay* v. *Ferguson*, 2 Den. 617.

So that, although the plaintiff is entirely innocent, if the defendant shows that he has reasonable grounds for believing him guilty at the time the charge was made, the action cannot be sustained.

Hall v. *Suydam*, 6 Barb. 86; *James* v. *Phelps*, 11 Adol. & E. 489; *Broughton* v. *Robinson*, 11 Ala. 922.

While malice in this form of action is not to be limited to "spite or hatred," it must consist in the "*malus animus*" as denoting that the party is actuated by improper and indirect motives.

Mitchell v. *Jenkins*, 5 Barn. & Ad. 594; see, also, 12 Mod. 208; 10 Mod. 217, 4 Barn. & C. 26.

Mr. Justice **Clifford** delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the Middle district of Tennessee. John J. Wheeler, the plaintiff in error, complained in the court below against the present defendants, in a plea of trespass on the case, as will more fully appear by reference to the declaration which is set forth at large in the transcript. It alleged three distinct causes of action, and each cause of action was set forth in two separate counts. All of the counts, however, were founded upon the same transaction, so that a brief reference to the first, third, and fifth of the series will be sufficient to exhibit the substances of the declaration, and the nature of the supposed grievances for which the suit was instituted. First, the plaintiff alleged that the defendants, falsely and maliciously contriving and intending to injure him in his good name and reputation, on the 18th day of September, 1856, at a certain place within the jurisdiction of the court below, went before a certain justice of the peace for that county, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen four horses, which he then and there had in his possession, and caused and procured the magistrate to grant a warrant, under his hand and seal, for the apprehension of the plaintiff, upon that false, malicious and groundless charge; and that he, the plaintiff, was accordingly arrested by virtue of the warrant so procured, and falsely and maliciously, and without any reasonable or probable cause, imprisoned in the prison house of the state there situate, for the space of seven days; and that at the expiration of that period he was fully acquitted and discharged of the supposed offense, and that the prosecution for the same was wholly ended and determined. Second, the plaintiff alleged that the defendants, on the same day and at the same place, with force and arms assaulted him, the plaintiff, and forced and compelled him to go to the prison house of the state there *situate, and then and [*547 there falsely and maliciously, and without any reasonable or probable cause, imprisoned him for the space of seven days, contrary to the laws and customs of the state. Third, the plaintiff alleged that the defendants, on the same day and at the same place, did unlawfully and falsely conspire, combine, and agree among themselves and with others, that the first named defendant, with a view to procure a warrant for the arrest and imprisonment of the plaintiff, should go before a certain magistrate of the county, and make oath, according to law, that he, the complainant, verily believed that the plaintiff, with two other persons, had committed the aforesaid offense, and that the other defendants in this suit should attend the preliminary examination of the plaintiff before the magistrate, and then and there aid, abet, and assist the complainant, by their testimony, influence and advice, in prosecuting the charge; and the plaintiff averred that the defendants so far carried their corrupt and evil conspiracy and agreement into effect, that they procured the warrant from the magistrate by the means contemplated, and that he, the plaintiff, was then and there

mination of the prosecution (Kelley v. Sage, 12 Kan. 109; McWilliams v. Hoban, 42 Md. 56; Gilbert v. Emmons, 42 Ill. 143; Fay v. O'Neill, 36 N. Y. 11; Leever v. Hamill, 57 Ind. 423); so is the quashing of an indictment and discharge of defendant. Hays v. Blizzard, 30 Ind. 457; discharge on habeas corpus, after commitment by justice, is not. Walker v. Martin, 43 Ill. 508; Swartwout v. Dickelman, 12 Hun, 358.

The insufficiency of the indictment is no defense, nor its rejection by the grand jury. Stancliff v. Palmeter, 18 Ind. 321; Jones v. Gwin, 10 Mod. 148, 214; Pippet v. Hearn, 5 Barn. & A. 634; Shaul v. Brown, 28 Iowa, 37; Chambers v. Robinson, 2 Str. 691; Wicks v. Fentham, 4 Term, 247.

The action lies if some of the charges in the indictment are maliciously preferred, though others are not. Reed v. Taylor, 4 Taunt. 616.

The action lies for knowingly procuring the indictment of a person for an act not a crime (Dennis v. Ryan, 5 Lans. 350; 63 Barb. 145; 65 N. Y. 385); or falsely and maliciously accusing of, and procuring arrest and indictment of another for, an act believed to be a crime (Shaul v. Brown, 28 Iowa, 37; 1 Am. Lead. Cas. 281; Anderson v. Buchanan, Wright, 725; Farlie v. Danks, 2 Eng. L. & E. 115; Streight v. Bell, 37 Ind. 550; Collins v. Love, 7 Blackf. 416; Barton v. Kavanaugh, 12 La. Ann. 332); or falsely and maliciously prosecuting before a court which has no jurisdiction of the crime. Morris v. Scott, 21 Wend. 281; Sweet v. Negus, 30 Mich. 406; Stone v. Stevens, 12 Conn. 219; Hays v. Younglove, 7 B. Mon. 545; *contra*, Painter v. Ives, 4 Neb. 122; Turpin v. Remy, 3 Blackf. 210.

Making a true statement in good faith, through which a person is prosecuted or indicted, will not support an action for malicious prosecution, although the facts stated constitute no crime. Dennis v. Ryan, 65 N. Y. 385; Bennett v. Black, 1 Stew. 494; Wyatt v. White, 5 H. & N. 371; McNeely v. Driskill, 2 Blackf. 259; Leigh v. Webb, 3 Esp. 165.

In case of a conviction, the action will not lie, unless the conviction was procured unfairly. Whitney v. Peckham, 15 Mass. 243; Com. v. Davis, 11 Pick. 343; Miller v. Deere, 2 Abb. Pr. 1; Monroe v. Maples, 1 Root. 554; Cloon v. Gerry, 13 Gray, 201; Rosenstein v. Brown, 7 Phil. 144; Basher v. Matthews, L. R. 2 C. P. 684; Hibbing v. Hyde, 50 Cal. 206; Griffis v. Sellars, 2 Dev. & Bat. 492; Palmer v. Avery, 41 Barb. 290; Witham v. Gowen, 14 Me. 362; Payson v. Caswell, 22 Me. 226; Burt v. Place, 4 Wend. 591.

An action will lie for procuring another to bring a malicious criminal prosecution, or voluntarily participating in such a prosecution, or for commencing one in good faith, and prosecuting after positive knowledge of innocence. Mowry v. Miller, 3 Leigh, 561; Perdu v. Connerly, 1 Rice, 49; Stanburry v. Fogle, 37 Md. 369; Fitzjohn v. Mackinder, 9 C. B. N. S. 505; 30 L. J. C. P. 264.

arrested by virtue of the same, and imprisoned upon that false, malicious, and groundless accusation, for the space of seven days, and that at the expiration of that period he was fully acquitted and discharged of the supposed offense. Such is the substance of the declaration, so far as it is deemed material to reproduce it at the present time. Testimony was introduced by the plaintiff tending to show that he was the lawful owner of the four horses described in the warrant on which he was arrested; and he also proved, without objection, that he had always sustained a good character in the neighborhood where he resided. He also introduced a duly certified copy of the complaint made against him by the first named defendant, and a duly certified copy of the warrant issued by the magistrate. Those copies show that the complainant, on the 18th day of August, 1856, made the accusation under oath, as required by the law of the state, and that the magistrate thereupon granted the warrant for the apprehension of the plaintiff, together with two other persons, who were jointly accused with him of the same of-
548*] fense. Both *the complaint and warrant were in regular form, and the latter contained the usual directions, that the persons accused should forthwith be brought before the magistrate who issued it, or some other justice of the peace for the county, to answer to the charge, and be dealt with as the law directed. Whether the officer made any formal return on the precept or not does not appear; but it is stated in the bill of exceptions, that the warrant was placed in the hands of the sheriff, and that the persons accused of the offense, including the plaintiff, were on the same day brought before the magistrate for trial. When brought into court they were not prepared for the examination, and at their request the trial was postponed for twelve days, or until they should have sufficient time to procure the attendance of certain witnesses, whose testimony was necessary, as they represented, to establish their defense; and the minutes of the proceedings before the magistrate, state, in effect, that the accused, "not being able to give any security for their appearance" at the time appointed for the trial, "or not offering to give any, the sheriff was directed to hold them in custody to answer to the charge." Pursuant to that order the plaintiff, as well as the other persons accused, remained in the custody of the sheriff, and were kept by him in the prison house of the state there situate until the witnesses of the plaintiff appeared; and on the 25th day of September, 1856, they were again brought before the magistrate, and after the witnesses on both sides were examined, all of the accused were fully acquitted and discharged of the alleged offense. To show that the prosecution was groundless, and without any reasonable or probable cause, the plaintiff examined several witnesses, to prove the circumstances under which he was arrested, and the substance of the evidence adduced against him at the trial before the magistrate. One of the defendants is the magistrate who granted the warrant, and the other defendants were witnesses for the state in the criminal prosecution. All of the defendants were citizens of the state of Tennessee, and the plaintiff was a citizen of the state of Kentucky, and it did not appear that the parties had any acquaintance with each other prior to this transaction. No attempt was made *on the [*549 part of the plaintiff to prove express malice, and there was no direct evidence of any kind to support the allegation of conspiracy. On the other hand, the defendants insisted that there was no evidence to support the charge of conspiracy or of false imprisonment, and that the prosecution was instituted in good faith, and conducted throughout upon reasonable and probable cause; and to establish that defense they called and examined several witnesses to prove what the evidence was which was given against the plaintiff at the trial before the magistrate. Without entering into particulars, it will be sufficient to say, that the evidence adduced by the defendants had some tendency to maintain the defense. Under the rulings and instructions of the court the jury returned their verdict in favor of the defendants, and the plaintiff excepted to the charge of the court. Unaided by the assignment of errors, it would be difficult to ascertain, with any degree of certainty, to what particular part of the charge of the court the exceptions were intended to apply. But that difficulty is so far obviated by the specifications contained in the printed argument filed for the plaintiff, that, with some hesitation, we have concluded that the case, as presented in the transcript, is one which may be re-examined in this court.

1. Among other things, the presiding justice instructed the jury, that, in order to excuse the defendants on the first two counts in the declaration, it must appear that they had probable cause for the prosecution of the plaintiff for the offense described in the complaint and warrant, or that they acted bona fide without malice. Objection is made by the counsel of the plaintiff to this part of the charge of the court; but we think it was quite as favorable to him as the well settled rules of law upon the subject would possibly allow. To support an action for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it *was actuated by malice. Proof of these [*550 several facts is indispensable to support the declaration, and clearly the burden of proof, in the first instance, is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars, the defendant has no occasion to offer any evidence in his defense. Undoubtedly, every person who puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute the proper foundation of an action to recover compensation. Malice, alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may, nevertheless, prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reason-

able and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation; and though the averment is a negative one in its form and character, it is, nevertheless, a material element of the action, and must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge. *Morris* v. *Corson*, 7 Cow. 281. Either of these allegations may be proved by circumstances, and it is unquestionably true that want of probable cause is evidence of malice, but it is not the same thing; and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description. Accordingly, it was held in *Foshay* v. *Ferguson*, 2 Den. 619, that even proof of express malice was not enough without showing, also, the want of probable cause; and the court go on to say, that however innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. Similar views were also expressed in *Stone* v. *Crocker*, 24 Pick. 83. There are two things. 551*] say the court in that case, *which are not only indispensable to the support of the action, but lie at the foundation of it. The plaintiff must show that the defendant acted from malicious motives in prosecuting him, and that he had no sufficient reason to believe him to be guilty. If either of these be wanting, the action must fail; and so are all the authorities from a very early period to the present time. *Golding* v. *Crowle*, Sayer, 1; *Farmer* v. *Darling*, 4 Burr. 1,974; 1 Hillard on T. 460.

It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi*, as was well remarked in the case last referred to, is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution. *Purcell* v. *McNamara*, 9 East, 361; *Willans* v. *Taylor*, 6 Bing. 184; *Johnstone* v. *Sutton*, 1 Term, 544; *Turner* v. *Ambler*, 10 Q. B. 257.

Applying these principles to the present case, it necessarily follows that so much of the charge of the court as is now under consideration, furnishes no just ground of complaint on the part of the plaintiff. On the contrary, it is quite obvious that unless it was accompanied by prior explanations, not stated in the bill of exceptions, it was even more favorable to the plaintiff than he had a right to expect. He was bound to make out his case; and if it did not appear that the prosecution had been commenced with malicious motives, and without reasonable and probable cause, then the plaintiff was not entitled to a verdict. *Mitchel* v. *Jenkins*, 5 Barn. & Ad. 594.

2. With these remarks as to the first ground of complaint, we will proceed to the examination of the second, which is also based upon a detached portion of the charge of the court. After stating the alternative proposition already recited, the presiding justice proceeded to define the term "probable cause." He substantially told the jury that probable cause was the *existence of such facts and circumstan- [*552 ces as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

Having thus defined the meaning of the term "probable cause," he then proceeded to say, that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence, showing that the party acted bona fide, and in the honest discharge of what he believed to be his duty; and then gave the instruction to which the second objection applies. It is as follows: "If, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable, dispassionate man to believe that the defendant was guilty of having stolen the horses he had in his possession, then the jury ought to infer malice." Clearly, this part of the charge must be taken in connection with what preceded it, and when so read and understood, it is impossible to hold that it is incorrect, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff. Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction. Be that as it may, it is quite certain that it furnishes no ground of exception to the plaintiff, and in all other respects we hold the instruction to be correct.

3. One other objection only remains to be considered. After stating the fact that the magistrate who issued the warrant was sued as a joint defendant, the presiding justice told the jury that the warrant, as given in evidence, was in due form, and that the presumption was, from the statements found therein, that there was sufficient evidence before the magistrate to authorize him to issue it; and then follows that portion of the instructions to which the third objection applies. He then told the jury that if there was probable cause for the arrest of the defendant, he could be lawfully detained a reasonable time till the warrant was issued and executed. It is insisted by the plaintiff that this instruction was both abstract *and [*553 misleading. But that theory is wholly without support, from anything that appears in the record, and, in point of fact, is directly contradicted by what does appear. To sustain that remark, it is only necessary to refer to the declaration, where it is alleged that the plaintiff was detained in prison for the space of seven days, and the minutes of the proceedings before the magistrate show that he was so detained as the necessary consequence of his own request for delay, and the neglect on his part to offer any satisfactory security for his appearance at the time appointed for the examination. Those minutes were introduced by the plaintiff; and

in the absence of any proof to the contrary, it must be assumed that they speak the truth. In view of the whole case, we think the charge of the court to the jury was correct, and that there was no error in the record.

The judgment of the circuit court is, therefore, affirmed, with costs.

MYRA CLARK GAINES, *Appt.*, *v.* DUNCAN N. HENNEN.

(See S. C. 24 How. 553–631.)

When will is lost or destroyed, it may be admitted to probate, on secondary proof in Louisiana—what proof necessary to admit parol evidence—immaterial objections — posterior will—what is interruption of prescription—executor's statement—res adjudicata—*criminal proceedings for bigamy, when inadmissible as evidence—bastard may be devisee or legatee—adulterine child may be legitimated in Louisiana—in what manner—when confession of bigamist admissible to prove bigamy—access between man and wife, and legitimacy of child, presumed—effect of judicial invalidation of marriage.*

In Louisiana, where a will has been destroyed, secondary proof is admissible to prove its contents, and to carry it to probate.

If a will, duly executed and not revoked, is lost, destroyed, or mislaid, either in the lifetime of the testator, without his knowledge, or after his death, it may be admitted to probate upon satisfactory proof being given of its having been so lost, destroyed or mislaid, and also of its contents.

To entitle a party to give parol evidence of a will having been destroyed, where there is not conclusive evidence of its absolute destruction, he must show that he had made diligent search and inquiry after the will in those places where it would most probably be found, if in existence.

That this case was not one for equity jurisdiction, that certain persons should have been made parties, that the sources of title had not been set out in the bill, that the probate proceedings in the court of New Orleans are yet pending and that the same court has exclusive jurisdiction; held, immaterial objections.

Courts of probate may, for cause, recall or annul testamentary letters, but they can neither destroy nor revoke wills.

Such courts may and often have declared that a posterior will of a testator shall be recognized in the place of a prior will which had been proved when it was not known to the court that the testator had revoked it.

Plaintiff's claim is not barred by prescription; the prescription of twenty years does not exist; for she did not attain her majority until 1826, and her suit for the probate of the will was instituted in 1834.

The complainant claimed the inheritance as early as that date, and the prescription which had begun to run had been legally interrupted on the 28th July, 1836, the date of her first bill.

By Louisiana Code, 3484, a legal interruption of a prescription takes place where the possessor has been called to appear before a court of justice, either on account of the property or the possession, and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not.

That article of the Code contemplates a voluntary, intentional and active abandonment of the suit, in order to restore the running of a right of prescription.

The mere absence of herself and counsel at a term of the court when her case was called is insufficient, without other evidence, to convict her of having abandoned her demand.

After the interruption of the prescription by the filing of the bill by the complainant, the defendants could no longer claim to be in possession in good faith, as that is defined in the Civil Code.

By the decisions of Louisiana, an extrajudicial statement by an executor, that he believes the debt to be due by the estate, does not bind the heir, nor is the heir bound by the approval of a court as to such a claim, if it be made *ex parte*.

The suit was not *res adjudicata* by this court in its judgment in the case of Gaines v. Relf and Chew, 53 U. S. 506.

This court having decided, in 47 U. S. that there had been a lawful marriage between the complainant's father and mother, and that Mrs. Gaines was the lawful and only issue of the marriage, the decision made in the case in 53 U. S. was not intended to reverse the decree in 47 U. S. and it cannot be so applied as *res judicata* to this case.

In the first suit her demand was for one half and four fifths of another half of the property owned by her father when he died, which she then claimed as the donee of her mother to the one half, and as forced heir of her father to four fifths of another half of his estate, and now she claims in this suit as universal legatee and legitimate child of her father, under his will of the 13th July, 1813, which has been admitted to probate by the supreme court of Louisiana. The law of Louisiana will not permit the decision in the first to be pleaded against her in this case as a *res judicata*.

The case in 53 U. S. and that now under our consideration are dissimilar as to parties and things sued for, or what is called "the object of the judgment," and the demand now made is not between the same parties or formed against each in the same quality.

Criminal proceedings instituted for bigamy by the canonical presbyter of the Holy Cathedral Church of New Orleans, introduced by the defendants as a part of their evidence in this case is inadmissible as such, and all which it contains must be disregarded.

A bastard *in case*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate.

If the complainant was the offspring of an illicit intercourse she would still be in the condition, from her father's testamentary declaration of her legitimacy, to take as his universal legatee.

In Louisiana, though a child may be adulterine in fact, it may be legitimated for all the purposes of inheriting from its parents, if one or either of them intermarried in good faith.

On such a question good faith is first to be presumed; and, as to what constitutes good faith, it is adjudged in that state that to marry a second time, supposing the previous marriage invalid, is one of the cases of good faith.

The testamentary recognition of a child as legitimate is of the highest legal authority. All presumptions are to be taken in favor of such a declaration.

In Louisiana, although a putative marriage be adulterine in fact, yet if it was contracted in good faith by the parties, or by either of them, their children are legitimated to inherit from their parents, either in a case of intestacy or to take by testament.

In the latter case, a declaration, by either father or mother, that they are their children, without the addition that they are natural children, will make them legitimate, and no other proof can be demanded of them to enable them to enjoy all the rights of legitimate children.

A charge of bigamy in a criminal prosecution cannot be proved by any reputation of marriage; there must be proof of actual marriage before the accused can be convicted.

But in a civil suit the confession of a bigamist will be sufficient, when made under circumstances from which no objection to it as a confession can be implied.

Access between man and wife is always presumed until otherwise plainly proved, and nothing is allowed to impugn the legitimacy of a child short of proofs by facts showing it to be impossible that the husband could have been the father of it.

A judicial invalidation of marriage at any time for the bigamy of a party to it relates back to the time of the marriage, and places the deceived in a free condition to marry again, or to do any other act as an unmarried woman, without any sentence of the nullity of the marriage.

NOTE.—*What constitutes a valid marriage. Evidence to prove marriage*—see note to Jewell v. Jewell, 11 L. ed. U. S. 108.

Evidence to establish lost or destroyed will—see note to 38 L. R. A. 433.

(Mr. Justice Campbell, having been of counsel, did not sit in this case.)

Argued Feb. 14, 1861. Decided Mar. 14, 1861.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana.

The case is fully stated by the court.

Messrs. **James M. Smiley, F. Perin, C. Cushing,** and **Chilton & Magrader** for the appellant.

Mr. **Duncan N. Hennen** in person.

Mr. **Louis Janin** in behalf of the city of New Orleans.

556*] *Mr. Justice **Wayne** delivered the opinion of the court:

We will first give some of the facts of this case, that the litigation which has grown out of the wills of Daniel Clark may be correctly understood. Without them it could not be.

They have been the subject of five appeals to this court. This is the sixth. It presents the controversy differently from what it has been before. It also presents points for decision which were not raised in either of the preceding cases. Some of those that were, however, will necessarily be mentioned in this opinion, to illustrate their connection with this case. They may be so considered without our coming at all into conflict with any judgment heretofore given concerning the rights of the parties in any antecedent appeal. Our conclusion will differ from one of them on account of testimony in this case which was not in that, but they will not be contradictory; and because we have information in this, concerning a piece of testimony then relied upon, which we shall exclude in this, as inadmissible for any purpose.

Four of the five appeals were decided by this court substantially in favor of Mrs. Gaines. The fifth was adverse, not in anywise excluding the re-examination of the only point then ruled by the use of the same testimony, and that which is new. Considered in connection, both have impressed us with a different impression of the status of Mrs. Gaines' legitimacy from that which this court did not then think was sufficiently proved, as we now think it has been. Now, she is here with a support which her cases have not had before. She comes with a decision of the supreme court of Louisiana, directing, upon her application, that the will of Daniel Clark, dated at New Orleans, July 13, 1813, as set forth in her petition, should be recognized as his last will and testament, and that it should be recorded and executed as such. In that will her father acknowledges that his beloved Myra, then living in the family of Samuel B. Davis, is his legitimate and only daughter, and bequeaths to her all the estate, real and personal, of which he might die possessed, subject only to the payment of certain legacies named in the will.

Her petition for the probate of that will was 557*] first addressed *to the second district court of New Orleans, in which Judge J. N. Lea presided.

After asserting that such a will had been made by her father, its contents were set out as they were recollected by witnesses who had read it, and by other persons to whom it had been shown by the testator, with whom he spoke of it in the last moment of his life, as his last will and testament, in favor of his legitimate daughter, Myra, charging them to take care of it, and telling them it would be found locked up in a trunk, describing it, which he had placed in a certain room in his house.

The will is then stated in the petition to have been olographic; that is, altogether written and signed in her father's handwriting, with his seal attached to the same; that immediately after his death diligent searches were made for it; that it could not be found; that it has not been since, and that it had been mislaid, lost or destroyed.

She then declares, that when her father died she was a minor, absent from New Orleans, and living with Samuel B. Davis, to whom and whose lady she had been confided in the year 1812. Judge Lea took cognizance of her petition, proceeded throughout its pendency with great judicial exactness and caution, and, as the whole record shows, with official liberality to everyone concerned in resisting the application, without in any particular having denied to the petitioner her rights.

The judge, however, finally decided against the sufficiency of the proof to establish the will according to the requirements of the Civil Code of Louisiana, but without prejudice to the right of the petitioner to renew her application, with such proofs as might be sufficient to establish an olographic will. She applied for a new trial, and upon that being denied, solicited an appeal to the Supreme Court, and that was allowed.

The Supreme Court tried the case. It differed with Judge Lea as to the proof which was required by the Code to establish a lost or destroyed olographic will. It reversed the judgment of the court below, and decreed that the will of Daniel *Clark, dated on the 13th [*558 July, 1813, should be recognized as his last will and testament, and ordered it to be recorded and to be executed as such, it being posterior to the will of May, 1811, which Relf and Chew had presented for probate, under which they had taken possession of the property of Daniel Clark, and had disposed of it to the entire exclusion of Mrs. Gaines from any part of it—an estate shown by the proof in the cause introduced by the defendants, which had been registered or inventoried a short time before Clark's death, at more than $700,000, in which Clark and Coxe were interested, and an estate exclusively belonging to Clark of $296,000.

But to return to the decree of the Supreme Court establishing the will of 1813; it must be understood, that its admission of the will to probate does not exclude anyone who may desire to contest the will with Mrs. Gaines from doing it in a direct proceeding, or from using any means of defense by way of answer or exception, whenever she shall use the probate as a muniment of title. And the probate does not conclude Relf and Chew, or any other parties having any interest to do so, to oppose the will, when it shall be set up against them, by such defenses as the law will permit in like cases. It was with those qualifications of the probate of the will of 1813 that the case was tried in the court below, and they have been constantly in our minds in the trial of the appeal here.

Upon the rendition of the probate by the Supreme Court, Mrs. Gaines filed her bill in this case. It shall be fully stated hereafter, with the defenses made against it.

Before doing so, it is due to the merits of the controversy to advert to the decisions of the probate court of the second district of New Orleans, and to that of the Supreme Court reversing it, more minutely than has been done. Especially, too, as they are coincident with our conclusions upon the testimony regarding the execution by Mr. Clark of his olographic will of 1813, and of the concealment or destruction of it after his death.

The Supreme Court adopts the prepared statement of the facts of the case as it was 559*] made by Judge Lea in the court *below Its accuracy has never been denied by any one of the parties interested in this suit, nor by anyone else.

It is as follows: "The petitioner alleges, that on the 16th of August, 1813, the late Daniel Clark, her father, departed this life, having previously, on the 13th of July, executed an olographic will and testament, by which he recognized her as his legitimate and only daughter, and constituted her universal legatee. That the will was wholly written, dated, and signed, in the handwriting of the testator, and was left among his papers at his residence; that after his death, search had been made for it, but that it was not found, and it had been mislaid, lost or destroyed."

The learned judge then proceeds: "To entitle the petitioner to a judgment recognizing the existence and validity of the will, it is necessary that she should establish affirmatively, by such testimony as the law deems requisite, that Daniel Clark did execute a last will containing testamentary dispositions as set forth in the petition, and that he died without having destroyed or revoked it." "That looking for the testimony which might solve the question, whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most intimate with the deceased in the latter part of his life, and especially, if they could be found, to those who were with him in the last moments of his existence, when the hand of death was upon him, if they had no interest in directing his property into any particular channel, as they might be considered as the best and most reliable witnesses that could be produced; and it appears to be precisely testimony of that character that the petitioner presents in support of her application." Judge Lea then says: "Boisfontaine had business relations with the deceased which brought them into frequent intercourse; and that for the 'two last' days of his life, up to the moment of his death, he was with him. That De la Croix and Bellechasse were intimate personal friends of Clark, and were with him shortly before his death. All of these witnesses concur in stating that Clark said he had made a will posterior to that of 1811, and De la Croix says that Clark presented to him in his cabinet a sealed parcel 560*] *which he declared to be his last will, and that it would be found in a small black trunk. De la Croix also had sworn, shortly after Relf had presented the will of 1811 for probate, that Clark had made a will posterior to that; that the existence of it was known to several persons, and he applied for an order of the court and obtained it, commanding every notary in New Orleans to report if such a document had not been deposited with one of them. Bellechasse and Mrs. Harper swore that they had read the will. The judge then expresses his conclusion to be, that the legal presumption of the existence of such a paper had been made out, and that its having been destroyed or revoked by the testator had been satisfactorily rebutted, and that there was nothing in the record to impeach the credibility of Bellechasse or Mrs. Harper. In these rulings of the district judge the Supreme Court concurred, and then said, in delivering its opinion, all they had to do was to inquire whether the will of 1813 had been proved in conformity with the article No. 169 of the old Code or 1648 of the new."

Those articles require the testimony of two witnesses when the will shall be presented for probate, who shall declare their recognition of it as having been written wholly by the testator, that it had been signed and sealed by him, and their declaration that they had often seen him write and sign in his lifetime. It was from such a requirement of proof, rejecting secondary testimony altogether, that the district court refused the petition for a probate of the will. Upon such refusal, Mrs. Gaines appealed to the Supreme Court.

That court said: "That the question of the alleged insufficiency of the proof in the case could only be determined by an inquiry, whether the article was to be pursued at all times and in all cases, or whether they were not merely directions when the will itself was presented for probate, and were inapplicable to restrain the court in certain cases, when by reason of the loss or destruction of such an instrument, from taking secondary proof of its contents, as the best which the nature of the case was susceptible."

The court then, by a course of reasoning, supported by several cases from the Louisiana Reports, determined that in the *event of a [*561 will having been destroyed, secondary proof is admissible in Louisiana to prove its contents, and to carry it to probate; that the articles 169 and 1648 contemplate that the will itself should be presented, with the proofs of its execution, to the judge of probate when that can be done; that no one would seriously contend that the calamity of its destruction should deprive the legatee of the right to establish it by secondary evidence; "for was such the law, a reward would be offered to villainy, and it would always be in the power of an unscrupulous heir to prevent the execution of a will." It then meets the assertion directly, that articles 1648 and 1649 of the Code require the production of the will in order that it might be identified by witnesses who recognize it; denies that position, and affirms that in the absence of such witnesses the evidence concerning an unproduced, destroyed olographic will might be complete. The articles are not negative laws, declaring that no other kind of proof shall be admitted. "And it is doubted very much if an olographic will made here had by some accident been destroyed before being legally proved,

whether a copy of it, identified by two witnesses, who were able to swear to the genuineness of the original in the manner pointed out by law, would not be considered a sufficient compliance with the provisions of the code." Such, in fact, was the petitioner's case they were considering. Such is the law in analogous cases. The law cannot have been intended to require an impossibility, and to leave a party so circumstanced without a remedy.

The doctrine of the common law is in accordance with the view taken by the supreme court of Louisiana concerning lost deeds and wills. It has been judicially acted upon in English and American cases. It was so in the case of *Dan* v. *Brown*, 4 Cow. 483. That was a suit upon a lost will devising real estate. By the statute of New York it was necessary to prove the will by three credible witnesses. The will of Brown, as to its execution, was proved by one of the subscribing witnesses. He stated it was executed in the presence of himself, James Mallory, and another person whose name he did not remember, but that he had no doubt **562***] of his being a *credible witness. That, the court said, was all the evidence which could be expected under the circumstances. There are several other cases to the same effect in our American Reports. Jarman, on the Probate of Wills, 1 vol. Perkins's edition, p. 223, says, upon the authority of many cases, note 4: "that if a will, duly executed and not revoked, is lost, destroyed, or mislaid, either in the lifetime of the testator, without his knowledge, or after his death, it may be admitted to probate upon satisfactory proof being given of its having been so lost, destroyed, or mislaid, and also of its contents." But to entitle a party to give parol evidence of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found, if in existence. Under its reasoning, the supreme court of Louisiana, sustained by the authorities in England and in the United States, admitted the olographic will of 1813 of Daniel Clark to probate, declaring, also, such was the law in Louisiana, and reversed the judgment of the lower court dismissing the petition of Mrs. Gaines.

In virtue of that decision of the supreme court, Mrs. Gaines presents herself to this court, declared by her father to be his legitimate and only daughter, and universal legatee. We will, in another part of this opinion, show the legal effect of her father's testamentary declaration.

We will now state, as briefly as it may be done in such a case, the essential allegations of the bill; the responses of the defendants and their averments; the proofs in support of the complainant's rights, and such of them as are relied upon to defeat them; the legal issues made by the bill and answers, and the points relied upon by both parties in their arguments in this case.

The bill was brought against several defendants, Duncan N. Hennen being one of them. They separated in their answers. Hennen, after giving the claim of title to the property for which he is sued, admits that it was a part of the estate of Daniel Clark, and adopts the answers filed by the other defendants as a part of his defense. The cause was tried with *respect to him only, and the bill was [***563** dismissed by the court below. From that decree Mrs. Gaines appealed to this court.

After specific declarations as to the character in which she sues, and her legal right to do so as the legitimate child of her father and his universal legatee, she acknowledges that he had made a provisional will in the year 1811. That he then made his mother, Mary Clark, his universal legatee, and named Richard Relf and Beverly Chew his executors. That they had presented it to the court for probate, that it had been allowed, and that they, as executors, had taken possession of the entire separate estate of Daniel Clark, and of all such as he claimed in his life in copartnership with Daniel W. Coxe. It is then assumed that the will of 1811 had been revoked by the will of the 13th July, 1813. That Chew was dead; that all the legal power which the probate of the will of 1811 had given to Relf and Chew had expired; that Mary Clark was dead, and that her heirs and legatees reside beyond the jurisdiction of the court.

Mrs. Gaines then states, in the language of equity pleading, the pretenses of the defendants in opposition to her claims—such as, that Relf and Chew sold them the property as testamentary executors of Daniel Clark under the will of 1811; that they bought for a full consideration, without any notice of the revocation of the will of 1811, or that any other person was interested in the property than Mary Clark; that the titles they had from Relf and Chew could not be invalidated by the revocation of that will, and that the right of action against them for the property in their possession, if complainant had ever had any, were barred by prescription—that is, by the acts of limitation of Louisiana. It is then charged by the complainant that Relf and Chew had no authority to sell the property of Daniel Clark when the sales were made by them. That they had never made an inventory of the decedent's property for the probate court before the sales were made: that the sales were made without any legal notice, and for an inadequate consideration. That if Relf and Chew had sold under a power of attorney from Mary Clark, and not as executors, that Mary Clark's power was insufficient in its terms for such purpose; *that [***564** she had no power or rights in the estate of Daniel Clark to give such a power, and that Relf and Chew had not caused themselves to be recognized in a proper court as Mary Clark's attorneys, as they ought to have done, before they could acquire any right to sell any part of the estate of Clark. She then charges that the defendants knew, when they bought the property sued for, that she had applied as early as in the year 1834 to have her father's olographic will of 1813 probated by the proper court at New Orleans; that the defendants knew of all the irregular proceedings and assumptions of Chew and Relf in respect to the estate of her father, and of their sales of it without authority; that the defendants knew, when they bought, of the suits which she had brought to recover her rights in her father's estate; and that her present suit was brought under the probate of the will of 1813 by the supreme court of Louisiana.

Hennen, the defendant, answers for himself,

and adopting the answers of the other defendants, states that the property for which he was sued is designated according to a plan made in 1844, as lots 9, 10, 11, on the square comprised between Phillippi, Circus, and Poydras streets; each lot, by English measure, containing 23 feet 11 inches and 2 lines between parallel lines.

The answers of the other defendants make the same admissions as to their titles having been derived from or through Relf and Chew and Mary Clark; admit the property separately claimed by them to have been a part of the estate of Clark; and finally make an averment that Mrs. Gaines has not that civil status by her birth which, under the law of Louisiana, can entitle her to take the property of her father under the will of 1813, though it had been admitted to probate, and that she had been declared in it his legitimate and only daughter. In other words, the defendants have declared that she is an adulterous bastard.

It is proper to state the books and documents which are in evidence in this case.

1. The present record of *Gaines* v. *Hennen*.

2. The printed record of the suit No. 188, of 565*] December *term, 1851, in this court, *Gaines* v. *Relf and Chew*, 12 How. 472.

3. The proceedings in the courts of probate entitled Probate Record.

4. The commercial account books kept by Relf and Chew, professing to relate to their transactions concerning the estate of Daniel Clark.

This testimony, as it has been enumerated, was brought into the case by agreement of the parties for as much as it might be worth, subject to exceptions by both sides as to its admissibility upon the trial of the cause.

Several immaterial or formal points were made in the argument to defeat the claims set out in this bill—such as, that the case was not one for equity jurisdiction, but was *ratione materiæ*, exclusively cognizable before the probate court of the second district of New Orleans. Next, that Chew and Relf, and Mary Clark, or her heirs should have been made parties; that the sources of Daniel Clark's title to the property sued for had not been set out in the bill in addition to the manner it had been enumerated. Again: that the probate proceedings in the second district court of New Orleans in 1856 are yet pending and undetermined, and on that account the same court has exclusive jurisdiction over the estate of Daniel Clark. We have examined these formal objections, and find them to be unsustained by the cases cited in support of them. They are inapplicable to the actual state of the case, and are insufficient to arrest the trial of it upon its merits. The same objections were also urged in the circuit court, but were disregarded, we presume, by the judge as unsubstantial points of defense. As to the objection that Relf and Chew and the heirs of Mary Clark had not been made parties to the bill, we observe it was not necessary to make either of them so. The present is a suit for the recovery of property admitted by the defendants to have been a part of the estate of Daniel Clark. Nothing is sought to be recovered from Chew and Relf. Their executorial functions under the will of 1811 have long since been at an end. Had the bill involved directly their transactions as executors with the complainant, as universal legatee, upon a *proper [*566 showing of that, with a prayer to be made parties, the court might have allowed it. But not having done that, the defendants cannot urge, because Relf and Chew have not been made defendants with them, that they should escape from a trial on the rightfulness of their possession of a part of the estate of Clark, as they have admitted it to be; or that they have not acquired it under circumstances from which the law presumes that they had notice of the irregularity of the sale as it was made by Relf and Chew. Nor was it necessary for the heirs of Mary Clark to be made parties; for Mary Clark herself never had any pecuniary responsibilities for the sales of the property of the estate of her son by Relf and Chew, as her power of attorney to them upon its face was irregularly executed, and was of itself notice to the defendants that when they bought, the sales had not been made in conformity with the law of Louisiana regulating the sales of the property of a testamentary decedent.

But it was also said in the argument that no claim could be set up by Mrs. Gaines under the will of 1813 until the will of 1811 shall be set aside. Neither the language used by this court in 2 How. 651, nor in the decision in 12 How. 472, will bear such an interpretation, or admit of such a conclusion. The rulings of courts must be considered always in reference to the subject-matter of litigation and the attitude of parties in relation to the point under discussion. And it will often be the case, as it is now, that counsel will use an illustration for a judicial ruling, or words correctly used when they were written as applicable to a different state of things. When this court said, in 12 How. 651, that the will of 1813 cannot be set up without the destruction of the will of 1811, it was with reference to the existing fact that the latter had been duly proved, and that it stood as a title to the succession of the estate of Daniel Clark, and that the will of 1813 had not then been proved before a court of probate, and on that account could not be set up in chancery as an inconsistent and opposing succession to the estate while the probate of the will of 1811 was standing in full force. And when Mr. Justice McLean, speaking for the court, 2 How. 647, says, "she (meaning *Mrs. Gaines, then the com- [*567 plainant) must ask for the probate of the will of 1813, and a revocation of the other will of 1811," adding "for no probate can stand while a previous one is unrevoked," it is plain that the meaning was, as we now say it is, when a court recalls the probate of a will, substituting the probate of another will by the same testator made posterior to the first, that the former becomes inoperative, and that the second is that under which the estate is to be administered, without any formal declaration by the court that the first was annulled, and it makes no difference that a part of the estate has been administered under the first probate. The unadministered must be done under the second. Courts of probate may for cause recall or annul testamentary letters, but they can neither destroy nor revoke wills; though they may and often have declared that a posterior will of a testator shall be recognized in the place of a prior will which had been proved, when it was

not known to the court that the testator had revoked it. Such is exactly this case. The Supreme Court decreed that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in the plaintiff's petition, should be recognized as his last will and testament, and the same was ordered to be recorded and executed as such, with the declaration, that admitting the will to probate does not conclude anyone who may desire to contest the will with the applicant in a direct action. The decree of the court in that particular is the law of the case.

It was also urged that the defendant and those under whom he claims were purchasers for a valuable consideration without notice, and are therefore in equity protected against the claims of the complainant. It is a good defense when it shall be proved as a matter of fact. But in this instance it is not only disproved by testimony introduced by the defendants, but by admissions in their answers, as shall be shown hereafter in this opinion. In our opinion the objection has no standing in this case, though the argument from which the counsel admitted he had borrowed it is a very good one in its proper place.

We shall now examine the case upon the more 568*] serious points *made in opposition to Mrs. Gaines by the learned counsel, Mr. Janin.

The first was, that her claim was barred by prescription. The prescription relied upon by the defendants is that of ten years against one claiming a vacant estate, twenty years to prescribe a title, and thirty years to bar the faculty of accepting a succession or the estate of a deceased person. There being no vacant succession in this case, the ten years' prescription does not apply, and the prescription of twenty years does not exist; for Mrs. Gaines did not attain her majority until June or July, 1826, and her suit for the probate of the will made by her father on the 13th of July, 1813, was instituted in 1834. When her petition for that purpose was dismissed in 1836, her first bill was filed in a month or two afterwards. From that time there was a legal interruption of the prescription of twenty years, which the defendants have pleaded and now rely upon. In fact, they recognize the interruption in their answers. In their averment of their having had peaceable possession of the property sued for since they bought it, they add, "that they had never been disturbed in respect to it," except by an abortive attempt of the complainant and her husband to recover it by their bill filed in 1836. New Record, 47. We find them also in their answer (New Record, 54) admitting that such a suit as complainant refers to in her present bill had been instituted by her and her husband in 1836, and that the object of it was the recovery of the "identical property" now in controversy. New Record, 56, 57. It is also admitted in the answer, that the suit of the complainant in the probate court to annul the probate of the will of 1811, and to set up that of 1813, was brought on the 18th June, 1834. These admissions are decisive that the complainant claimed the inheritance as early as that date, and that the prescription which had begun to run had been legally interrupted on the 28th July, 1836, the date of her first bill.

By the article of the Code, 3484, a legal interruption of a prescription takes place where the possessor has been called to appear before a court of justice, either on account of the property or the possession, and the prescription is interrupted by *such demand, whether [*569 the suit has been brought before a court of competent jurisdiction or not.

The weight of authority upon the construction of that article of the Code is, that it contemplates a voluntary, intentional and active abandonment of the suit, in order to restore the running of a right of prescription. In the case of *Wilson* v. *Marshall*, 10 La. Ann. 331, the court said the plaintiff did not dismiss the suit, or consent to the dismissal. She lived in a remote part of the state, and the mere absence of herself and counsel at a term of the court when her case was called is insufficient, without other evidence, to convict her of having abandoned her demand.

Prall v. *Peet's Curator*, 3 La. 282; *Dunn* v. *Kenney*, 11 Rob. La. 250; *Norwood* v. *Devall*, 7 La. Ann. 528; *Mechanic & Traders' Bank* v. *Theall*, 8 La. Ann. 469.

After the interruption of the prescription by the filing of the bill by the complainant, the defendants could no longer claim to be in possession in good faith, as that is defined in the Civil Code. In article 3415 the possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, or that his title is vicious and defective. The possessor must not only not be in bad faith, but in the positive belief that he is the true owner, and if he doubts the validity of his title, his possession is not the basis of prescription. Troplong, Prescription, Vol. II., p. 451, No. 927; *Ib.*, p. 444, No. 918; *Ib.*, p. 442, No. 915. The plea of prescription is not available in this case.

But the defendants go further, and insinuate that their possession of the property, though beginning with the executors, Relf and Chew, continued afterwards under Mary Clark, whose power of attorney to them authorized them to sell the estate of Clark.

When Relf and Chew proved the will of 1811, they received the estate of Clark as executors, with a right of detainer for one year, and for as long afterwards as the court of probate might permit upon their application, showing cause for the delay or the extension of a longer time. They did receive such an extension for three years, upon their representation *that the nature of the estate, the diffi- [*570 culty of the time, and the ample sufficiency of the estate to pay all of its debts, would enable them by the delay to accomplish that result. The creditors were called upon to meet to consider the proposition. They assented to it. But the executors never fulfilled the arrangement, either for the benefit of the creditors or for the legatees under the will of 1811. Nor did they ever make any return to the court of probates of their transactions relative to Clark's estate, until 1836, after the complainant had sued them, and then without vouchers to homologate their receipts, expenditures and payments, except for a small part. Shortly after the application for an extension of time, in the year 1813, they applied for a power of attorney, from Mary Clark, who had been named in the will of 1811 as universal legatee, to authorize them to sell the estate in her behalf. The pow-

er was given: and under it, without any notice to the court of probate, which ought to have been given, and the power filed in it, they continued, as the testimony in this case shows, to act as executors, and to dispose of the estate of Clark, both real and personal, property in copartnership, and other property separately belonging to Clark, without ever having received any permission to do so from the court of probate; and that should have been obtained, as Mary Clark had not been acknowledged by that court as the universal legatee of Clark. It may be that they mistook their powers in doing so; but they received the estate of Clark in a fiduciary character, to be accounted for to the legatees and creditors, according to their rights under the law of Louisiana, and for that they are responsible. Besides, the power from Mary Clark was given to them as executors, that she might have the benefit of those responsibilities for the faithful execution of the trust that they were under by the law of Louisiana as executors. They paid debts, received moneys, sold property, and acted throughout as if they were not responsible to the court from which they derived their testamentary letters, or to Mary Clark, and, as the record in this case shows, without sustaining their transactions by vouchers of any kind.

Nothing is better settled by the decisions of 571*] its courts in *Louisiana, than "that an extra judicial statement by an executor, that he believes the debt to be due by the estate, does not bind the heir, nor is the heir bound by the approval of a court as to such a claim, if it be made *ex parte*." 4 La. 382. Again: that the admission of the genuineness of the signature to vouchers, filed by the curator of a succession, in support of his account, dispenses with any other proof of the payment claimed; but when such payments are made without an order of the court, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. *Miller* v. *Miller*, 12 Rob. (La.) 88. A receipt given to an administrator for the payment of an account is not evidence that the account was due, if the fact of being due is disputed. *Moore* v. *Thebadeaux*, 4 La. Ann. 74. So an administrator who renders an account is bound to establish the items of it by evidence, and may be held to strict proof by the parties interested, without a formal opposition on their part. *Succession of Lee*, 4 La. Ann. 579. The accounts of Relf and Chew were put in evidence by the defendants, and they were used to show, among other things, that they were authorized to sell the estate of Clark as they did, and that they were auxiliary for the establishment of the defendant's plea of prescription. Such, however, is not our opinion, and but for the use made of them, we should not have noticed them at all, not thinking that they are put in issue by the bill of the complainant, or the answer of the defendants, particularly as Relf and Chew are not parties to this proceeding.

We will now proceed to the consideration of that point made in the argument by the counsel of the defendant, but more particularly representing the city of New Orleans, as he said he did.

It was, that complainant's suit could not be maintained, because it was *res adjudicata* by this court in its judgment in the case of *Gaines* v. *Relf*, in 12 How. 506.

We do not think so. That case is misunderstood by the learned counsel. Then the parties went to trial upon the demand of Mrs. Gaines for one half of her father's estate, as the donee of her mother, his widow, and as forced heir of her father *by the law of Louisi- [*572 ana *for four fifths of another half of his estate.*

Her bill then was brought in consequence of this court having decided, in 6 How. 550, that there had been a lawful marriage solemnized in good faith between them in Philadelphia. That case was tried upon the same evidence upon which the appeal was determined in 12 Howard, with the exception of what is miscalled an ecclesiastical record from the Cathedral Church in New Orleans, of which we shall have much to say hereafter. Besides having decided, in 6 Howard, that there had been a lawful marriage between the complainant's father and mother, this court decreed that Mrs. Gaines was the lawful and only issue of the marriage; that at the time of her father's death she was his only legitimate child, and was exclusively invested with the character of his forced heir, and as such was entitled to its rights in his estate.

The judgment in that case has never been overruled or impaired by this court. It certainly was not intended to be by the case in 12 Howard, for the report in that such shows, from the number of the justices who sat upon its trial and their decision as to the judgment then to be rendered, that the majority of them did not intend to overrule the decree in 6 Howard. It was recognized again as still in force by a majority of the judges who sat in this case in our consultation. The defendant in the case of 1851, 12 How. 537, admitted that such a decree was rendered, denying, however, that it was conclusive upon or that it ought to affect their right; and if it could do so, it ought not to have such an effect in that instance, averring the same as a matter of defense, that the decree was brought about and procured by imposition combination, and fraud, between the complainants and Charles Patterson. That it should not be regarded in a court of justice for any purpose whatever, and that it had been consented to by Patterson to enable the complainant to plead the same as *res judicata* upon points in litigation not honestly contested. Mr. Janin was mistaken when he said that the decree in 6 How. 583, had been reviewed in the case of 12 How. 537, meaning thereby that it had been overruled. It was not only not so, but one of *the justices who assented to the judg- [*573 ment in 6 Howard, which declares that there had been a valid marriage between Daniel Clark and Zulime Carrière, and that she was the legitimate child of that marriage, would not assent to its being done when he concurred in the decree in 12 Howard.

The decision in 12 Howard does not, either in terms or inferentially, assert that no marriage had ever taken place between Daniel Clark and the complainant's mother. The issue in that case was, that at the time of the complainant's birth, her mother was the lawful wife of another man, namely, of Jerome Des Grange.

It was, therefore, essential to the defendants to get rid of the decree which had affirmed the legitimacy of Mrs. Gaines and of the marriage

of her father and mother, and it was attempted by a contrivance as extraordinary in its beginning as it was abortive in its result. We will show what it was from the record, not only on account of its anomalous character, but because it is unexampled in jurisprudence.

After having asserted that the decree in 6 Howard had been obtained by the fraud of Patterson and General Gaines, thus impeaching the credibility of Patterson in advance, the defendants, Relf and Chew, introduced him as their witness (Old Record, pp. 590–594), and he was examined by their counsel, first as to a suit in which Mrs. Gaines had recovered a house and lot from him. After stating his age to be about seventy, his answer was: "It was for a house and lot on which I resided when the suit was brought; I still reside in that house and lot, and have done so ever since the suit was brought. Mrs. Gaines succeeded in the suit, according to the judgment of the court. That house and lot belongs to her, but they told me they would not take it from me. General Gaines and his wife gave me in writing, under their hands, that they would not take the property from me; that he would make my title good. The property has always been assessed as mine, and I have always paid the taxes on it. I paid most of the costs, but they paid me again —that is, General and Mrs. Gaines. There was an understanding between us that they would pay the costs, even should the suit be decided 574*] *against me. They made the same offer to Judge Martin." In his cross-examination, witness said he had made the best effort in his power, with the aid of able counsel, to defeat Mrs. Gaines in her suit. The cross-examination was resumed the next day, 20th June, 1849. Patterson was asked to look upon a document marked A, and to state if he knew the handwriting of the late General Gaines; whether the signature to it was not his; whether he had received that, or a communication of which that was a copy, prior to withdrawing his dilatory pleading in the case of *Gaines v. Relf and Chew*, and filing your answer to the merits of that case. The defendants, by counsel, protested against the paper being put into the record, on the ground that it contained false, malicious, and gratuitous imputations against parties in nowise connected with the suit. Witness then answered, that was the signature of General Gaines; he had often received letters from him, and seen him write, and that he had received two or three communications, of which that was a copy, before he withdrew his dilatory pleadings in that case, and answering to the merits. A letter was then handed to witness, marked B. He answered, the body of it was the handwriting of General Gaines; was present when he wrote it, and saw both General and Mrs. Gaines sign it. Then the following question was put to the witness: "At the trial of your cause with Gaines and wife, did not your counsel make a request of the counsel of Mrs. Gaines to be permitted to introduce the record from the probate court of New Orleans, of all the proceedings of Mrs. Gaines in the prosecution of her rights in that court?" Witness answers: "Yes, sir; her counsel objected to that, and I applied to General and Mrs. Gaines to introduce the record. They replied to me to get all the evidence possible, the stronger the better. General Gaines remarked, it would be more glorious to have it as strong as possible. I then caused it to be introduced." Here the cross-examination of the witness was closed. The counsel for the defendants objected to the foregoing testimony, and especially to that part which relates the conversations of the complainants with the witness, and that part which details what was done in *a judicial proceeding, *on the* [*575 *grounds*, among others, that it is incompetent for the complainants to make evidence for themselves, and *that what had been done in judicial proceedings should be shown by the record.* And from that gentleman's accurate knowledge of his profession, indicated as it has been by the two lines just underscored, may we not say in the zeal of professional advocacy, that the best of us may forget it? For what has been his interrogation of Patterson but an attempt to invalidate a judgment against him by the testimony of the most interested party to have it annulled, without having made any appeal to the record of that judgment? And Patterson was the defendant's witness.

But we have not yet done with this attempt to prejudice the rights of Mrs. Gaines by suggestions that her suit with Patterson was pretensive and fraudulent, and to extract from him some proof or confession of his own infamy.

After the examination in chief and the cross-examination had been completed and signed by the witness, and both counsel had announced that they had concluded their examination, the counsel for the defendant made another objection to the cross-examination of Mr. Patterson, insisting that it should be considered as his examination in chief by the complainant, to which the defendants had the right of cross-examination; and the witness was recalled on the following day for that purpose. Every effort was then made by many questions to extract from him some inconsistency with his first examination, without success. But fortunately for his own character, he removes the imputation of fraud and combination between himself and General Gaines, to give to the latter the benefit of a collusive judgment in the circuit court against himself, by having, in his answer to one of the questions, alluded again to the documents A and B, which are now presented as conclusive against the charge that there was ever any combination between them, by trick or by contrivance, or by any deceitful agreement or compact, for a suit to be brought by one against the other to defraud any third person of his right. See Old Record, pages 1018 for Document A, and 819 for letter B. And when the witness was asked if *he had not been particu- [*576 larly requested by the General and Mrs. Gaines to use his best exertions, with the aid of the best counsel he could employ, to make every defense in his power to this suit of which it was susceptible, he answered: Yes, and I did so; and I considered the agreement with General and Mrs. Gaines as an act of liberality on their part, growing out of a desire to come to a speedy trial with some one or more of the defendants on the merits of the case.

It was an indiscreet arrangement between General Gaines and Mr. Patterson, not to be tolerated in a court of justice, but not one of intentional deception in contemplation of any un-

due advantage. And it would never have been made by Relf and Chew, in their answer to the subsequent bill of the complainant against them, had they not been erroneously advised that the decree in 6th Howard, establishing the marriage of Clark and Zulime Carrière, and the legitimacy of Mrs. Gaines, might be used as *res judicata* against the defendants in the suit of the 20th January, 1849, and as they now attempt to make the decision in that case a *res judicata* against the claims of Mrs. Gaines in this which we are now deciding.

But what was decided in the case in 12 Howard? It is stated, in the language of the decision, "that the first and most important of the issues presented is that of the legitimacy of Mrs. Gaines." Then are stated the pleadings under which the issue was made. It shall be given in the language of the decision: "She (Mrs. Gaines) alleges that her father, Daniel Clark, was married to Zulime née Carrière, in the city of Philadelphia, in the year 1802 or 1803, and that she is the legitimate and only legitimate offspring of that marriage. The defendants deny that Daniel Clark was married to Zulime at the time and place alleged, or at any other time and place. And they further aver that, at the time the marriage is alleged to have taken place, the said Zulime was the lawful wife of one Jerome Des Grange. If the mother of the complainant was the lawful wife of Jerome Des Grange at the time Zulime is alleged to have married with Clark, then the marriage is merely void, and it is immaterial whether it did or did not take place. *And the first question we propose to examine is, as to the* 577*] **fact whether Zulime was Des Grange's lawful wife in* 1802 or 1803." Then follows the recital of the marriage between Des Grange and Zulime, with the record of it, on the 2d December, 1794, admitted on the part of Mrs. Gaines. To rebut and overcome the established and admitted fact of that marriage, the complainant introduced witnesses to prove, "that previous to Des Grange's marriage with Zulime he had lawfully married another woman, who was living when he married Zulime, and was still his wife and, therefore, the second marriage was void, and this issue we are called on to try."

Then it is said that "the marriage with Des Grange having been proved, it was established as prima facie true that Zulime was not the lawful wife of Clark, and the onus of proving that Des Grange had a former wife living when he married Zulime was imposed on the complainant; she was bound to prove the affirmative fact that Des Grange had committed bigamy." Then follows the recital of the testimony of the complainant to prove that Des Grange became a bigamist by his marriage with her mother. And then, to "meet and rebut this evidence, the defendants introduced from the records of the Cathedral Church of the diocese, to which New Orleans belonged at that period, an ecclesiastical proceeding against Des Grange for bigamy, which respondents insist is the same to which complainants refer." It is set out in full in the decision, beginning at page 513 in 12 Howard, extending to 519, inclusive. Then the rebutting testimony of Daniel W. Coxe, for a long time a copartner in business with Clark, was introduced. He states an antecedent connection between Clark and Zulime to the time of their alleged marriage, with a confidential letter to him, which was delivered by Zulime, in which it was stated that she was pregnant; and that he, Clark, was the father of the child; further requesting that he would put her under the care of a respectable physician, and furnish her with money during her confinement and stay in Philadelphia; and further, that she gave birth to a child, who was Caroline Barnes, who before her marriage went by the name of Caroline Clark, and that what has been related happened in 1802; and he further states that Clark was not in Philadelphia in 1803, having *gone to Europe in August, 1802, [*578 and having returned to New Orleans early in 1803. A letter from Des Grange was introduced, dated at Bordeaux, July, 1801; also a suit for alimony brought by Zulime against Des Grange in 1805, which will be further noticed in the opinion. Then it is said: "This is substantially the evidence on both sides on which the question depends, *whether Des Grange was or was not guilty of bigamy* in marrying Maria Julia née Carrière, in 1794. Objections are taken to several portions of this evidence, and especially as respects the record of the suit against Des Grange for bigamy in the ecclesiastical court." And though this is followed in the decision by a suggestive, able and searching commentary upon the objections made to the testimony of the defendants, and upon that of the complainant, by connection and comparison of the two, and upon what was deemed the law of the case, all of it relates exclusively to disprove that Des Grange was married, and had a wife alive when he married Zulime.

The announced conclusions in that case, which were seven in number (12 How. 539), show it to have been so. It was "the question decided," and was said "concludes this controversy." The *factum* of marriage between Clark and Zulime, and the legitimacy of Mrs. Gaines, as both had been decreed by this court, were not then disaffirmed, either directly or inferentially, and all that was said about it is, "that the decree of this court in *Patterson's Case* does not affect these defendants, for two reasons: 1. Because they were no parties to it; and 2d, because it was no earnest controversy."

It is our opinion that the decision made in the case in 12 Howard was not intended to reverse the decree in 6 Howard, and that it cannot be so applied as *res judicata* to the case we are now trying.

We will now show the difference as to the character in which Mrs. Gaines then sued and that in which she now does, in connection with the law of Louisiana, as to what constitutes a *res adjudicata*, and what does not.

In the first, her demand was for one half and four fifths of another half of the property owned by her father when he died. She then claimed as the donee of her mother to the one half, *and as *forced heir of her father* to [*579 four fifths of another half of his estate. Now she claims as universal legatee and legitimate child of her father, under his will of the 13th July, 1813, which has been admitted to probate by the supreme court of Louisiana, and ordered to be executed as such.

The difference between the two cases is just that which the law of Louisiana will not permit

the decision in the first to be pleaded against her in this case as a *res judicata*.

It is declared in the article 2265 of the Louisiana Code, "that the authority of the thing adjudged takes place only with respect to what was *the object of the judgment*. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be made between the same parties, and formed by them against each *other in the same quality*."

The case in 12 Howard and that now under our consideration are dissimilar as to parties and things sued for, or what is called "the object of the judgment." The suit now is not between Mrs. Gaines and Relf and Chew, but between herself as complainant, and Duncan N. Hennen as defendant. Nothing was said in the first suit of the claim of Mrs. Gaines under the will upon which she now sues, as in every particular detailed in the article 2265. There are differences between her present cause of action and that formerly made, and the demand now made is not between the same parties, or formed against each in the same quality. And therefore, upon well settled principles coincident with the article 2265, and also independent of it, nothing that was said or done in the case in 12 Howard can prejudice her claim as she now makes it. We give the authorities for that position, that they may be consulted, without being able, for want of time, to show their application by extracts.

24 Wend. 585; 14 Pet. 406; 1 Dana. 109; 3 Wend. 27; 2 Sim. & Stu. 464; 6 Wheat. 109; 7 Cranch, 565; 3 East, 346; 4 Gill & J. 360; *Preston* v. *Slocomb*, 10 Rob. (La.) 361; 1 La. Ann. 42; 3 La. Ann. 530; 10 La. Ann. 682; 3 Mart. (La.) 465; 7 Mart. (La.) 727; 7 Rob. (La.) 46.

And the precise point was ruled in *Burt* v. *Sternburgh*, 4 Cow. 563, 564, "that the defend- 580*] ant might have *shown, if he could, that he had acquired a title since the former trial, or any title other than that which had been passed upon in the former trial.

We are fully satisfied, from the article 2265, and the cases cited from the Louisiana courts, and from the English and American reports, that the objection of *res judicata*, as made against the recovery of the complainant in this case, is without any foundation in law.

We have now reached the last and most important objection made against the complainant's recovery. But before discussing it directly, we must dispose of the ecclesiastical record, which was much relied upon in the argument to repel the evidence of her legitimacy, and to establish the fact that the marriage between her father and mother was unlawful, from her having been then the lawful wife of Jerome Des Grange; in other words, that Des Grange did not commit bigamy when he married her, by which she was not released from her conjugal relations with him; and had not the right to marry any other man who was free to contract marriage.

We have seen that exceptions were taken to the admissibility of that record as evidence when it was first presented by the defendant's counsel in the case before the circuit court. They were renewed upon the appeal here. They were continued when the defendants introduced it again into this case, and it is necessarily before us to be determined as a question of law, whatever may have been thought of it heretofore, either by judges or by counsel.

Our first remark concerning it is, admitting that the canon law, as sanctioned by the Church of Rome, was in force in Louisiana at the time of this procedure, it was a mere assumption, without authority in its beginning, tyrannous against the object of it, and irregular in its action. It was a nullity, *coram non judice*, before the canon who issued it. The presbyter canon who assumed to do so was not Vicar-General or Governor of the Bishoprick of Louisiana and the two Floridas. He was only the presbyter canon of a vacant see, without delegation by commission or deputation from a bishop to represent him in his spiritual offices and powers. He had no canonical power *in his pastoral charge of a particular [*581 church and congregation to originate a prosecution for bigamy. Nor would either archbishop or bishop, had there been either then in Louisiana, have ventured to do so in the condition at that time of the ecclesiastical practice and royal ordinances of Spain, especially in their application to its foreign possessions. And such a procedure was a direct violation of the *Instituciones de Derecho Canonico Americano* por El. Rev. Sr. D. Justo Donoso.

The inquisition, as it had existed for more than a hundred years in France and Italy, was introduced into Spain by Gregory IX. about the middle of the 13th century. It encountered no opposition there. It at first attained a prevalence and extension of power larger than it had exercised before, and was on the increase when Spain became an united kingdom under Ferdinand and Isabella. They were authorized by the bull of Sextus IV. to establish the inquisition in their states. And then it was invested with jurisdiction of heresies of all kinds, and also of sorcery, Judaism, Mahomedanism, offenses against nature, and polygamy, with power to punish them, from temporary confinement and severe penances to the *san benito* and the *auto de fé*. Before that time the inquisition had exercised a capricious jurisdiction, both as to persons and creeds. Encyclopædia Britannica, 8th edition, 11th vol. art. *Inqui.* page 386. In its new form it met with opposition. Attempts were made in Castile and Arragon to repulse its authority and to restrain the holy office, as it encroached upon government and deprived the people of many of their ancient rights and privileges. Its power, however, became triumphant, and so aggressive upon royal authority that it was resisted by the Kings of Spain, as well in the kingdom as in its foreign possessions.

It cannot be expected that we shall enter chronologically into such a detail. We will verify what has just been said by distinct citations from the laws of Spain and royal ordinances.

The first of these ordinances which we shall cite is that of Charles I. of Spain (5 of Germany), issued at Madrid on the 21st September, 1530; Leyes de Indias, tom. 1, livre 1, *titulo* 10, page 48.

Charles had been about twelve years in Spain. The mines *of the West had begun to [*582 throw their treasures into Spain. They were

essential to the accomplishment of the political and military designs of the King, and to his necessities also. Complaints were constantly being made of the rigors of the inquisition upon the Indians in his western dominions, and upon his subjects who had emigrated to them in large numbers in pursuit of gold. It was said but for such causes that the yield of gold would have been larger. The King determined to restrain the holy office in its jurisdiction, and issued his decree of September 21, 1530. We give Judge Foulhouse's translation of it: "We order the attorneys, police officers, sheriffs, and other ministerial officers *of the prelates and ecclesiastical judges of our West Indies, Islands, and continents along the ocean,* not to arrest any layman, or issue any execution against him or his property, for any reason whatever; and we order all clerks and notaries not to sign, seal, or take any deposition with regard to the same, or for any reason thereto relating; and whenever ecclesiastical judges shall judge necessary to have a person imprisoned or an execution issued, they shall pray for the royal aid of our secular justices, who shall grant it according to law. And all vicars and ecclesiastical judges shall observe this order and comply with it, as is prescribed by this law, under penalty of losing the status and privileges which they enjoy in the Indies, and of being there held as foreigners and strangers to the same. And any of said attorneys, police officers, sheriffs, clerks, and notaries, and any other who do the contrary, shall be forever exiled from all of our Indies, and all of their goods shall be confiscated for the profit of our royal treasures; and we hereby direct and empower all of our justices, and all of our subjects and settlers, not to consent thereto and let the attorneys or executing officers do so, too; and we order that this ordinance be observed, any contrary custom notwithstanding.

The ordinance of Charles was followed by another of his son, Philip II., which declared "that whenever in our royal courts of the Indies the aid of the secular arm shall be asked by the prelates and ecclesiastical judges, either for an arrest or for execution, the demand shall **583*]** be by petition, and not by *requisition." These royal ordinances will be found in the *Recopilacion* in the Indies. They were declared by a law of Don Carlos II., one hundred and thirty years after they were promulgated, to be existing laws, on the 18th May, 1680. See the law to that effect preceding the *Titulo Primero in Libro Primero,* fol. 1, *Recopilacion Leyes de Indies.* They have had their places in every edition of the *Recopilacion* since. Indeed, they were never abrogated, and were in practical operation in all of the dominions of Spain in America until she lost them.

They establish satisfactorily that the presbyter canon. Hasset, when he issued his prosecution against Jerome Des Grange for bigamy and imprisoned him, that he did so contrary to law, and that his whole proceeding in the matter was a nullity, and, as such, inadmissible as record evidence in a secular or ecclesiastical court. *Recopilacion Leyes de los reynos de las Indies; En Madrid, por Andres Ortega, ano. de* 1774; *Tercera Edicion,* page 48.

But there are other royal ordinances establishing what has just been said in respect to the nullity of that procedure, because they bear directly upon the incapacity of the ecclesiastical power to originate a prosecution for bigamy.

The first of them which we shall cite is a cedule of March 19, 1754, in which it was declared that polygamy was a crime of a mixed nature, in which the royal tribunals may take cognizance in the first instance, with this qualification, that if the inquisition wishes to punish the accused for suspicion of heresy, he shall be remitted to it after having suffered the legal penalties. *Leyes de Indies,* ch. 1, tit. 19, note 2.

But this cedule was modified in 1761 by Charles III., leaving to the inquisition cognizance of this crime, and reserving only to the secular courts the power to take informations, and to arrest the accused in order to deliver him to the inquisition. This concession was made by the King, who ascended the throne at a period peculiarly critical, requiring the conciliation of every agency in his new kingdom to meet the pressure of political difficulties, and to allay discontents and suspicions against himself, which subsequently became a revolt. He was *charged with being opposed to the [*584 inquisition, from having been on the throne of Naples for several years, where it had never been introduced, the people having always resisted its establishment over them.

But the prudence of the King did not restrain the inquisition from the assertion of its jurisdiction in that and in other particulars offensively to the ancient usages and rights of Spain. In its eagerness to extend its power, it invaded the royal authority, and stretched its jurisdiction to every cause in the slightest degree connected with ecclesiastical discipline or punishment. The King resisted it, and he was soon furnished with a cause for doing so. The inquisition having taken from the auditor of the army a process instituted against an old veteran who was accused of bigamy, the jealousy which the King, in fact, entertained against the inquisition was revived. His vigilant minister, d'Aranda, used it to obtain a royal decree, ordering the process against bigamy to be restored to the civil or secular courts. It also enjoined upon the inquisition to abstain from interfering with the proceedings of the secular courts; required it to confine itself to its proper functions in the prosecution of apostacy and heresy; forbade it to "defame with imprisonment his vassals before they were previously and publicly convicted," and commands the inquisitor-general to require the inquisitors to observe the laws of the kingdom in cases of that kind; and further, all the King's royal tribunals, judges, and justices were ordered to keep and obey the decree, and to punish those who should violate it in any manner whatever. This was the decree of Charles III., of the 5th of February, 1770, cited by Judge Foulhouse in his opinion upon the nullity of the proceedings against Jerome Des Grange, by the assumption of the Presbyter Canon, Hasset, of the Cathedral Church of New Orleans. For the royal decree of the 5th February, 1770, see original, the *Novissima Recopilacion,* Vol. V. p. 425; Coxe's Memoirs of the Kings of Spain, 3d vol., ch. 57, page 367.

Thus stood the jurisdiction of the inquisition in respect to the crime of bigamy restrained by royal authority for six years. Complaints

were then made of the uncertainty of the royal 585*] *cedule of the 5th February, 1770, especially in respect to the extent of its interference with the power of the holy office to inquire for discipline and for punishment into cases of polygamy. The King was induced to call a *toro* or council, to discuss the different relations and boundaries between the secular and ecclesiastical cognizances of the crime of bigamy. The result of that council was communicated to the King on the 6th September, 1777. It was that a majority of it had come to a conclusion, that by the act of marrying a second time whilst the first wife was alive, the person who does so violates the faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession, and of the legitimacy established by the laws, *inasmuch as his fraud makes the children of the second matrimony, though truly adulterine, legitimate, and capable to inherit from their parents* on account of the good faith of their mother in contracting that marriage; further, that the kingdoms of Spain assembled in *cortes* had established penalties against the crime of bigamy, commanding that they should be imposed by the royal courts, and declaring that they should not be embarrassed in their cognizance of the offense; also, that he who marries a second time, his first wife being living, offends the ordinary jurisdiction in maliciously deceiving the curate to assist at a null marriage, and that on that account there is ecclesiastical jurisdiction to inquire into the validity or nullity of marriages; but that it was to be done without embarrassing the royal courts in their cognizance of the offense. It was then said that such persons may also incur the crime of a false profession of the sacraments, which was exclusively within the jurisdiction of the holy office; which was, however, to be exercised reciprocally by it and the secular courts, to prevent the repetition of the offense by the imposition of penalties which belong to each, and by the delivery of prisoners from one to the other to be tried. Upon the foregoing report being made to the King, he gave a royal order to be communicated to the inquisitor-general, that by his cedule of the 5th February, 1770, the holy office was not impeded in the cognizance of the crimes of heresy and apostacy, and of persons declared 586*] subject to *suspicion of bad conscience by the violation of apostolic bulls which had been received and enforced in Spain with royal consent, in those cases in which the jurisdiction of them was in the holy office. This royal resolution was followed by another decree, remitted to the *alcaldro* and to the chancery and audiences of the kingdom on the 20th February, 1782. *Novissima Recopilacion*, page 425 of Vol. V. ley. 10, note 1, *Tercera Edicion*, Madrid, *por* Andres, Ortega, 1774.

The result of the council, however, of which we have just given the particulars, did not satisfy the grand inquisitor. Attempts were made to reassert his assumed jurisdiction in all its plenitude, both in Spain and its foreign dominions. The holy office was on its decline. This was its last great struggle for existence. The King had long resided in Naples, where the inquisition was regarded with the same horror as among Protestants. Though partaking of the same feeling, he was too prudent to trample on the prejudices and opinions of his Spanish subjects, or to make a direct attack against the great engine of ecclesiastical authority. He had witnessed the danger of precipitate reforms and of shocking national prejudices in matters however beneficial. He adopted in his long reign the only maxim which could be pursued with safety, and perhaps the only means to produce the intended effect. He endeavored to check the oppressions, to soften the rigors, and to circumscribe the authority of the inquisition, and thus prepared the way for time and circumstances to produce its total abolition. In the pursuit of this design he was seconded by the energy and liberal principles of his minister, Florida Blanca. The principal restrictions of de Aranda were gradually revived; and in 1784 the celebrated decree was issued, which partially subjected the proceedings of the holy office to the cognizance of the sovereign. It was ordered that no grandee, minister, or any person in civil or military service of the Crown, should be subjected to a process without the approbation of the King. Thenceforth this formidable tribunal became feeble in its operations, and was suffered only to give such displays of its authority as were calculated to weaken the public veneration. Coxe's Memoirs of the Kings of Spain, Vol. III. *pages 526, 527, etc. Under the reign of the son of Charles, the Prince of Asturias, his successor in Spain and the Indies, "the inquisition received a still heavier shock, and before the late revolution it had become a mere tribunal of police, to arrest the progress of political, rather than of religious, heresy." It was finally abolished in Spain in 1808. [*587

It appears, then, from the royal ordinances which have been cited, that from the time of the introduction of the inquisition into Spain the extent and manner for the exercise of its jurisdiction were subject to the regulations of royal ordinances; that it had been so restrained in polygamous cases, its jurisdiction in them having been confined to inquiries connected with the validity or nullity of marriages, and to the infliction of penances for the violation of the ecclesiastical law in respect to them. It had not the power to initiate a process in a case of bigamy for the punishment of it but in subjection to the royal ordinances, or to institute in the Indies, after those ordinances were passed, an inquisitorial tribunal concerning it before the accused had been convicted in the secular courts.

Such was the law of Spain in respect to prosecution for bigamy, and the sunken condition of the inquisition, when no ecclesiastic, however high may have been his dignity, would have ventured to make such a decree as was issued by the Presbyter Canon of the Cathedral Church of New Orleans against Jerome Des Grange for bigamy. It had all the form and more than the vigor of the holy office. It was entitled "Criminal proceedings instituted against Geronimo Des Grange, for bigamy, by the Vicar-general and governor of the Bishoprick of this Province, and attested by the notary, Franco Bermudez." The canon subsequently styles himself Canonical Presbyter of this Holy Cathedral Church, which he was; but adds that he was provisory vicar-general and governor of the Bishoprick of the Province, which he was not.

This assumption was either ignorance, or was intended to give consideration to himself or to the prosecution. He was neither provisor nor vicar-general. For the manner in which those functions were deputed by the bishop, we refer to the 3d volume of the *Instituciones de Derecho* 588*] *Canonico Americano*, **Appendice Primero*, pages 394, 395, 396, 398. The decree purports to have been issued on the 4th of September, 1802. It begins by saying that it had been publicly stated in this city that Geronimo Des Grange, who had been married in 1794 to Maria Julia Carrière, was at that time married before the Church to Barbara Jeanbelle, and is so now, who has just arrived; and also, that Des Grange, having just arrived from France a few months since, has caused another woman to come here, whose name will be obtained. It is also reported in all the city, publicly, and notoriously, that Des Grange has three wives, and not being able to keep it a secret, etc., etc., His Excellency has ordered, in order to proceed in the investigation and the infliction of the corresponding penalty, that testimony be produced to substantiate his being a single man, which Des Grange presented in order to consummate the marriage, and that all should appear who can give any information in the matter, etc., etc. And as it has been ascertained that Des Grange is about to leave the city with the last of his three wives, let him be placed in the public prison during these proceedings, with the aid of one of the alcaldes, this decree serving as an order, which His Excellency has approved, and as such it is signed by me, notary.

Before me, Franco Bermudez.

(Signed) Thomas Hassett.

It is not necessary to cite any of the proceedings upon that paper, or to speak of the frequently occurring notarial certificates of Francisco Bermudez. The whole of it, however, shows that what was done was so under his contrivance and auspices. The canon, Hassett, is made to begin as an ecclesiastic in authority, and signs the decree, but places the execution of it and the imprisonment of Des Grange upon an order of His Excellency. It is twice referred to in the paper as a part of it. It should have been produced with the other proceedings. Without that being done, no part of it can be received in evidence as the record of an authentic judicial tribunal. The whole paper is a novelty in the proceeding of an ecclesiastical court. His Excellency means the chief *alcalde* of the city, who had no legal authority under the law of 589*] Spain to sanction such *a prosecution, or to order the execution of it, either by the introduction of testimony or the imprisonment of the accused. The paper signed by Franco Cassiergues is insufficient for that purpose.

The procedure of the holy office in such cases will be found in the article Inquisition, in the 8th edition of the *Encyclopædia Britannica*, Vol. XII. page 389. It establishes the fact that the canon, Hassett, and Bermudez, intended to proceed against Des Grange according to the forms of the holy office, and that at a time when its functions in such particulars had ceased in Spain and in the Indies. Those who are curious may also find directions for such a procedure in Burns' Ecclesiastical Law, and in Ougton's *Ordo Judiciorum sive Methodus Procedendo in Negotiis et Litibus in foro Ecclesiastico Civili Britannico et Hibernico*, 2d volume. Mr. Bentham, also, in his *Rationale* of Judicial Evidence, specially applied to English Practice, Vol. II. book 3, ch. 17, pages 380 to 403, exposes with cogent reasoning and admirable satire the artifices of the early English ecclesiastics, and their success in getting up a similar initiation of a prosecution in contravention of English statutes.

Before leaving the paper we have been examining, it is proper for us to allude to the testimony of Judge Foulhouse given in this case, and to his opinion given afterwards in confirmation of its invalidity.

When he was examined as a witness, it was distinctly understood between the parties, and agreed to, that the defendants might make a motion to suppress his testimony. That was not done. We cannot infer from it that the counsel of the defendants acquiesced in the witness's conclusion that the paper from the Cathedral Church was inadmissible as evidence, but it is certainly good cause for the reliance placed by counsel in their argument of the cause upon the learned judge's declarations, and his support of them by his researches. He cites from the Partida, 7 tit. law 16; *Novissima Recopilacion*, book 12, tit. 28, law 16; *Novissima R.*, book 12, tit. 28, law 10; the last being the cedule of Charles III. in a case of imputed bigamy, ordering the inquisitor-general to direct the inquisitors to take cognizance of the crimes of heresy and apostacy, *bigamy [*590 being considered by the canon law as a kind of heresy, without assuming to do so "*by defaming the accused with imprisonment* before they had been previously and publicly convicted."

For the reasons given, supported by the royal ordinances of Spain, we have been brought to the conclusion that the paper from the Cathedral Church of New Orleans, introduced by the defendants as a part of their evidence in this case, is inadmissible as such, and that all which it contains must be disregarded by us in the judgment we shall give.

We finally remark that our extended examination of that paper has not been made because of its essential bearing upon the merits of the case of the complainant. It was to disabuse the record of what did not legally belong to it, and to correct misapprehensions which might arise unless its character and import had been legally shown. Give to it, however, the fullest credence, and it will be seen that it can have no effect upon the law of adulterine bastardy, upon which this case must be decided, which we are now to consider.

This brings us to the chief objection which was made in the argument, and most relied upon to defeat the recovery of the complainant. It is that her status of adulterine illegitimacy incapacitates her from taking as legatee under the olographic will of her father, though admitted to probate, as it has been, by the supreme court of Louisiana.

It is an averment of the defendant in his answer to the complainant's bill, but not in response to any allegation in it. It changes the attitude of the litigants from what it was in the case of *Gaines* v. *Relf and Chew*, in 12 How. 472. Then Mrs. Gaines had the burden of proof to establish affirmatively the fact, that she was the forced heir of her father, and the donee of

her mother, his widow. This court at that time did not think that had been satisfactorily done, and dismissed her suit, without affirming for or against the *factum* of marriage between her father and mother. Indeed, such a point could not have been made, or be supposed to have been intended to be decided by the court in the case then in hand, without expressly overruling its decision in 6 Howard, that there had 591*] *been a lawful marriage between Daniel Clark and Zulime Carrière, her father and mother, and that Mrs. Gaines was their lawful child. To get rid of the force and effect of that decision, the defendants, having only charged before that she was the offspring of an illicit intercourse between her father and mother, invoked the church papers of which we have spoken so much, in the hope of establishing from it that she was an adulterous bastard. And again, with the aid of that which is not evidence in the case, and with much that is so, they now rely to establish that charge. Mrs. Gaines meets the charge with new evidence, relying upon the old also, and with the declaration of her father in his last will, that "I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies, hereinafter named." And with this presentation of herself, of which she had never had the proof before, asked that the case might be judged according to the evidence *and the laws applicable to it*. What that proof is will be arrayed hereafter in its proper place. Now, we only remark, that the burden of proof is upon the defendant, and that the law applicable to such a declaration in a will, concerning a child, requires that there shall be full proof to the contrary of it, and will not be satisfied with *semi plena probatio*.

But the law regulating the sufficiency of proof for the disaffirmance of such a declaration in a will cannot be fully understood and appreciated, unless our recollection shall be revived of the differences made by the ecclesiastical law and that of Louisiana as to the kinds of illegitimacy, and the disabilities and privileges attending them. In fact and in law they differ. The rights and capacities of illegitimates depend upon the distinctions being preserved.

If one be a bastard, from having been born, as the code expresses it in article 27, of an illicit connection, though they cannot claim the rights of legitimate children, yet if they have been duly acknowledged by their fathers and 592*] mothers, leaving **no lawful children or descendants*, they, as natural children, will be called to the legal estate or succession of *the mother*, to the exclusion of her father and mother, and other ascendants and collaterals of lawful kindred. And in the case of their father's succession or estate, they may be called to the inheritance of it when he has acknowledged them, and has left no descendants, no ascendant, no collateral relations nor surviving wife, and to the exclusion only of the state. But though natural children, and known to be so, they can take by testament or will from their father, if born before their father's will were made. And here we have the reason, in the differences of their right of succession to their fathers and mothers, why Clark made his olographic will in favor of his legitimate daughter Myra; fearing from the clandestinity of his marriage, and other circumstances attending it, that her ligitimacy would be denied, notwithstanding his habitual and daily acknowledgment of it, unless it was proclaimed and avowed in his will. They take or inherit by wills of their fathers, if born before the wills were made. As of a devise that B shall stand seised of land to the use of Jane, his daughter. This would be a good devise to her, if she were reputed to be so, though she were a bastard, and not so called in the will. Dyer, 323, pl. 29; S. C. Jenk, p. 239; 41 E., 3-13. But this does not extend to a bastard born after will made.

Sid., 149; 39 E., 3-24; 3 Leon, 48; *River's Case*, 1 Atk. 410; *Hardin* v. *Staden*, 2 Ves. Jr. 589; 2 *Blodwell* v. *Edwards*, Cro. Eliz. 509, 510; Coke Litt. 123, B; *Ex parte Wallop*, 4 Brown, C. C. 90; *Kennell* v. *Abbott*, 4 Ves. 502.

A bastard *in esse*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate. The only question in such a case is, whether, when *in esse*, the bastard is sufficiently designated as the object of the bequest.

Gordon v. *Gordon*, 1 Mer. 141; *Bayley* v. *Snelham*, 1 Sim. & Stu. 78; 2 Pow. Dev. by Jarm. p. 260; Co. Litt. 3-6, and note 1; Dyer, 313; Noy, 35; Park, 26; 3 Leon, 48, 49.

But we ought to mention in this connection whether a gift can be made to a bastard not procreated is *vexata questio*. The early authorities certainly lean to the negative. The *reason assigned is, "that the law does [*593 not favor such a generation, nor expect that such shall be." *Blodwell* v. *Edwards*, Cro. Eliz. 509; Co. Litt. 3-6.

So that we see by the foregoing authorities, had it been proved in this case or in any of the cases which the complainant has brought for her rights in her father's estate, that she was the offspring of an illicit intercourse, which we affirm it never has been, she would now be in the condition, from her father's testamentary declaration of her legitimacy, to take as his universal legatee. And if the case was made to turn upon that now, the complainant would be entitled to a decree; but it does not.

It is said, as an adulterous bastard, produced by an unlawful connection between two persons who at the time when the child was conceived were either of them or both connected by marriage with some other person, the complainant cannot take under the olographic will of her father, because the Code forbids it. The articles 217, 222, do forbid the legitimation or acknowledgment by their fathers and mothers of adulterine children. The article, 914, does say that in no case can adulterine children inherit the estates of their fathers and mothers—that is, as acknowledged natural children may do, by the articles 912 and 913 of the Code. And it is declared by the 1475 article of the Code, "that natural fathers and mothers can in no case dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or pos-

session by which to support themselves." This is the prohibition upon which the defendants rely to defeat the complainant.

The application of it, however, to the case in hand, was not as fully considered by the learned counsel for the defendant as it might have been. We will make it, with a decided Louisiana case, for everything that shall be said, and by authorities for every general proposition cited, akin to the subject-matter.

The article containing the prohibition necessarily intends that the relation of the parties shall be such as it mentions, before it can have an effect upon either of them.

594*] *Now, we say, first, that the legal relations of adulterous bastardy do not arise in this case; for, independently of the declaration of the will, that the complainant is the legitimate child of Daniel Clark, this court having decided in 6th Howard that the marriage of Clark to Zulime was valid by reason of the invalidity of her previous marriage with Jerome Des Grange, that of course makes the complainant legitimate. But if it be assumed, as it was in the argument, that by the decision in 12 Howard, the marriage of Clark to Zulime was invalid on account of the validity of her marriage with Des Grange, then still Myra is legitimate by the law, as the offspring of a putative marriage.

The cases from the Louisiana Reports are conclusive. The articles in the old code, 119, 120, are to this effect, that if both parents, or either of them, contracted the second marriage in good faith, the issue of it will be legitimate. So it was ruled in the case of *Clendening* v. *Clendening*, 3 Mart. N. S. 538. The language of that case is, "that the plaintiff resists the claim on the succession of his father by a woman he married in the lifetime of his wife, the plaintiff's mother, and of the children, if born of that woman. The defendants contend that notwithstanding the plaintiff's father had a lawful wife at the time of his second marriage, that as the woman he last married was in good faith at the time of the marriage, and ever since, at least till after the birth of the last child she had by him, her marriage has its civil effects; and that she and her children, the present defendants, are entitled to all the advantages the law gives to a lawful wife and children. There seems to be no dispute on the question of law. The woman who was deceived by a man who represents himself single, and the children begot while the deception lasted, are bona fide wife and children, and as such are entitled to all the rights of a legitimate wife and issue." The plaintiff then urged, that four of the children were born after the good faith of the woman ceased, as she had been advised of the illegality of her marriage by a communication made to her that her husband had another wife living in Tennessee. The court, however, said the proof of this knowledge was insufficient 595*] to deprive herself *and her children of their rights, though one witness swore he communicated that fact to her.

The next case came up before the new court organized in Louisiana under the Constitution of 1845. It is that of *Patton* v. *Philadelphia and New Orleans*, 1 La. Ann. 100. The facts were, that in 1799 A. Morehouse married Abigail Townes in the State of New York, and had two children by her. He subsequently came to the Spanish colony of Louisiana, and gave out that he was a widower, and married Elenore Hook. In the act of marriage, he declared himself the widower of Abigail Townes. By the second wife he had children, and both wives survived him. It was said, "the decision of the late supreme court in the case of *Clendening* v. *Clendening et al.*, 3 Mart. N. S. 538, in relation to the good faith of the second wife, is a correct application of the Spanish law, which regulated the subject-matter at the time of the marriage of the plaintiff's ancestor. By the law, 1 title, 13, part 4, it is ordained, that if, after both parties know with certainty the existence of the impediment to the marriage, they beget children, these children will not be legitimate; yet, if, during the existence of such impediment, and while one or both of them was ignorant of it, they should be accused before the judges of Holy Church, and before the impediment, as proved in the sentence pronounced, they should have children, those begotten during the existence of the doubt will all be legitimate. We agree with the plaintiff's counsel, that the second wife, and all the children conceived during her good faith, have all the rights which a lawful marriage gives." In this case, also, it was said that the second wife was informed of the existence of her husband's first wife; "but the court answered, the evidence establishes nothing more than the existence of a doubt."

We now give the case of *Abston* v. *Abston*, 14 La. Ann. 137, decided in 1860, by the supreme court of Louisiana. Its ruling is coincident with the two previous cases cited, upon a statement of facts concurring with them, but more particular in detail.

Olive Abston sued to have herself recognized as the lawful *surviving wife of John [*596 Abston, deceased, late of the parish of Carroll, claiming she was entitled to a portion of the property of his succession. Her son, John N. Abston, the issue of her marriage with John Abston, deceased, joined in the action, for the purpose of having himself recognized as the legitimate son and lawful heir to the estate of his deceased father. John N. Abston is the exact case of Mrs. Gaines. The suit is against Rebecca Wright, the third wife of John Abston, deceased, and *the administrator of his succession or estate.* He intervened in his capacity of tutor of Nancy Nix Abston, the minor child of the defendant, the issue of her marriage with the deceased, claiming in behalf of the minor the rights of legitimate and forced heir in the succession of John Abston, her father. Rebecca Wright pleads in general denial, and avers that she was lawfully married to John Abston, deceased, in Warren county, in the state of Mississippi, and that if the plaintiff's alleged prior marriage was ever consecrated, it was unknown to her, and to all other persons residing in the state of Mississippi. She filed, also, a supplemental answer, averring that her husband, John Abston, had made in the state of Mississippi his will, leaving to her his whole estate, after the payment of his debts, and that the will had been admitted to probate in the parish of Carroll, in Louisiana.

The facts of the case were these: John Abston married with Olive Hart, his first wife,

and plaintiff in this suit, in the state of Alabama. John N. Abston, the coplaintiff in the suit, and other children, were the issue of that marriage. John Abston abandoned his family in the state of Alabama, without having been divorced, *a vinculo matrimonii*, from his first wife, contracted a second marriage with one Susan Bell, and she died. After her death, and being still undivorced from his first wife, he intermarried in Mississippi with Rebecca Wright. In a short time after this last marriage he removed from Mississippi into Carroll county, in the state of Louisiana, where he acquired a new domicil, and where he died, in which was situated the whole property of his succession, movable and immovable at the time of his death.

This narrative, and the relations as they had **597***] been given *of the parties to the suit, raised two questions, which it became necessary for the court to decide before it gave its opinion upon the question of the legitimacy of the two sets of children of John Abston, the bigamist, and father of them, and the rights of his two wives in his estate: First, as to the effect of the probate of the will, it being contended, as that had been done by a court of competent jurisdiction, that it could not be questioned collaterally, nor its validity be inquired into in the suit. The court declared that the decree of a probate court ordering a will to be executed does not amount to a judgment binding on those who are not concerned in it, and that when the will is offered as the title in virtue of which property is claimed or withheld, that its validity may be inquired into. *Sophie* v. *Duplessies*, 2 La. Ann. 724; *Succession of Dupuy* 4 La. Ann. 570. The other question raised was, whether the rights of the parties in the suit should be determined by the law of Mississippi, where the marriage of the defendant and the deceased had been contracted, or by the law of Louisiana, where John Abston had his domicil at the time of his death, where his succession was opened, and where all his property was situated. The answer to that question was, that the laws of Louisiana which regulate the right of succession make no distinction between persons who have contracted marriage in or out of the State, nor the issue of such marriages, whether born in or out of the State. If they have the qualities required by the law in matters of inheritance, they will be recognized as legal heirs without regard to the places of marriage or birth.

The court, then, with a proper regard to the fact that the will which had been made by John Abston *was invalid on account of its not having been attested by three witnesses, and that the succession was an intestacy*, determines that it could not be regulated by the law of Mississippi, as the plaintiff contended it should be, the basis of which is the common law but that it must be by the law of Louisiana. We prefer to cite its own language as to the similitude and the differences between them: "The prior marriage of the deceased with the plaintiff, which remained undissolved, was a legal disability under **598***] the *common law, which made the marriage with the defendant, Rebecca Wright, not merely voidable, but void *ab initio*, and made their issue illegitimate, and incapable of succeeding by inheritance to the estate of any one. By the law of this state, the disability of a prior marriage, undissolved, also renders the second marriage null and void; *but the legal consequences of a marriage void* ab initio *under our law are very different from those under the common law.* The Civil Code declares, that "the marriage which has been null nevertheless has its civil effects in respect to the parties and their children, *if it has been contracted in good faith. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage.*" "In two cases, somewhat similar to the present, it has been held that each wife was entitled at the death of the husband to one half, as the community property, after the payment of debts; and this rule will govern our decision in this case." *Patton* v. *Philadelphia*, 1 La. Ann. 98; *Hubbell* v. *Inkstein*, 7 La. Ann. 252. The mandate of the court was accordingly given, with this further decree, that John N. Abston, the co-plaintiff, and that *Nancy Nix Abston, the minor, represented by the intervener*, are entitled as heirs at law to the separate property or estate of their deceased father, John Abston, and the costs of the appeal were directed to be paid, one half by the plaintiff, Olive Abston, and the other half by Rebecca Wright, the defendant.

But in further confirmation of what has been the Spanish law, and, of course, that of Louisiana, in legitimating the children of those who marry in good faith, believing, upon good ground, that there was not a precedent marriage to prevent it, we cite from the *Novissima Recopilacion*, 5th vol. 425, N. Ley. 10, what was said in the Council allowed to be held by Charles III., King of Spain, in the year 1777, for the purpose of giving to the inquisitor-general a better understanding than he professed to have concerning the King's royal ordinance of 1770, concerning the jurisdiction of the holy office in bigamy and polygamous cases generally.

The result of that council, and so recognized by the King, was: "That by the act of marrying a second time, whilst the *first wife [*599 was alive, the person who does so violates the faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession and of the legitimacy established by the laws inasmuch as his fraud makes the children of the second marriage, *though truly adulterine, legitimate, and capable to inherit from their parents on account of the good faith of their mother in contracting that marriage.*"

To the same effect is the Code Napoleon. C. Cer. art. 201, 202. The law of France was so before the Code. Pothier, *Contrat du Mariage*, Vol. III., pp. 172, 107; Toullier, tome 1,598; Marcadi *Explication du Code*, tome 1,520; Law of Spain, Partida, 4 Lex, tit. 13. Vol. 1; Dalton's Dic. tome 2,372, tit. Mariage, 372.

Thus we see, though a child may be adulterine in fact, it may be legitimate for all the purposes of inheriting from its parents, if one or either of them intermarried in good faith.

Such is the law for others in Louisiana, and it must be administered accordingly for the complainant, if she stands in the position, by the evidence which the law requires and has

determined to be sufficient to establish a marriage *in good faith* between her father and mother, *or as to either of them*, to entitle her to inherit from either or both of them *as legitimate by the law.*

On such a question good faith is first to be presumed. Marcadi, *Explication*, tom. 1, pp. 522, 698. As to what constitutes good faith, it is adjudged that to marry a second time, supposing the previous marriage invalid, is one of the cases of good faith. Dalton's Dic. tom. 2, p. 371; Tit. Spain, No. 578. The last two citations have been given to show the inaccuracy of the conclusion of the learned council of defendant, that if the invalidity of the marriage between Des Grange and the complainant's mother was not proved, that she was necessarily an adulterine illegitimate.

She was heir at law if procreated by Clark in good faith, or if conceived by her mother in good faith—that is, she supposing her capacity to become the wife of the former.

Nor was a sentence of the nullity of the marriage between Des Grange and the complain-
600°] ant's mother necessary to *protect the legitimacy of the offspring. Marcadi *Explication*, tome 1, p. 495; *Ibid.* p. 519; 2 Phillimore's Report, 16; Shelford on Marriage, Law Library, Vol. XXXI., p. 275.

The good faith of Clark and Zulime is proved by the evidence of Madame Despau (Old Rec. 580), and Madame Calliant (Old Rec. 309), and by the contemporaneous facts relating to the marriage, as well as by the testimony of Caviliere (Old Rec. 546) as to the bigamy of Des Grange, by the testimony of Bellechasse, by that of Madame Benguerel. Old Rec. p. 349. The good faith of Clark in marrying is proved by his own declarations in the last years of his life. By Bellechasse's testimony, Probate Record, 173; Boisfontaine, *Ibid*, 162; Mrs. Symth's *Ibid*, 152. Again: the good faith of the marriage is proved by the authentic declaration of Clark in his will that the complainant was his legitimate daughter and only child. See, also, the opinion of the supreme court of Louisiana, *Clark Succession*, 11 La. Ann. 124.

But we now say, if we are to consider the question of adulterine bastardy to be properly before us in this case, it cannot affect the rights of the complainant under the will of Clark of 1813. If the complainant, by reason of the matrimonial character of her mother, shall be deemed adulterine on that side, she is not so on the side of her father, he having been as a single man free to marry; and if he did marry in good faith, she is not incapacitated, as respects him, to be, under his will, his universal legatee. *Journal du Palais*, Vol. LX. p. 45, January 7, 1852.

There is no pretense that Clark was incapable to contract marriage; and it matters not whether, as to the mother of the complainant, any impediment existed under the Spanish law; the complainant stands as the declared issue of her father by a woman to whom he supposed himself lawfully married. Not only the bill itself, but the evidence upon which it is established, shows that Daniel Clark had no other legitimate issue. No one exists who has any right to contest his acknowledgment of the legitimacy of his child, or to set up the adulterous source of her origin. See C. N. art. 335, 2 Marcadi, pp. 51, 31, 52, Nos. 60-62; *Journal du Palais*, Vol. LX. p. 45; *Jobert v. [*601 *Pitot*, 4 La. Ann. 305; Judge Foulhouse's Opin. 57, 58, 2 Toulliers, 960.

The testamentary recognition of a child as legitimate is of the highest legal authority. All presumptions are to be taken in favor of such a declaration. Matthews on Pres. Ev. pp. 284, 286; *Haines* v. *Chew*, 12 How. 593; *Miller* v. *Andrus*, 2 La. Ann. 767; Jarman, Wills, Vol. I. p. 188; 5th Phillip's Note, 284, 287. And authorities cited. 1 Greenl. Ev. 134. And we now cite, in confirmation of all that has been said upon this point, the 117 Nouvelle of Justinian. It gives the rule of evidence in such cases, and it prevails in every ecclesiastical court in Europe, where the Roman law is the basis of its jurisprudence, in respect to the legitimacy of persons. It is, also, in cases of that kind, the law of Louisiana.

We give it in the original Latin: "*Ad hoc autem et illud sancire perspeximus, ut si quis filium aut filiam habens de libera muliere cum qua nuptiæ consistere possunt, dicat in instrumento, sive publica, sive manu conscripto et habente subscriptionem trium testium fide dignorum, sive in testamento, sive in gestis monumentorum, hunc aut hanc filium suum esse, et non adjecerit naturalem, hujusmodi filios, esse legitimos, et nullam aliam probationem ab iis quæri, sed omni frui eos ure quod legitimis filis nostræ conferunt leges.*" Translation: "We have determined to ordain, that if anyone having a son or daughter of a free woman, with whom he might have been married, shall say in a written act, either before a public officer or under his own hand, sustained by three credible witnesses, or in his last will, or in public act, that this son or this daughter is his child, and that he does not call them natural children, they shall be reputed legitimate, and no other proof shall be demanded of them, and they shall enjoy the rights of legitimate children." This Nouvelle has been the subject of much criticism and learned interpretation by the most distinguished civilians. By no one more so than the Chancellor d' Auguesseau, in his declaration or ordinance of 1736, which had for its object, as he himself says, to explain and affirm the proofs of the legal condition of men. The declaration consists of forty-two articles. Several of them relate to the form in which baptismal *acts ought to be registered to [*602 give verity to legitimates; but whether they are so or not, this ordinance of Justinian secures to children legitimacy if they shall be placed by their fathers or mothers within its predicament. And we may add, that the interpretation of it by all who have been skilled in the civil law is, that it attaches legitimacy to the son or daughter of a man and woman who are both free, but that it does not demand that the word legitimate should be applied to them to make them so. On the contrary, the Nouvelle means that if the child is not called a natural child, he is of right to be reputed legitimate, and the commentator's remark is: "Mark well, that this is not a Roman law made when paganism reigned in Rome, but a law made by a Christian Emperor." Merlin *Repertoire de Jurisprudence*, 17th Vol. tit. Legitime, §§ 1, 11, pp. 348, 349; Ed. Bruxelles, 1827; Question *d'Etat; On la preuve testi-*

moniale ne ful point admise, tome 8; *Causes Celébres Filiation Reclamee, Sans acte de baptime, sans une Veritable Possession d' Etat sur le fondement de plusieurs forte consectures;* tome 19, Causes Celébres, 204.

Such as we have stated it to be is the law relating to the children of a putative marriage, though it be adulterine in fact, if it was contracted in good faith by the parties, or by either of them. Their children are legitimated to inherit from their parents, either in a case of intestacy or to take by testament. In the latter, a declaration by either father or mother that they are their children, without the addition that they are natural children, will make them legitimate, and no other proof can be demanded of them to enable them to enjoy all the rights of legitimate children. But the case in hand is even stronger than that, for here the father in his will "acknowledges his beloved Myra to be his legitimate and only daughter," and makes her the universal legatee of his estate after the payment of certain legacies.

But the defendants aver that the connection between her father and mother was adulterine, even though they may have been married, and on that account that she is barred from taking as legatee under her father's will.

We will now give the proofs upon which they 603*] rely to *substantiate their allegation, in connection with the voluntary rebutting testimony of the complainant, as we find it in the record.

The paper from the Cathedral Church in New Orleans is first invoked by the defendants. Now, though that paper has been shown to be an unauthorized attempt by a canonical prebendary, without jurisdiction of any kind in such a matter, upon a public report, to try Des Grange for bigamy, for having three wives at the same time, and to make him answer by imprisonment, whether such an irresponsible accusation was true or not true, the defendants, in our consideration of their averment, shall have the full benefit of that paper as evidence, though we have declared it to be inadmissible as such.

Des Grange, it appears from the paper, was put in the public prison and kept there until the canon, Hassett, after having examined several witnesses, decreed: that not being able to prove the public report, he directed the proceeding to be suspended, to be resumed thereafter if it should become necessary, and that Des Grange should be set at large, on condition that he paid the costs. This he did, and fled from New Orleans, without ever again having any conjugal relations with the mother of the complainant, though as it will directly appear from the paper that he was indebted to her for his enlargement from the canon's usurped authority. Nor did Des Grange reappear in New Orleans until after the cession of Louisiana to the United States.

In the course of the proceedings against Des Grange, both himself and the complainant's mother were examined as witnesses. Both of them reply to questions concerning his bigamy in respect to his marriage in 1794 with her; acknowledged that they were aware of the report prevailing against him in that regard; and she says that about a year since (in 1801) it was stated in the city that her husband had been married at the North, and, wishing to ascertain whether it was true or not, that she had gone to Philadelphia and New York, where she used every exertion to find out the truth of the report, and that she learned only that he had courted a woman, whose father, not consenting to the match, it did not take place, and *she married another man shortly after- [*604 wards; and she adds that she had recently heard that her husband was married to three women, but she did not believe it, nor had she any doubt about the matter which rendered her unquiet or unhappy. All of this Des Grange confirms; for being asked why his wife, Maria Julia Carrière, went to the North last year, he answers: "That the principal reason was that a report had been circulated in this city that he was married to another woman; she wished to ascertain whether it was true, and she went."

Thus the defendants, by the introduction of the paper from the Cathedral, show the existence and currency of the report of Des Grange's guilt of bigamy in marrying the mother of the complainant, and the aggravation of it in the public mind by the prosecution of him, and from the canon not having dismissed it altogether, but having retained it for further inquiry. Upon his enlargement, as has been proved by unimpeachable testimony, Des Grange fled.

Now, in this connection, it is appropriate to state the evidence which the law will receive and pronounce to be sufficient to determine that he did commit bigamy when he married the mother of the complainant. It so happens, excluding all admission of it to the family of the mother of the complainant, the fact is proved by a witness, the truthfulness of whose testimony has not been assailed, and could not have been.

Madame Benguerel has no connection with the family of the complainant, and her standing and character were such that the defendants could not impeach her credit by even an insinuation against either; but she was subjected to their cross-interrogation. It brought out neither difference nor contradiction of herself, nor was there anything in the way in which she gave her testimony to subject her to any suspicion of friendship to the complainant, or of any want of memory or uncertainty in her narrative.

Madame Benguerel says: "My husband and myself were very intimate with Des Grange, and when we reproached him for his baseness in imposing himself upon Zulime, he endeavored to excuse himself by saying, that at the time he married her he had abandoned his lawful wife, and never intended to *see her [*605 again." In answer to a cross-interrogatory put upon the point, she says: "I am not related to the defendants, nor with either of them, nor am I with the mother of Myra; nor am I at all interested in this suit." She adds: "It will be seen by my answers how I know the facts; I was well acquainted with Des Grange, and I know the lawful wife of Des Grange, who he married before imposing himself in marriage upon Zulime."

The paper then discloses the following facts: That Des Grange was notoriously charged with bigamy in marrying Zulime; that she left New Orleans "for the North" in 1801 to get proof of it; that he says that her principal reason for going was for that purpose; that he was prosecuted

for bigamy by the canon in 1802, and was temporarily released from prison after Zulime had sworn that she did not believe the report about him. It is in proof, also, that he then fled from New Orleans, and did not return to it until the year 1805. Her interference or testimony before the canon negatives every suspicion that she had any agency in instigating the prosecution against him. His own oath upon the occasion confirms it, for he speaks of his wife being satisfied with his innocence, and there is not a word in the paper nor in any of the evidence to show that her friends had provoked or abetted in any way the public accusation of his bigamy. Nor is Clark, the father of the complainant, at all associated with that procedure. Indeed, he was in Europe at that time. With all these facts and obvious inferences from them, taken in connection with the testimony of Madame Benguerel, the only question concerning the bigamy of Des Grange in marrying the mother of the complainant when he did, is whether the law determines the evidence to be sufficient in a civil suit to establish the fact.

We think that the law requires us to pronounce that it is sufficient.

A charge of bigamy in a criminal prosecution cannot be proved by any reputation of marriage. There must be proof of actual marriage before the accused can be convicted. But in a civil suit the confession of a bigamist will be suffi-
606*] cient. *when made under circumstances from which no objection to it as a confession can be implied. There are none such in this case. The first legal consequence of such a state of the evidence is, that it released the mother of the complainant from all conjugal obligations with Des Grange, making her free to contract marriage with any other man who was free to intermarry with her. But that conclusion is not the purpose for which we have used, as the defendant wishes it, what the church paper discloses. The object has been to show that the defendants have introduced that paper in support of the charge of adulterine bastardy, when in fact it discloses a condition of things from which it may well be inferred that both the father and mother of Mrs. Gaines intermarried in good faith. It is far short of the evidence in the record to prove that they did so, which will be seen presently. Then the next testimony which the defendants rely upon to aid in proving the adulterine status of the complainant is that of Daniel W. Coxe, the friend and copartner in business with Daniel Clark. His testimony was originally taken in a previous case to invalidate the marriage between Clark and the mother of the complainant. In 12 Howard, as it was in this case, it was associated with the church paper to sustain the objection we are now considering. In the argument, it was said that the two were sufficient to prove it. But take the testimony of Mr. Coxe as a whole, or in its particulars, and no part of it has the slightest bearing upon the canon's prosecution of Des Grange, or upon the objection that the complainant was the offspring of an adulterous intercourse. Mr. Coxe begins with the history of Caroline Barnes, giving an account of the preparations which he had made at the solicitation of Daniel Clark for the confinement of her mother, and then states it to be his belief that Clark had never married her. Beyond this, in regard to the marriage, he does not speak, except in his offers to the success of his effort to dissuade her from attempting to prove it, and that he did not believe that Daniel Clark was in Philadelphia in the year 1803, when it is alleged that he married there the mother of the complainant. Many other circumstances are narrated by Mr. Coxe in connection with the affairs of Mr. *Clark, [*607 and of his acknowledgment of Caroline Barnes as his illegitimate child. But after the closest examination of them in connection with the point of adulterous bastardy, and that Clark and Zulime, after the birth of Caroline, were married in good faith, there is not a word in Coxe's testimony to impeach the fact of marriage, or the fidelity of the parties in entering into it.

The defendant also gave in evidence a letter written by Bellechasse, from Matanzas, to Coxe, in rely to one from the latter. Coxe had written to Bellechasse at the instigation of Mr. Relf, requiring him to dispose of fifty-one lots in favor of Caroline Barnes, to the exclusion of the complainant, for whom they were confided by Clark to him for her benefit. This Bellechasse refused to do. He then states what had previously passed between Relf and himself concerning these lots. He had before given to Relf his renunciation of any ownership of them, with directions to dispose of them for Myra, stating what had passed between himself and Clark upon the subject, as he has related it in his testimony. Probate Record, pages 173 to 182, inclusive, answer to 13th interrogatory. This letter does not relate in any way to the marriage between Clark and the complainant's mother, or to their alleged adulterous intercourse. It, however, confirms the honorable character of Bellechasse, and strengthens all that he had said of Clark's declarations to him of the legitimacy of his daughter Myra, and of his intentions to make her the heiress of his estate. This letter seems to us to have been introduced into this case by the defendants, with some expectation that it might serve to make Bellechasse's testimony equivocal, and also to associate both Myra and Caroline as the adulterous offspring of Clark and Zulime. The attempt, in our view, is a failure as to both. The complainant's status depends upon the evidence in this case. That of Caroline Barnes, notwithstanding the declarations of Coxe that she is the natural child of Clark by Zulime, must be determined by the law as to what were the relations between her mother and Des Grange when she was conceived and born. The witness, Madame Despau, says that she was at the birth of Caroline, and that it took place in 1801. Mr. *Coxe says, to the [*608 best of his belief, that she was born in the year 1802, but without any of those attendant circumstances which give even a coloring to the correctness of his chronology as to the event of which he was speaking, and with one proceeding from himself, which shows how little reliance can be put upon the accuracy of his memory, either as to the time when he says Mrs. Des Grange presented to him Clark's letter to have her taken care of in her confinement, as she was with child by him, or as to the time of the birth of Caroline, or as to Clark's visits to Philadelphia immediately preceding his departure for Europe in the year 1802. In Mr. Coxe's second examination, he states it had been disclosed to

him by his correspondence with Clark that the latter had been in Philadelphia from late in 1801 to the last of April, 1802, all of which time Zulime was there; that it was in April that Clark returned to New Orleans, and afterwards that he had revisited Philadelphia in July, 1802, on his way to Europe; thus confirming the statement of Madame Despau in those particulars. In the absence of all contrary proof, either by circumstance or deposition, the declaration of Madame Despau as to the time when Caroline Barnes was born must be received to establish that fact. And that being in the year 1801, however much it may be suspected that she was the child of Clark, and even that he supposed her to be so, she must be considered in law to be the child of Des Grange, the gestation of her mother and the birth of the child being within the time before any interruption had taken place of their conjugal relations. That is proved by evidence introduced into the case by the defendants. The first is the power of attorney of the 26th of March, 1801, given by Mesdames Caillavet, Lasabe, and Despau, authorizing Des Grange, their brother-in-law, to proceed to Bordeaux, in France, to recover property of which they were coheiresses of their father and mother. Next, by a general power of attorney, which Des Grange at the same time gave to Zulime to act for him in all affairs during his absence. She did so in several particulars, styling herself the legitimate wife and general attorney of Don Geronimo Des Grange. Des Grange accepted the power given to him, sailed for France in 609*] *April, and on the 1st July, 1801, wrote from Bordeaux to Clark to aid his wife with his advice, should she be embarrassed in any respect, and expressed his uneasiness that he had not yet heard from her; saying, also, that he was then engaged in a "lawsuit for the purpose of recovering an estate belonging to my wife and family." Now, under such a chronology of circumstances and of conjugal amity, we need not say that as access between man and wife is always presumed until otherwise plainly proved, and that nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been the father of it, the law, then, establishes the relation between Des Grange and Caroline as having been that of father and legitimate child, and that she was not the offspring of an adulterous commerce between Clark and Zulime; though Coxe says she was, and reaffirmed substantially in his letter to Bellechasse, as we gather from his answer in his refusal to turn over property to Caroline which was received by him from her father for Mrs. Gaines. See letter in page 896 of Record of *Gaines* v. *Hennen*.

The defendants also gave in evidence an authenticated record from the county court of New Orleans. It was introduced by them, and declared by them, in their answers to the complainant's bill, to be a petition by her mother, Zulime *née* Carrière, wife of the said Des Grange, to a competent judicial tribunal in New Orleans, praying for a divorce and dissolution of the bonds of matrimony existing between her and Des Grange, which was subsequently decreed after the birth of the complainant. But they now urge and declare that such record and decree prove nothing in the case. In our opinion it proves much, though differently from what it was introduced for. Their counsel now says, that the record was deficient in the petition and, therefore, that it does not appear that its object was the annulment of the marriage between Zulime and Des Grange on account of his bigamy. The petition is wanting; and why, has not been satisfactorily shown by the defendants. They knew it to be wanting when they introduced the record of evidence, and on that account cannot now *repudiate [*610 it for what it contains, because that is against the purpose for which it was introduced. It shows that a petition was filed; that a curator was appointed for Des Grange; that he was summoned to answer for Des Grange; that he appeared and demurred to the jurisdiction of the court in cases of divorce, and on that account that the court could not pronounce a judgment therein, and that the damages prayed for in the petition could not be assessed until after the court had rendered judgment touching the validity of the marriage. There was a joinder in demurrer, which, however, was withdrawn, and the curator filed the general issue. The docket entries in the suit, kept by the clerk, are in conformity with the act of April 10th, 1805, section 11. They are as follows: Petition filed June 24, 1806. Debt or damages. $100. Plea filed 1st July, 1806. Answer filed July 24, 1806. Set for trial 24th July. The witnesses are stated, and the costs given. And then follows judgment for plaintiff, damages $100, July 24, 1806. Now this extract, of so many particulars, makes out as well as it could be done the purpose of the petition, and establishes consistently, as it is required to be done, by the rules of evidence for such a case, that the marriage between Jerome Des Grange and Zulime, or, as otherwise named, Marie Julia, *née* Carrière, was thereby declared null and void. But the defendant's counsel says, that the record is inoperative for any purpose, inasmuch as it was a proceeding at the instance of Zulime in her maiden name, three years after her alleged marriage with Clark. It is forgotten that a judicial invalidation of marriage at any time, for the bigamy of a party to it, relates back to the time of the marriage, and places the deceived in a free condition to marry again, or to do any other act as an unmarried woman, without any sentence of the nullity of the marriage. The evidence, too, shows that the procedure by Zulime against Des Grange originated in her anxiety to place herself in that condition in respect to her marriage with Clark, which he had enjoined upon her to keep secret until a sentence of the nullity of her marriage with Des Grange had been obtained. She could not, under such circumstances, use Clark's name in such a suit; she could not *have sued [*611 in Des Grange's when disclaiming the validity of her marriage with him; and therefore her counsel in filing her petition used her maiden name, as it was proper and professional in them to do. One thing is certain, that the record from the county court of New Orleans does not in any way sustain the charge against this complainant of adulterine bastardy, but adds another circumstance to the many which exist in proof of the marriage between her father and mother, and of the good faith with which they entered into it.

To confirm what has just been said, we will now recite the evidences of it:

"Madame Despau testifies that she was at the marriage of Zulime and Clark in 1802 or 1803; that it took place in Philadelphia, and the ceremony was performed by a Catholic priest, in the presence of other witnesses as well as of herself. She states that she was present when her sister gave birth to Mrs. Gaines; that Clark claimed and acknowledged her to be his child, and that she was born in 1806. That the circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Des Grange, she heard he had a living wife. Our family charged him with the crime of bigamy in marrying Zulime. He at first denied it, but afterward admitted it, and fled from the country. These circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family." The witness then continues her narrative, that it was considered essential, before the marriage should take place, that proof should be obtained from the Catholic church in New York of Des Grange's bigamy, it being there that his prior marriage had taken place. They went there; found that the registry of marriages had been destroyed. Clark followed them, and having heard that a Mr. Gardette in Philadelphia had been one of the witnesses of the prior marriage of Des Grange, and he told them that he had been present at the prior marriage of Des Grange; that he knew him and his wife; that the wife had sailed for France. Clark then said, "you have no reason any longer to refuse to marry me; it will be necessary, however, to keep our marriage secret until I have 612*] obtained judicial proof *of the nullity of your marriage with Des Grange." They were then married.

Such judicial proof was subsequently obtained, as has already been shown. Another witness, Madame Caillavet, confirms the statement that Clark made proposals of marriage for Zulime to her family, after her withdrawal from Des Grange, on account of her having heard that he was the husband of another woman then alive. She also swears that Clark admitted the marriage to her, and that so did Zulime. Clark also made an acknowledgment of it to other witnesses, with simultaneous declarations to them of the legitimacy of Myra; and his paternal treatment of her from her birth to his death impressed them with the full belief of the fact and of the sincerity of the purposes for which he made such declarations. Mrs. Harper, who nursed Myra, not as a hireling, but as the friend of Clark, says that he made to her, at different times, declarations of the child's legitimacy and of his marriage with her mother. He admitted it also to Boisfontaine, and added that he would have avowed the marriage but for her subsequent marriage to Gardette. Pressed upon by such proofs, every effort was made by the most searching and repeated cross-examination to lessen the force of them, without success. Failing in this, a direct attempt was made to discredit their veracity by an impeachment of their characters. It was a signal failure. Forty years of their lives were canvassed to bring upon them some reproach. The proofs to the contrary were decisive. They, too, had had their misfortunes; but their lives had been passed in the different places where they had lived, not only without censure, but altogether free from suspicion. Their testimony was also put in comparison with that of Mr. Coxe. They do differ in immaterial circumstances, but in nothing concerning the marriage between Clark and Zulime. All that Coxe had been able to say about that was, that he did not believe it. That conclusion, too, he came to by inferences from his own narrative concerning the time of the birth of Caroline Barnes; that he withdrew afterwards, as to the time of its occurrence, and also as to his declaration, that Clark had not been in Philadelphia in the year 1801, extending his sojourn there for more than *four [*613 months, whilst Zulime and her aunt were in search of proofs of the bigamy of Des Grange. The evidence also shows that Clark aided their inquiries for that purpose. Besides the want of memory of Mr. Coxe, his narrative shows so strong a bias against the marriage that we must receive it with many grains of allowance. After Zulime had obtained a sentence of the nullity of her marriage with Des Grange, she went to Philadelphia to learn the truth of reports which were in circulation concerning the fidelity of Clark to herself. She had an interview with Coxe; told him her purpose, and her intention to proclaim her marriage with Clark, unless she became satisfied upon that subject. He told her that she could not prove the marriage, and afterwards advised her to take counsel of a lawyer. He, of course, dissuaded her from any attempt to do so. At the same time Coxe aggravated her distress and hopelessness by telling her that Clark was then engaged to marry a lady of distinction in Maryland, which, whether true in the particulars of his narrative of it, or as a general report, there is no proof in this record; but it served his purpose in disuniting Zulime and Clark forever. Clark was then in the height of his popularity and distinction in the Congress of the United States. His friend sheltered him from the disclosure. Mrs. Harper, as a witness to Clark's admission to her repeatedly of the marriage, was cross-examined severely, but without any effect, to diminish the weight of her testimony in chief. Bellechasse and Boisfontaine, in their subsequent examinations, adhered to what they had at first sworn, and their characters forbade even a suspicion of its not being true.

Failing in every attempt to lessen the proof of the marriage, it was suggested that all of these witnesses were in combination to establish it by perjury. The defendant's counsel had himself extracted from their answers that they had no interest of any kind in the result of the suit. They are protected by the rules of evidence from any such imputation. There was no foundation for it.

The marriage, then, having been proved, the only point remaining is, whether it was contracted in good faith by the parties to it. We see no cause for thinking that it was not *entered into in good faith. Supposing it, [*614 however, not to have been so by Zulime, on account of her not having sincerely believed in the invalidity of her marriage with Des Grange, that could not take away the complainant's right to inherit her father's estate under his olographic will of 1813, if it has not been fully proved, as the rules of evidence in such cases require it to be done, that he did not marry in good faith.

The doubts, which may be indulged in respect to Zulime's sincerity, cannot apply to him. He was an unmarried man, never had been married, when he united himself to Zulime, and the weight of testimony in the case is, that he did marry her in good faith. His conduct to his child from her birth to his death, his frequent declarations of his marriage to her mother, and of her legitimacy, and his avowal of it in his last will, are conclusive of his having married in good faith. The law applicable to such cases requires us to say so.

We have not thought it necessary to give all the evidence in this case in detail, but have accurately done so as to all of it bearing in any way upon the points in controversy, and especially as to that having any connection with the charge of adulterine bastardy. Those who may have any curiosity to read the testimony in full, will find it in what is called the Probate Record; also in the cases as they are reported in 6 and 12 Howard, particularly in the old record of the last case.

Our judgment is, that by the law of Louisiana Mrs. Gaines is entitled to a legal filiation as the child of Daniel Clark and Marie Julia Carrière, begotten in lawful wedlock; that she was made by her father in his last will his universal legatee; and that the Civil Code of Louisiana, and the decisions and judgments given upon the same by the supreme court of that state, entitle her to her father's succession, subject to the payment of legacies mentioned in the record. *We shall direct a mandate to be issued accordingly, with a reversal of the decree of the court below, and directing such a decree to be made by that court in the premises as it ought to have done.* Thus, after a litigation of thirty years, has this court adjudicated the principles applicable to her rights in her father's estate. They are now finally settled.

615*] *When, hereafter, some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its courts.

DECREE OF THE COURT.

This appeal having been heard by this court upon the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and upon the arguments of counsel, as well for the appellant as for the appellees, this court, upon consideration of the premises, doth now here adjudge, order, and decree, that the decree of the said circuit court be, and the same is hereby reversed, with costs; and that such other decree in the premises be passed as is hereinafter ordered and decreed.

And this court, thereupon proceeding to pass such decree in this cause as the said circuit court ought to have passed, doth now here order, adjudge, and decree, that it be adjudged and decreed and is hereby adjudged and decreed upon the evidence in this cause, that Myra Clark Gaines, complainant in the same, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child, and entitled to all the rights of the same; and that under and by virtue of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such entitled to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed; subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge, and decree, that all property described and claimed by the defendant, Duncan N. Hennen, in his answer and exhibits thereto annexed, is part and parcel of the property composing the succession of the said Daniel Clark, to wit: the same which Richard Relf and Beverly Chew, under pretended authority of testamentary executors of the said Daniel Clark and of attorneys in fact of Mary Clark, by act of sale, dated December 28, 1820, conveyed to Azelic Lavigne: which the said Azelic Lavigne, by act *of sale of the 29th of February, 1836, [*616 conveyed to J. Hiddleston, and which the said J. Hiddleston by act of the 27th May, 1836, conveyed to the New Orleans and Carrolton Railroad Company, and which the said company, by act of sale on the 13th of May, 1844, conveyed to the said Duncan N. Hennen, the defendant in this cause; that the said Richard Relf and Beverly Chew, at the time and times when, under the pretended authority aforesaid, they caused the property so described and claimed by the defendant, Hennen, to be set up and sold by public auction on the 19th day of December, 1820, and when they executed their act of sale aforesaid of the 28th of December, 1820, to the said Azelic Lavigne, had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction, and the said act of sale to Azelic Lavigne in confirmation thereof, were wholly unauthorized and illegal, and are utterly null and void; and the defendant Hennen, at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of the said Beverly Chew and Richard Relf, in the premises, illegal, null and void; and that he, the said Hennen, ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question, with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and their said act of sale to said Azelic Lavigne, were illegal, null and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And this court doth further order, adjudge, and decree, that all the property claimed and held by the defendant, Hennen, as aforesaid, now remains unclaimed and undisposed of as part and parcel of the succession of the said Daniel Clark, notwithstanding such sale at auction and act of sale in the pretended right or under the pretended authority of the said Richard Relf and Beverly Chew.

And the court doth further order, adjudge, and decree, that the complainant, Myra Clark Gaines, is the legitimate and *only child [*617 of the said Daniel Clark, and universal legatee under his last will and testament, is justly and lawfully entitled to the property aforesaid, so claimed and held by the defendant, Hennen, together with all the yearly rents and profits

accruing from the same since the same came into the said defendant's possession, to wit: on the 13th of May, 1844, and for which the said defendant is hereby adjudged, ordered, and decreed, to account to the said Myra Clark Gaines.

And the court doth now here remand this cause to the said circuit court for such further proceedings as may be proper and necessary to carry into effect the following directions; that is to say:

1. To cause the said defendant, Hennen, forthwith to surrender all the property so claimed and held by him as aforesaid into the hands of the said Myra Clark Gaines, as a part of the succession of the said Daniel Clark.

2. To cause an account to be taken by the proper officers of the court, and under the authority and direction of the court, of the yearly rents and profits accrued and accruing from the said property since the 13th of May, 1844, when it came into the possession of the defendant, Hennen, and to cause the same to be accounted and paid to the said Myra Clark Gaines; the account to be taken, subject to the laws of Louisiana in cases of such recovery as is now decreed in favor of the said complainant.

3. To give such directions and make such orders from time to time as may be proper and necessary for carrying into effect the foregoing directions, and for enforcing the due observance of the same by all parties and by the officers of the court.

Mr. Justice **Catron**, dissenting:

A principal question in this case is, how far it is affected by the decree in the case of *Gaines and Wife* v. *Chew, Relf, and others*, reported in 12 Howard.

In that case the complainant sought to re- [*618] cover: first, four *fifths of the real estate of Daniel Clark, alleged to be vested in the complainant, Mrs. Gaines, as heir of Daniel Clark; and second, the undivided moiety of the real estate owned by Daniel Clark at his death, being the community interest taken by his widow, the mother of the complainant, Myra, from whom she obtained a conveyance for said moiety in 1844. In the former case this court found that Mrs. Gardette, the mother of Mrs. Gaines, was the wife of Jerome Des Grange (in 1802 or 1803), when the bill alleged she intermarried with Daniel Clark, and was, therefore, not the widow of Clark; and this moiety of the estate claimed by the bill was rejected.

2. It appeared in the former case, by the evidence furnished by the record in that suit, that Caroline Clark was the sister of Mrs. Gaines, born before the father and mother intermarried, as is alleged by the former bill; but she was fully recognized by the father as his illegitimate daughter, and was supported by him during his lifetime, and after his death by his friends. The deposition of Mr. Coxe proves these facts very fully.

Conceding the fact that the parents intermarried after Caroline's birth, then that marriage made Caroline a legitimate child of the marriage, and equal heir with Myra; such being the law of Louisiana. Nor could the father, by the laws of that state, take from his legitimate child more than one fifth part of his estate by devise. Civil Code of 1808, ch. 3, § 1. And therefore Caroline and Myra each took as heir four fifths of their father's estate, less the mother's moiety; that is, four shares each of twenty parts. On these portions the will of 1813 did not operate; the children holding the estate as heirs. It operated only on the two twentieth parts which Daniel Clark had the power to devise by his will. Civil Code, 232, sec. 3; 234, sec. 4.

Caroline, who intermarried with Doctor Barnes, was a party respondent to the former suit, and answered the bill. She has since died beyond the jurisdiction of the court, and is not a party to this controversy; still, the interest of her absent heirs is entitled to protection. Nor can Mrs. Gaines set up any claim to that interest.

*As respects the claim to one tenth part, [*619] the next question is, whether the fact found in the former case, that the complainant was the daughter of Des Grange's wife, establishes the status of Mrs. Gaines, so that she is excluded from taking as devisee of Daniel Clark.

According to the provisions of the Code of 1808, this court held that Mrs. Gaines could not take as heir of her father; nor could she take her mother's grant by the deed of 1844.

By the laws of Louisiana, as they stood in 1813, the complainant was an adulterous bastard, and could not inherit from her father (Code of 1808, p. 156, art. 46), which declares, that "bastard, adulterous, or incestuous children, even duly acknowledged, shall not enjoy the right of inheriting from their natural father or mother." And article 15, page 212, declares, that "natural fathers or mothers can in no case dispose of property in favor of their adulterine children, even acknowledged, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves."

The only issue decided in the former suit was, whether the complainant's mother, for years before, and at the time of Myra's birth, was the lawful wife of Jerome Des Grange. The court so found and based its decree, dismissing the bill, on that fact. The fact being established, carried with it all the legal consequences that result from the fact. 1st Stark. Ev. 182, § 57. One of these consequences is, that Mrs. Gaines was an adulterine bastard, according to the laws of Louisiana, and incapable of taking by the will of her father.

But suppose this consequence does not follow; then how does the matter of estoppel stand? The complainant, Mrs. Gaines, by her amended bill, filed in 1848, renounced all claim that she had to the property sued for by her original bill (including the same sued for now), as instituted heir of Daniel Clark, by the will of 1813, and asserted a right to four fifths of said property as legal or forced heir and only legitimate child of Daniel Clark, and declared she would not rely on said will of 1813. O. R. p. 85.

She also virtually renounced as heir one moiety of the estate *Daniel Clark died pos- [*620] sessed of, and set up a deed from her mother for the moiety as lawful widow of said Clark; this being her community interest by the laws of Louisiana. Old R. p. 32.

That the widow was entitled to a moiety as her share in the community is alleged and relied on by the foregoing amendment; and the

complainant being the party who made the avowal, is irrevocably bound by it. Such is the statute law of Louisiana, declared by the Code of 1808 (p. 314), and the Code of 1825 (Vol. II. p. 355).

In the former case the avowal was matter of title, and in this case it is conclusive evidence of the fact avowed as against the complainant. The law of Louisiana binds the Federal courts in like manner that it is binding on the state courts. So this court has uniformly held. 1 Stat. at L. 92; note (*a*) to 34th section of judiciary act of 1789.

If the mother was lawful widow of Clark, then her right to the moiety was undoubted, as the parties resided in Louisiana, and it is alleged the property was acquired during the coverture. Mrs. Gaines must abide by her allegations in the former suit, as on them the issues were formed, and on which the decree in that suit proceeded.

Nine of ten parts of Clark's estate was sued for by the former bill. The decree rejected, on a direct issue, five ninths claimed to have been acquired by deed from said mother, on the ground that she was the wife of Des Grange, when, as is alleged, she intermarried with Clark, and when the complainant was born. This was the precise issue made, and found by the court, and is undoubtedly *res judicata* as respects the mother's moiety. As to the other five tenths, Mrs. Gaines, by her amended bill of 1848, in express terms renounced one fifth to the purchasers, under Daniel Clark's will of 1811. To the extent of one fifth, the validity of that will was recognized. The complainant cannot be allowed to split up her claim and sue for portions by several suits.

The remaining four fifths of the moiety Mrs. Gaines claimed to recover as legal or forced heir. Heir, or no heir, was the issue tried. This court **621***] found that she was Clark's daughter *by Des Grange's wife, and not Clark's lawful heir, and therefore dismissed her bill. It follows, that as to the four fifths of one half, the complainant stands barred as heir by the decree. She is also estopped by the former proceedings to sue a second time for the moiety derived from her mother, and thirdly, is estopped to set up a claim to the one tenth part she renounced and abandoned.

An objection is raised that the parties in this cause are not the same who were sued in the former case. The bill alleges that they are the same; and so they are, except that Mr. Hennen claims under the railroad company, by a conveyance of the land in dispute, made pending the former suit, which, if it had been decided against the railroad company, would have bound Hennen, and being decided in favor of the company, have bound the complainant.

The rule in chancery proceedings is, that where there are contesting parties in each suit, as between these parties, a decree is *res judicata*. It was also held by this court at the present term in the case of *Thompson* v. *Roberts*, 24 How. 233. (*ante*, 648.) Sixty defendants were sued by the former bill; they all, as joint respondents, got a decree against the complainant on her common title set up against them all. The estoppel operated against her for each defendant; and in this second contestation of the same title any one respondent to the former suit can set up the estoppel in his favor.

The laws of Louisiana are confidently relied on as prescribing the true rule of estoppel. In this English bill in equity, resorted to here, as a remedy, the rule is, that the same subject-matter cannot be litigated twice between the same parties on evidence brought forward or left out of the first case. Here the will of 1813 is introduced, and could just as well have been introduced in the former suit. The difficulty was, that it had not been proved and recorded in the probate court. But it might have been proved just as well forty years before the time it was admitted of record as now. If a title deed could not be read on the hearing for want of being recorded, the complainant might fail to recover. This is of constant occurrence; *still, the judgment or decree would be as [***622** conclusive as if the deed had been authenticated and recorded. It was simply a neglect of the complainant to produce her proof in legal form; a matter with which the defendants had no concern. Holding back an existing will and making an experiment on the issue of heirship, requiring the same proof, and, in case of failure, to bring a second suit on the established will, is a mere contrivance and an evasion of the due administration of justice, which cannot be allowed. On the will of 1813 the present bill is founded. By that will Daniel Clark declares the complainant, Myra, to be his only legitimate and lawful heir, and devises to her all his estate. She must, therefore, have been his daughter, born in wedlock. Conceding this to be true, and it follows as a consequence that the complainant took as heir, and not as devisee, to the extent of four fifths. As to four fifths of a moiety, we are by this bill called on to try the precise issue of heir, or no heir, that we tried in the former suit.

If the decision reported in 12 How. be overthrown, ruin must be the consequence to very many who have confided in its soundness. In a rapidly growing city like New Orleans, much of the property supposed to be protected by our former decree must have changed hands. Large improvements must have been made in the nine years since that suit was decided. It covered all Daniel Clark's estate as it existed at his death, and had over sixty defendants to it. If the twenty odd defendants to this bill can be recovered against, so can the others who were parties to the first suit.

It is most manifest from this record that the fragment of a cause brought here by Mrs. Gaines and Mr. Hennen by stipulation, will, in effect, decide, and was intended to decide, the cause of the other defendants sued jointly with Mr. Hennen, and who are standing helpless, awaiting their fate at the hands of this court.

It is insisted by counsel, that Clark, being a free man, could lawfully devise to his daughter; and that the laws of Louisiana did not apply to the case of a single and free man *bequeathing to his child by a married [***623** woman, as was done here. Such a construction would evade the Code to a great extent. Its terms are too plain for controversy, and so the courts of Louisiana have held. *Jung* v. *Doriocourt*, 4 La. 178.

According to this assumption, slaves might be devisees, if the evasion was used to suppress

the fact that the mother was a slave. As in case of other conveyances, wills must have a grantee capable to take by the devise; and it is undoubtedly true that the heir at law, or a devisee, holding under a former will, can plead and prove the facts of incapacity by parol evidence, and thereby defeat the last will, and of course alienees, in the condition these respondents are, can do the same. The case above cited (4 La. 178) is directly to this point, and to the same effect it was held in *Robinett* v. *Verdun*, 14 La. 542. There, the court declared that a disguised donation to a slave child, under the forms of a sale, was absolutely null.

But the right and justice of this cause depends on the defense of the plea of bona fide purchaser set up by the answer. The bill in chancery is a remedy peculiar in its character, when resorted to in the Federal court held in the state of Louisiana. In the state courts there, this defense is unknown. But when a complainant resorts to it to enforce rights to lands in the Federal court, the respondent can defend himself, as an innocent purchaser, if he pleads, and can show that he acquired by purchase at a fair price, and got an apparent legal title, without notice of an outstanding better title, the purchaser believing that he acquired full property in the land; and the question is, has the respondent here made out such a defense? The purchase was made from Mary Clark, in 1820, by her legally constituted attorneys in fact, Chew & Relf. She claimed to be the true owner by a will made in her favor as instituted heir. It is an olographic will, in due form, fully proved, and regularly recorded. This will, from the time it was probated in 1813, stood as the true succession of Daniel Clark for more than forty years. An immense estate in lands and personal property has been acquired under it, by all classes of innocent purchasers, without any suspicion of the fact that any other and better title existed. It is 624*] admitted on behalf of the *respondents, by stipulation in this cause, that each purchaser who bought in 1820, and every subsequent purchaser under the first one, bought for a full price, paid the purchase money, and got a regular conveyance for the land purchased. This title, tested by itself, was a perfectly fair, legal title, according to the laws of Louisiana. *Duplesse* v. *White*, 6 La. Ann. 514. If Mary Clark sold the estate without an authorization from the court of probate, by that act she rendered herself liable to pay the testator's debts; but this did not affect the purchaser. He was not bound to know that any debts existed, nor to see to the application of the purchase money. The present bill does not allege that there were any debts owing by Daniel Clark at the time of his death; on the contrary, the complainant sues for the lands, and the rents and profits of them, without any reductions. Finding Daniel Clark's estate to be insolvent on the accounts exhibited, General and Mrs. Gaines, by their amendment of 1844, declare that they do not require of said Chew & Relf any account, and that they "discontinue their prayer to that end."

The complainant admits the existence and probate of the will of 1811, but denies, in general terms, that the sales were lawfully made. For more than forty years the respondents and their alienors had a regular legal title, traceable to the only then existing succession of Daniel Clark; they could sue for and recover the land by force of that title. They knew nothing of the existence of Myra. She was born in New Orleans in 1804 or 1805, and immediately after her birth was taken from her mother by Daniel Clark, her reputed father, and put into the charge of Col. and Mrs. Davis. In her childhood she was carried to the state of Pennsylvania, raised up and resided there till 1832, when she intermarried with William W. Whitney, under the name of Myra Davis; during all which time she was ignorant of her true name, history and rights. She so states in her first bill, filed in 1836, put in evidence in this suit. Of course the purchasers of the lands sued for could have no knowledge of the complainant's existence when they paid their money and took title, in 1820.

But the respondents would have been bona fide purchasers *had the will of 1811 [*625 never existed. Mary Clark was the apparent legal heir of her son in the ascending line. Daniel Clark was known and recognized in New Orleans as an unmarried man; he had resided there from his youth, and was extensively and uncommonly well known, having represented the territory of Orleans in Congress. A number of witnesses prove, and most conclusively, that he was deemed and recognized universally as a man who had never been married up to the time of his death. His father was then dead, and Mary Clark, his mother, recognized as his undoubted heir. He addressed and made propositions of marriage to ladies of his own rank, after it is pretended he had married Madame Des Grange. Those who purchased in 1820, including judges of the highest rank residing on the spot, could not doubt the validity of Mary Clark's title, and power to sell the lands they bought and paid for.

In the printed argument submitted to us on behalf of the complainant, and again on the oral argument delivered before us in this court, the answer to his apparently complete defense was, that Mary Clark was dead in 1820, when her attorneys made the sales, and conveyed in her name.

The bill alleges no such fact, nor does the answer refer to it. But the complainant, by her bill of 1848, in evidence here, states that Mary Clark died in June or July, 1823, leaving a will, alleging who the legatees were (of which the complainant was one); and some of these legatees are made defendants to that will. Daniel W. Coxe proves the circumstances connected with making the will of Mary Clark, and says she died in 1823, in which year her will was duly proved and recorded in Philadelphia county, Pennsylvania.

It is also relied on that Mary Clark did not accept the succession by taking possession of the estate in legal form. She made her power to sell, and did sell, and gave possession to the purchasers, and they have held actual adverse possession under their conveyances since 1820. This is admitted of record; and it is now too late, after the lapse of thirty-five years before they were sued, to set up this technical objection. The *presumption in favor of reg- [*626 ularity in the proceeding is too clear to admit of controversy.

Another objection is made to this plea of bona fide purchaser, namely: that Chew & Relf had

no authority from the probate court to sell, and that they joined with Mary Clark in the conveyance. The conveyance of Mary Clark was valid, notwithstanding this circumstance, as the supreme court of Louisiana held in *Duplessis* v. *White*, 6 La. Ann. 514. She held the actual legal title. The will operated as a conveyance in the same manner that a private act of sale would have done. It is proved that the sales of the estate were made at auction, and had the form of sales made by authorization of the court; this is the fair presumption; nor can the complainant at this late day have a decree against these respondents. Presumption that the executors were duly authorized to make sales for payment of debts comes instead of proof. This bill was filed more than thirty years after Mrs. Gaines became of age, and thirty-six years after the first vendor purchased and took title, in 1820; and it must be presumed that the proper orders of the probate court were granted. The presumption arises from possession and lapse of time. Possession of itself is, in the nature of men and things, an *indicium* of ownership. If all persons acquiesce in the possession, the acquiescence tends to prove property in the possessor; and after the lapse of thirty years the probabilities so increase, that courts of justice, for the safety of society, hold an adverse claim to be without foundation. He who thirty years ago may have been abundantly able to show regularity of proceedings and evidence of ownership, may be unable to do so now. His witnesses may be dead, as is emphatically the case here. His title papers may be destroyed or lost; and a court of equity must say, as the supreme court of New York did in the case of *McDonald* v. *McCall*, 10 Johns. 380, "The fact is presumed for the purpose and from a principle of quieting men's possessions, and not because the court really think a grant has been made." Or, as the supreme court of Tennessee said in the case of *Hanes* v. *Peck*, Mart. & Yerg. 236, "In [*627] such case, *length of possession supplies the place of testimony; presumption is substituted for belief; we believe when the fact is proved; we presume in the absence of proof."

Had Mary Clark's devisees sued this purchaser, he could have relied on presumption to supply proof of regular orders from the probate court to authorize the executors to sell, or that Mary Clark regularly accepted the succession; and the same presumption must prevail against this complainant.

It is provided by the 7th section of the act of March 25, 1810, that contracts of sale of real property in Louisiana shall be recorded in the office of the parish judge where the property is situated; and if not so recorded, the contract shall be void. It is admitted in this case that both the power of attorney from Mary Clark, and the deeds to purchasers made under that power were not recorded in the office of the probate judge, but that they were recorded in a notary's office in New Orleans; and it is assumed, and the cause is made to depend mainly on the fact, that the sales of Chew & Relf, as attorneys of Mary Clark, are null as to third persons for this reason. This is an entire mistake. The act of 1810, section 7, never had any application to the parish of Orleans, where the land in dispute lies. It "had reference to those parishes where the office of parish judge was established, combining with the judicial powers of the officer those of notary and recorder of mortgages," etc. "These powers were not possessed by the judge of the parish and city of New Orleans. The law is not applicable to this parish, and has been so considered ever since its enactment." *Morris* v. *Crocker*, 4 La. 149. It is further held, that the notarial offices of the city were the proper offices in which the record was to be made. *Ib.* In this, and all other respects, Mary Clark's conveyance was regular.

The evidence shows, that as against the respondents to this bill, the claim set up is grossly unjust. Clark's failure was very large; his estate was wholly insolvent. The purchasers have, in fact, paid his debts to a large amount. Many of them are yet unpaid. The purchasers have built houses and raised families on the property now sought to be recovered. A city *has been built upon it. It has prob- [*628 ably increased in value five hundred fold since 1820; much of it certainly has.

That the respondents have been harassed with a previous lawsuit for the same property, in which the complainant claimed as heir, and was defeated, neither helps her case nor lessens the hardships imposed on the respondents.

At the argument, conclusions of law and of fact were relied on as having been established by the case of *Patterson* v. *Gaines*, reported in 6 How. 556. That was a false and fictitious case made up by Gaines and wife, with the assent of Patterson, they having relinquished to him the property sued for. The object of that suit was to circumvent this court by a fraudulent contrivance to obtain an opinion here, to the end of governing the rights of the other defendants sued jointly with Patterson. And in this, General and Mrs. Gaines seemingly succeeded. They obtained both the opinion and decree they sought; but when the other defendants came to a hearing, they examined Patterson as a witness, and proved and exposed by his testimony the contrivance and fraud practised; and for us now to declare that so gross a contempt to this court, and the practice of a fraud so disgraceful to the administration of justice, established any matter of fact or any binding principle of law, would be to sanction and uphold that proceeding, and to invite its repetition. That case should be disregarded, as it was disregarded, when the cause of which it was part was fully and fairly heard in 1852, and which is reported in Howard, vol. 12.[1]

By an amendment to their bill made in 1849 (12 How. 537), General and Mrs. Gaines had the boldness to allege and claim that the decree in Patterson's fictitious case was *res *judicata*, and an estoppel to the other [*629 defendants to that suit; and to that end relied on the decree on the final hearing in 1852, thereby avowing the fraudulent object of obtaining that decree.

A question not directly decided in the case reported in 12 How. was whether Daniel Clark

1.—The case of Lord v. Veazie, 8 How. 253, is full to the point, that a fictitious proceeding is void because there is no contest. Patterson did not act in the matter at all, further than to lend his name to General and Mrs. Gaines. They made up the case by filing the answer to their own bill—filing such evidence as suited their purposes; and bringing up the appeal to this court in Patterson's name.

married Mrs. Des Grange. Madame Despau swore that she was present at the marriage in Philadelphia, and that several others were present. Her integrity and credit as a witness were so directly overthrown in the former case by the deposition of Daniel W. Coxe, and by many circumstances, as to leave her evidence of no value. She swore that she went to Philadelphia with her sister to procure evidence of Des Grange's marriage previous to marrying her sister. Coxe proved beyond doubt that the two women came there for the sole purpose of concealing the birth of a child, of which Mrs. Des Grange was pregnant, and of which she was very soon delivered, and it was secreted and raised to womanhood near Philadelphia. This was Caroline, afterwards Mrs. Barnes. And as soon as Mrs. Des Grange was able to travel, the two women returned to New Orleans. Me. Despau also swore in several depositions that this was Des Grange's child. At the time of its birth he had been absent in France for more than a year. Clark sent Mrs. Des Grange to Mr. Coxe with a letter, saying the child was Clark's, and to provide for the mother, and take charge of the child, which Coxe did. It was suggested at the argument that Coxe was not a competent witness, and not altogether entitled to credit. Clark's estate owed Coxe largely and if Mrs. Gaines recovered, then Coxe expected to be benefited by the recovery. So that he was interested to uphold Mrs. Gaines' claim; nor has the deposition of Mr. Coxe been objected to; on the contrary, it is admitted by stipulation. R. 93.

Mr. Coxe's character for integrity is prominently manifest by sustaining facts.

Clark never admitted the marriage to any one entitled to credit, or who could be believed, when swearing to what a dead man had said.

He proposed to marry another lady in 1808, 630*] and Mrs. Des *Grange and Madame Despau came to Philadelphia, and sent for Mr. Coxe, then in partnership with Mr. Clark in large mercantile transactions, and inquired of him whether the fact was true. Coxe assented. Mrs. Des Grange said that Clark had promised to marry her, and that she then felt at liberty to marry herself; and soon after, she was married to M. Gardette, a dentist of Philadelphia.

In 1805 Des Grange returned to New Orleans, and was sued by his wife for alimony. She recovered, and had a decree against him for $500 per annum. Mrs. Des Grange never assumed that Clark was her husband, so far as we are informed from any reliable source. She resided in Louisiana for many years, and until these proceedings had progressed for fifteen years and more and could have deposed to the fact of marriage, had her daughter seen proper to examine her as a witness; but this was not done.

It is altogether immaterial, however, whether Clark did or did not marry Des Grange's wife, as it could be of no value to the complainant if he did. Clark must have been an innocent and deluded party to give Mrs. Gaines the benefit proposed by the will of 1813—as in the case of an adventurer from abroad, marrying an innocent single woman, leaving a wife behind him. There the children of the second marriage cannot be disinherited and condemned; they can take as bastards from the mother. So the courts of Louisiana hold. But what are the facts here? Clark acted in concert with Mrs. Des Grange and her sisters in sending Des Grange to France, as agent of his wife's family, to settle up the affairs of an estate of theirs at Bordeaux. Des Grange was absent about fifteen months, and in the mean time, and shortly before the expiration of the time, Mrs. Des Grange was delivered of the child Caroline at Philadelphia, which Clark admitted at all times before his death was his child. This is an undisputed fact. Clark acted as the friend of Des Grange, and corresponded with him during his absence, and aided his wife. The criminal connection that was exposed by the birth of the child had obviously existed before Des Grange was sent to France; and in the transaction of sending him away, and of prosecuting *him on his return, [*631 Mrs. Des Grange, her two sisters, and Clark, were undoubtedly acting in conjunction. Madame Caillavet swears that she set on foot the prosecution against Des Grange. 12 How. 509, 510.

That Des Grange had a wife living when he married the complainant's mother was a mere pretense to cover a nefarious transaction, as is abundantly established by the facts appearing in the case reported in 12 Howard. The idea, therefore, that Clark was an innocent, a deluded party, is wholly inadmissible, and must be rejected as the least sustained part of this remarkable case.

I am of the opinion that the decree of the circuit court should be affirmed.

Mr. Justice **Grier**, dissenting:

I wholly dissent from the opinion of the majority of the court in this case, both as to the law and the facts. But I do not think it necessary to vindicate my opinion by again presenting to the public view a history of the scandalous gossip which has been buried under the dust of half a century, and which a proper feeling of delicacy should have suffered to remain so; I, therefore, dismiss the case, as I hope, for the last time, with the single remark, that if it be the law of Louisiana that a will can be established by the dim recollections, imaginations, or inventions of anile gossips, after forty-five years, to disturb the titles, and possessions of bona fide purchasers, without notice, of an apparently indefeasible legal title, "*Haud equidem invideo, miror magis.*"

Also dissenting, Mr. Chief Justice **Taney**.

THOMAS J. DAVIDSON, *Plff. in Err.*,
v.
WILLIAM L. LANIER, Curator of John J. McMann, Deceased.

Practice on motion to dismiss—what notice to be given to plaintiff in error or appellant.

It is the practice of this court to hear motions to dismiss, on the day assigned for business of that description, before the case is reached in the regular call on the docket.

Notice on the motion must be given to the plaintiff in error or appellant, long enough before the motion is heard to give him opportunity to contest the motion.

The length of notice must depend upon the distance of the counsel or party from the place of

holding the court, and must be long enough to enable him to arrange his business and reach the court.

Distant counsel cannot be expected to attend the court merely to guard against the possibility of a motion to dismiss.

Where there is no proof of the actual service of the notice, and the case is so late on the docket that it could not be reached during the term, the motion will be continued to the next term, then to be heard on thirty days' notice, where the counsel reside in Mississippi.

Motion filed Feb. 15, 1861. Continued Mar. 14, 1861.

IN ERROR to the District Court of the United States for the Northern District of Mississippi.

The question involved is stated by the court.

Mr. **Brent** for defendant in error.

Mr. **Davis,** Attorney of Record, for plaintiff in error.

Mr. Chief Justice **Taney** delivered the opinion of the court:

A motion has been made in each of these cases to dismiss it for want of jurisdiction. on account of certain defects, as it is alleged in the process and proceedings made necessary by the act of Congress, in order to bring it before this court.

It is the practice of this court to receive and hear motions of this kind on the day assigned for business of that description, before the case is reached in the regular call of the docket. And the rule has been adopted, because it would be unjust to the parties to delay the decision until the case is called for trial, if the court are satisfied that they have not jurisdiction, and that the case must be ultimately dismissed without deciding any of the matters in controversy between the parties.

But in order to prevent surprise upon the plaintiff in error or appellant, the court have always, where the motion is made in advance of the regular call, directed notice to be given to him or his counsel, and required proof that it was served long enough before the motion was heard to give him an opportunity of contesting the motion if he desires to do so. And the time required must depend upon the distance of the counsel or the party from the place of holding the court, and must be sufficient not only to enable him to make the journey, but to arrange business in which he may be engaged when he receives the notice. For when a case stands so late upon the docket of this court as to give no reasonable proof of reaching it during the term, it cannot be expected that distant counsel will leave their usual place of business and attend here to guard against the possibility of a motion to dismiss.

The motions, in these two cases, were made about three weeks before the close of the term, but as soon as could be conveniently, after they were docketed, and the court directed the usual notice to be given. We are satisfied that the counsel for the defendant in error has used every means in his power to comply with the order. But he has no proof that it was actually served. The counsel and the client both reside in Mississippi, and the cases stand so late on the docket that a trial could not be expected at this term. Nor could they anticipate that there would be any reason for their attendance. Under these circumstances the court *order that the motions be continued, to be heard on the first Friday in next term, provided notice of the motion and the day of hearing be served on the party or his counsel, thirty days before the commencement of the term.*

END OF VOLUME 65.

APPENDIX.

THESE actions were brought to obtain injunctions prohibiting the erection of bridges over the Passaic River, which were authorized by the Legislature of New Jersey. The complainants were owners of vessels. The circuit court dismissed the bills. On appeal to the Supreme Court of the United States, the decree of the circuit court was affirmed of necessity, the court being equally divided. No opinion of this court was, therefore, written. Since these causes were thus disposed of, however, the remarkable development of the great commercial interests of the country would seem to have rendered the report of the able argument of the eminent counsel engaged, as well as the exhaustive treatment of the principles involved by His Honor, *Mr. Justice* Grier, of too great practical value to excuse its omission from these reports.—ED.

CHARLES E. MILNOR, *Appt.*,
v.
THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY, and The Proprietors of the Bridges Over the Rivers Passaic and Hackensack.

DAVID BIGELOW, *Appt.*,
v.
THE NEW JERSEY RAILROAD AND TRANSPORTATION COMPANY.

CHARLES E. MILNOR, *Appt.*,
v.
THE NEWARK PLANK ROAD AND FERRY COMPANY, and The Proprietors of the Bridges Over the Rivers Passaic and Hackensack.

(*Not found to have been hitherto reported.*)

Every bridge may be said to be an obstruction on the channel of a river; but it is not, necessarily, a nuisance.

The court has no power to arrest the course of public improvements, on account of their effects on the value of property, appreciating it in one place, and depreciating it in another.

If special damage occurs to an individual, the law gives him a remedy.

But he cannot recover in a court of law or equity, special damage, as for a common nuisance, if the erection complained of be not a nuisance.

A bridge authorized by a state cannot be treated as a nuisance under the laws of that state.

The police power of a state includes the regulation of highways and bridges within its boundaries.

Congress has never assumed the exercise of such a power, nor has it, by any legislative act, conferred this power on the courts.

The United States has no common law offenses, and has passed no statute declaring such an erection a nuisance.

A court cannot, by arbitrary decree, restrain the erection of a bridge, or define its form and proportions. These are subjects of legislative, not judicial, discretion.

It is a power which has always heretofore been exercised by state legislatures over rivers wholly within their jurisdiction.

The case of Pennsylvania v. Wheeling Bridge Co. 54 U. S. 579, considered.

The question, whether the power to regulate bridges over navigable rivers wholly within the bounds of a state, could be exercised by it below a port of entry, and whether the establishment of such a port did, *ipso facto*, devest the state of such a power, was not in the Wheeling Bridge case, and therefore, not decided.

Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a state.

Congress has never attempted to regulate canals, turnpikes, bridges, and railroads.

When a city is made a port of entry, Congress does not, thereby, assume to regulate its harbor or detract from the sovereign rights before exercised by each state over its own public rivers.

Congress may establish postoffices and post-roads, but this does not affect or control the absolute power of the state over highways and bridges.

Congress, by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a state exercised in bridging her own rivers below such port.

The police power to make bridges over its public rivers, is as absolutely vested in a state as the commercial power is in Congress.

The court has jurisdiction to administer the relief sought here, if complainants have shown themselves entitled to it.

History of the legislative and other transactions connected with the right of the "Proprietors of the Bridges over the Rivers Passaic and Hackensack," given.

The "Proprietors of Bridges," etc., have no monopoly for building bridges within the boundaries specified in the New Jersey act.

If the proprietors had the sole right to build bridges and take tolls, their whole franchise might have been condemned by the legislature, under their right of eminent domain.

The railroad company has not covenanted or agreed with the complainants, or those under whom they claim, that the railroad bridge over the Passaic shall be forever fixed at Center street.

Argued Dec. 5, 6, 7, 10 & 11, 1860. Cur. ad. vult, Mch. 14, 1861. Decided Jan. 27, 1862.

APPEALS from the Circuit Court of the United States for the District of New Jersey.

The above three cases involved the same questions and were argued and decided at the same time in this court. The cases are stated with sufficient fullness in the opinion of Mr. Justice Grier, delivered in the court below, and in the following brief for the appellants.

Messrs. **George Harding** and **Cortland Parker**, for appellants·

The complainants pray injunctions against two bridges, as proposed to be built on the River Passaic, one by the New Jersey Railroad & Transportation Company, the other by the New York Plank Road & Ferry Company, upon three

NOTE.—*Bridges over navigable stream; as nuisance; when constructed under legislative authority*—see note to 59 L. R. A. 64.

distinct grounds, all applying to the railroad bridge, two of them to the plank road bridge.

I. The complainants are owners of vessels, duly enrolled and licensed in the coasting trade, accustomed to pass the site of the proposed bridges, up and down the Passaic, a navigable river, wherein the tide ebbs and flows, to and from Newark, which is a port of entry. They are also owners of docks above such sites, and which will be depreciated by the bridges. They assert that these bridges will be a nuisance to navigation and, therefore, ought to be enjoined.

II. The complainant, Charles E. Milnor, is one of "the Proprietors of the bridges over the Rivers Passaic and Hackensack," and entitled to the benefit of a contract made by the state of New Jersey with him and his associates, that no other bridge than theirs, commonly called the turnpike bridge, should be erected within certain limits. These bridges are to be within those limits. He has protested against any such erection, and he insists that they cannot be legally built.

III. The New Jersey Railroad Company in 1832 was about to locate its route and bridge at Commercial Dock, the site now in dispute. They were opposed; a legal controversy was begun in chancery of New Jersey, which was compromised by their adopting the bridge and route now used by them, more than twenty years, across the Passaic river. This, the complainants assert, was a binding agreement for lawful consideration, to the benefit of which they, as owners of real estate which will be affected, and depreciated by the change, and otherwise are entitled, and they seek legal remedy against its infraction. This cause of complaint applies only to the railroad bridge.

The River Passaic is a public navigable river, bounding the coasts of the United States, and Congress, by virtue of its power "to regulate commerce with foreign nations and among the several states," has asserted a certain jurisdiction in itself, and a certain right of navigation, or *jus publicum*, in the citizens of the United States in this and similar navigable rivers, and has regulated commerce thereon:

1. By establishing ports of entry and delivery for the citizens of the United States and other nations. Congress has designated the ports on the coast or navigable rivers from or to which vessels engaged in certain branches of commerce may sail; and incidentally Congress has indicated the waters which may be used by the citizens of the United States or other nations in going to or from the designated ports.

1 U. S. Statutes at Large, 632; 4 U. S. Statutes at Large, 715; Hale *de Portibus Maris*, 46, 50, 52, 53, 72, 84; *Blundell* v. *Catterall*, 5 B. & Ald. 268; *Penna.* v. *Wheeling Bridge*, 18 How. 435; *Corfield* v. *Coryell*, 4 Wash. C. C. 371.

2. Congress has divided the "coast" of the United States into collection districts, of which one comprehends "the waters of New Jersey, heretofore within the jurisdiction of New Jersey," and has subsequently included the River Passaic by name.

Act of 1789, 1 Stat. at L. 32, 147; act of 1832, 4 Stat. at L. 715.

3. Congress has granted coasting licenses, and attached certain privileges and duties thereto, which involve the use of navigable rivers extending from the ports to the open sea.

Act of 1793, 3 Stat. at L. 305, §§ 4, 14–18; act of 1819, 3 Stat. at L. 492; § 1; act of 1822, 3 Stat. at L. 685; *Gibbons* v. *Ogden*, 9 Wheat. 212.

4. Congress has included in the designation "coast of the United States," expressly, shores of "navigable rivers," as well as "sea coast," thus defining the term "coast."

Act 1819, 3 Stat. at L. 492, § 1; 3 Stat. at L. 685; 1 Stat. at L. 309, §§ 14–18.

5. Congress has attached certain duties and privileges to foreign vessels and to vessels trading with foreign countries, or in foreign articles, by treaty and by legislation. Act 1793, 1 Stat. at L. 309, §§ 14 and 18; act 1799, §§ 50–53, 92, 104.

6. Congress has expended money in surveying, sounding and charting navigable rivers extending from the sea to ports of entry.

Act 1807, 2 Stat. at L. 413; see Synoptical Index of U. S. Stat. at L. pp. 100, 101.

7. Congress has expended money in clearing out and improving the channels of rivers between the sea and ports of entry, by constructing breakwaters, buoys in the channels to guide the mariner by day, and lighthouses to guide him by night.

Act of 1804, 2 Stat. at L. 300; see List of Appropriations in Synoptical Index of U. S. Stat. at L. pp. 62, 70, 75 to 89; Vols. X. and XI. Stat. at L.

8. Congress has established customhouses, warehouses, scales, etc., at ports of entry, and established collectors, surveyors, appraisers, and other officers thereat.

Act 1799, 1 Stat. at L. 642, § 21; *Tremlett* v. *Adams*, 13 How. 304.

9. Congress, in establishing these places as ports, constituted them sea marts, at which trade between foreign nations and other states should be carried on; and this was done with a view to the best interests of the citizens of the whole of the United States, not of the citizens of the particular state or town.

Passenger Cases, 7 How. 450, Mr. Justice Catron's opinion; Mr. Justice Grier's opinion; Hale *de Portibus Maris*, 72.

10. Lastly, Congress has regulated navigation on the Passaic, by willing that "Commerce shall be free," and by its negative action in not imposing restraints, or authorizing the several states to do so.

Passenger Cases, Mr. Justice McLean's opinion, 7 How. 399; Mr. Justice Grier's opinion; *Gibbons* v. *Ogden*, 9 Wheat. 209.

11. The "navigable rivers" in which the tide ebbs and flows, which connect the ocean with the ports of the United States, were held to be arms of the sea, both by the common law and by the international law, at the time of the adoption of the Constitution; and to such rivers, therefore, the *jus publicum* of the United States was attached, by reason of this fact, in the same manner as it attached to the high sea.

Angell, Waters, pp. 73, 75, 80; Hale *de Portibus Maris*, pp. 10, 12, 35; Davies, 149; *Commissioners* v. *Hemphill*, 26 Wend. N. Y. 404; 2 Conn. 48; 7 Conn. 186; 8 Conn. 221; 9 Conn. 38; 3 Black, Ind. 193; 3 Scam. Ill. 500.

In this particular the Ohio river differed at law, and hence the act of Virginia, providing

for the erection of Kentucky into a state, of 1789. The effect of the compact between Virginia and Kentucky was to place the Ohio on the same footing as the tidal rivers of the old states.

2 Conn. 48; 7 Conn. 186; 9 Conn. 38; *Commissioners* v. *Hemphill*, 26 Wend. N. Y. 404; *City of Mobile* v. *Eslava*, 16 Pet. 255; *Pollards* v. *Hagan*, 3 How. 229; *Pennsylvania* v. *Wheeling Bridge*, 13 How. 585, per Mr. Justice Taney; *Genesee Chief* v. *Fitzhugh*, 12 How. 455.

The commerce which begins or ends at the United States ports located on these arms of the sea, or navigable rivers, and which is carried on between foreign nations and the several states, is wholly independent of state jurisdictional lines.

Gibbons v. *Ogden*, 9 Wheat. 194; *Passenger Cases*, per Mr. Justice Wayne, 7 How. 414; per Mr. Justice Catron, 445; per Mr. Justice Grier, 462.

IV. In view of the foregoing Congressional action, no state can interfere with the free navigation of any "navigable river," or arm of the sea, leading from the high sea to any declared port of the United States, by interfering with either of the essentials required in navigating said waters, *viz.:* the vessel, the impelling agent, the water, or the navigators.

Gibbons v. *Ogden*, 9 Wheat.; *Pennsylvania* v. *Wheeling Bridge*, 13 How. 518; *Devoe* v. *Penrose Ferry Bridge*, 3 Am. Law Reg. 80; *Passenger Cases*, per Mr. Justice Catron, 7 How. 450.

V. The citizens of the United States, and of foreign nations, having thus, under the Constitution and acts of Congress, acquired a right to navigate the River Passaic to and from the port of the town of Newark, an obstruction to such navigation, under the act of state legislature, is unconstitutional and a public nuisance that may be enjoined or abated on complaint of an injured party.

Pennsylvania v. *Wheeling Bridge Co.* 13 How.; *Devoe* v. *Penrose Ferry Co.* 3 Law Reg. 80; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *State of Maryland*, 12 Wheat. 419; *Corfield* v. *Coryell*, 4 Wash. C. C. 379.

VI. It is immaterial whether the building of a bridge across a navigable river, in pursuance of state legislation, is appropriately denominated a municipal regulation, a police regulation, or a regulation of commerce. The only question now to be discussed is, whether the bridge so built, under authority of a state legislature, would, as a matter of fact, interfere with the exercise of a *jus publicum* recognized in a citizen of the United States by Congress, or any jurisdiction that has been assumed or asserted by Congress over such a navigable river of the United States, or any regulation of commerce in reference thereto.

Gibbons v. *Ogden*, 9 Wheat. 210; *Corfield* v. *Coryell*, 4 Wash. C. C. 379; Quarantine Regulation, 1 U. S. Stat. 619.

VII. The equitable powers of the courts of the United States are adequate to grant relief, either by injunction or decree in abatement, at the suit of an injured party.

Pennsylvania v. *Wheeling Bridge Co.* 13 How. 518; *Devoe* v. *Penrose Ferry Bridge Co.* 3 Law Reg. 80.

VIII. That the courts of the United States in exercising this power, may enjoin absolutely against the erection of any bridge across "a navigable river," or decree absolute an abatement, or may grant a conditional injunction against particular form or extent of construction; that courts of the United States can take cognizance of, and determine the alleged fact and extent of nuisance, or can refer the same to a master or to a jury.

Pennsylvania v. *Wheeling Bridge Co.* 13 How. 518; *Devoe* v. *Penrose Ferry Bridge Co.* 3 Law Reg. 80.

The present case is within the principle decided in the case of *Pennsylvania* v. *Wheeling Bridge*, and unlike *The Black Bird Creek Case*.

State of Pennsylvania v. *Wheeling Bridge*, 13 How. 518; *Devoe* v. *Penrose Ferry Bridge Co.* 3 Law Reg. 80; *Wilson* v. *Black Bird Creek Marsh Co.* 2 Pet.; Angell on Tide Waters, 89; *King* v. *Montague*, 4 B. & C. 58; 10 Eng. Com. Law, 413; *Rowe* v. *Granite Bridge Co.* 21 Pick. 344.

IX. In exercising this power the court will consider the requisites of the commerce carried on upon the river; the position and size of the draws; and the facility and expense of enlarging the same.

Penna. v. *Wheeling Bridge Co.* 13 How. 518; New Jersey Laws, 1855, 374; 6 McLean, 517.

Messrs. **J. P. Bradley, A. O. Zabriskie, W. H. Seward, W. L. Dayton,** and **D. H. Hayes,** for appellees:

I. The Federal courts have no jurisdiction. The Federal government has the exclusive power to regulate commerce between the states, and as a necessary incident thereto, the vessels and vehicles which are the instruments of that commerce, and which pass from one state to or through another; but it has not the right to regulate or change the surface or physical face of the country or land within the bounds of a state over which such vessels or vehicles pass. That power is wholly in the states, who alone can construct roads, canals, docks, ferries, etc., level or tunnel mountains, erect embankments, wharves, etc.

1. This power is nowhere delegated by the Constitution.

The Federalist, No. 45, cited 11 Pet. 133, says: "The powers reserved to the several states. . . . extend to the internal order, improvement and prosperity of the states."

Roads, ferries, etc., have been repeatedly declared to be exclusively within the powers reserved to the states.

Gibbons v. *Ogden*, 9 Wheat. 403; *New York* v. *Miln*, 11 Pet. 133; *Veazie* v. *Moor*, 14 How. 574; *Withers* v. *Buckley*, 61 U. S. (20 How.) 92, §§ 93 and 94.

2. All agree that Congress cannot construct a bridge or railroad, canal or ferry, in the interior of a state, although commerce between two other states, may, nay must, be carried on over them.

The power to regulate commerce among the states clearly includes commerce not carried on by water; as by far the greatest extent of boundary lines between the old thirteen states was on land, and the first commerce among nations was by land, by caravans and camels.

9 Wheat. 196, *Gibbons* v. *Ogden; License Cases*, 5 How. 508.

The regulation of the channels of communica-

tion was not included with the reasons urged for giving the regulation of this commerce to Congress. Federalist, No. 42, 45, and 7. A direct grant of this power would not have been tolerated.

3. Bridges across streams are but a continuation of a road over water, and when wholly within a state can be erected and authorized not only by the state but by Congress.

This is conceded when the stream is not navigable.

Wilson v. *Blackbird Creek Marsh Company*, 2 Pet. 245; *People* v. *Railroad Company*, 15 Wend. 113; *U. S.* v. *Railroad Bridge Co.* 6 McLean, 52; *Commonwealth* v. *Breed*, 4 Pick. 460; *Veazie* v. *Moor*, 13 How. 547.

Wharves are erected in navigable waters at New York, Charleston, and New Orleans, without authority from the Federal Government. They interfere with navigation.

4. The jurisdiction of the states over the channels of communication across their territory is the same, whether those channels consist of water or land, are natural or artificial.

No foreign state or subject has a right to pass over these natural channels of commerce, navigable rivers, without the consent of the state within whose bounds they are.

In this respect the publicists all agree.

Grotius, lib. 2, ch. 2, §§ 12–14; Grotius, lib. 2, ch. 3, §§ 7–12; Phil. on International Law, 16, 17, ch. 5, § 155; *In re Twee Geb.* 2 Rob. Ad. 338, *Wheeling Bridge Case*, 13 How. 582, Ch. J. Taney.

5. If a state in the exercise of any power clearly reserved to it, pass laws which are not laws directly regulating commerce, but which incidentally affect it, by obstructing or promoting it, such legislation is not unconstitutional.

This is the point of the decision in the *License Cases*, 5 How. 584; *Brown* v. *Maryland*, 12 Wheat. 419; *New York* v. *Miln*, 11 Pet. 130; *Ins. Co.* v. *Curtenius*, 6 McLean, 215.

6. The right to regulate, construct, and maintain roads and bridges is in the states, as clearly as the power to protect health by health laws, to regulate the sale of liquor by license laws, or to provide for protection against paupers, and to tax goods, when imported, for support of government. And when so exercised as not to regulate the commerce or trade upon them directly by the provisions of the law, but only indirectly, as by its consequences, it is not in conflict with the Constitution.

7. The license of a vessel to trade from one port to another does not affect this power in the state. Congress may regulate and license drovers from Ohio to New York, or Yankee peddlers and their wagons from Connecticut to Georgia, and in this protect the states from incendiary documents and underground railways. Yet Pennsylvania, through which these licensed drovers and peddlers might pass, could still regulate her own roads, narrow or widen them, improve or increase their grades, intersect them by canals and railroads, even if the draw bridges on the canals and the trains on the railroads would necessarily sometimes delay a licensed drover or peddler, break a wheel, or destroy or drown a few cattle or hogs.

II. But if the Federal government has the right to control the physical condition of the territory of the states, it is an extreme power and to be exercised with great delicacy and caution. It must be a power in which the states participate, and in which their action is supreme, until interfered with by Federal legislation; and Congress has never regulated the bridging of rivers in New Jersey.

The Federal courts have no common-law jurisdiction over nuisances.

13 How. 580.

Congress could by enactment have declared such erections nuisances. Congress has not done so.

If the power thus to set aside state legislation does not exist in the Federal courts, it is so extreme a power, that many of the Federal judges have hesitated to exercise it.

Chief Justice Taney, opinion in *State of Pennsylvania* v. *Wheeling Bridge Co.* 13 How. 587.

The same hesitation existed with Justices Woodbury and Daniel; Chief Justice Marshall, in *The Blackbird Creek Case*, 2 Pet. 245. The *Chancellor* of New Jersey held like views in *Grover* v. *Alexander*, Law Reg. of April, 1855.

III. The Federal courts will never exercise the right of preventing tnose erections on the navigable rivers which the sovereignty of a state has declared requisite and proper, unless it clearly appears that the rights of the public commerce are irreconcilable with the existence of such erection.

These principles are brought out in *The Wheeling Bridge Case*, 13 How. 577; *Works* v. *Junction Railroad*, 5 McLean, 438; *Devoe* v. *Penrose Ferry Bridge Co.* Law Reg. of December, 1854, p. 83; *Columbus Ins. Co.* v. *Peoria Bridge Co.* 6 McLean, 73.

IV. If this power of reversing state legislation is to be exercised by the Federal courts, we have no apprehension from it in the present case, if it is exercised with the caution and under the restrictions indicated.

In this case the comparative unimportance of the river, and the trifling obstruction proposed, are such that no considerable injury will be done to public commerce and the Federal government is not called upon to question the judgment or to nullify the enactments of the state.

Congress has no power to enable it, in ordinary cases, to interfere with the state's right to erect a bridge over such a river as the Passaic.

It is not necessary for carrying into execution the power to regulate commerce.

There are doubtless many incidental powers which are thus necessary; for example — the power to regulate ships and vessels, and seamen —the power to regulate the system of lighthouses, beacons and buoys—the power to make public piers at the entrance of harbors; along the coast of the sea and lakes, and other works of national, and not local, importance, where a single state is not alone interested, and could not alone compass the improvement desired; the power to improve the navigation of common rivers, bounded by two or more states and not subject to the exclusive jurisdiction of either. But no such necessity exists with regard to the internal rivers of a state flowing only in and through a single state. Rivers are necessary to commerce; but not more so than roads, wharves and storehouses.

The necessities of the case are the other way. It is necessary for the preservation of the pub-

lic order that the states should have jurisdiction over their own rivers.

It cannot be denied that the general good often requires bridges to be built over navigable rivers. But Congress cannot build them. It has no power. The state alone can do it, or authorize it to be done.

Injuries to the navigation are indictable.

Wharton's Precedents of Indict. 416–418; Wharton's Am. Crim. Law, 806, 807 (3 ed.); 1 Barr. Pa. 105; *Com.* v. *Church; Caldwell's Case*—Wharf, 1 Dall. 150; *Com.* v. *Wright*, Thatcher's Cr. Cas. 211.

Has Congress the power to take from New Jersey its jurisdiction over such cases? Congress cannot punish them by indictment, any more than it can punish, by indictment, nuisances to common highways.

The state legislature alone has the true local knowledge of the wants of the state, including its rivers as well as the other portions of its territory, to legislate properly with regard to it.

These considerations disaffirm the power of Congress to assume a superintending control over state rivers, as well as a general and exhaustive control.

These considerations also show that no regulation of commerce, as such, can interfere with the power of the state to regulate and control the physical features of its lands and waters. The power to regulate commerce is a paramount power, but it is not in the nature of the power to interfere with this state power. Congressional regulations of commerce are to be made, and are necessarily to be made in reference to the existing state of things in the territorial condition of the states, their lands, waters, roads, towns, wharves, storehouses, etc., whether that state of things is the effect of natural or municipal causes.

The case of a postoffice is analogous. The state is not deprived of its power to change roads because they have been made post-roads, nor because they lead to a postoffice.

The principle involved in these views is supported by *Gibbons* v. *Ogden*, 9 Wheat. 203, Ch. J. Marshall; Passenger Case, *New York* v. *Miln*, 11 Pet. 102; *Norris* v. *Boston*, Passenger Case, 7 How. 283.

If any necessity exists that Congress should exercise jurisdiction over the surface or physical aspects of our internal rivers, such jurisdiction must be limited by the extent of the necessity. At most, it can be only a jurisdiction to preserve a right of way for commercial transportation. All other jurisdiction over the river itself must be deemed to be retained by the state. And rivers being part of the state's territory and domain, all state acts undertaken in respect of them, short of obstructing such right of way, must be deemed valid; and the necessity for such acts must be deemed settled by the legislative action of the state. If a bridge is erected by state authority, provided with a draw for the passage of vessels, the courts will deem such means of passage sufficient, unless Congress interferes to declare the contrary.

The history of the events which resulted in the formation of the Constitution does not call for such a construction of the commercial power, as would invest the Federal government with a control over the internal rivers of the state.

Marshall, Life of Washington, Vol. II., ch. 4, 2d ed. pp. 96, 98–100, 105, 109; Federalist, No. XI., by Hamilton; 1 Laws U. S. Bioren's ed. pp. 23, 28, 29, 37–54.

The decree of the court below, in each of these cases, dismissing the complainant's bill, was affirmed by a divided court.

The following is the opinion of Mr. Justice Grier, delivered in the circuit court at Trenton, September 22d, 1857, in the three above cases and in the two cases of William L. Shardlow against the same respondents.

OPINION OF GRIER, J., in CIRCUIT COURT.

The object of these five several bills is to obtain injunctions prohibiting the erection of certain bridges over the Passaic river. One of these proposed to be erected at a point called the Commercial dock, in the city of Newark, by the New Jersey Railroad & Transportation Company. The other by the Newark Plank Road Company, near the mouth of the Passaic river, and some two and a half miles below the wharves of the port of Newark. The erection of these bridges is authorized by the legislature of New Jersey. They are required to have pivot draws leaving two passages of sixty-five feet each, for the passage of vessels navigating the river or harbor. The first of these bridges is required in order to avoid the certain curves in the railroad where it passes through Newark, and to make it straight. The other to accommodate the large and increasing commerce between the cities of New York and Newark, on the plank road connecting the lower end of Newark with Jersey City.

It will not be necessary to a proper consideration of these several questions affecting the decision of these cases, to give an abstract either of the pleadings or of the testimony. Where opinions are received in evidence there can be no restraint as to quantity. Such testimony is always affected by the feelings, prejudices and interests of the witnesses, and is of course contradictory. A skipper will pronounce every bridge a nuisance, while travelers on plank or railroads will not think it proper that their persons or property should be subject to delay or risk of destruction, to avoid an inconvenience or slight impediment to sloops or schooners; owners of wharves or docks who may apprehend that their interests may be affected by a change of location of a bridge, are unanimous in their opinion that public improvement had better be arrested than that their own interests should be affected. In this conflict of testimony and discordant opinion, we shall not stop to make any invidious comparison as to the credibility of the witnesses, but assume such facts as we believe to be proven, without attempting to vindicate the propriety of our assertions.

I. The first of the three great questions so ably discussed by the learned counsel in these cases, is briefly and lucidly stated in the following propositions, which complainants have endeavored to establish:

1st. "That the Passaic river is a public highway of commerce, which, under the Constitution of the United States, has been regulated by Congress."

2d. "That the free navigation of the Passaic river as a common highway having been established by regulation of Congress, and by com-

pact between the states, it cannot lawfully be obstructed by force of any state authority or legislation."

3d. "The bridges proposed to be erected by the New Jersey Railroad Company and Plank Road Company, will be each an obstruction to the free navigation of the Passaic river and public nuisances."

"Consequently this court will enjoin their erection on complaint of any injured party."

So far as these propositions involve the facts of the case, we find them to be as follows:

The Passaic is a river having its springs and its outlet wholly within the state of New Jersey.

Though a small and narrow river, it is navigable for sloops and the smaller class of steamboats as far as the tide flows, some miles above Newark. At the upper end and above this city, there are several bridges with small draws and difficult to pass. These were all erected by authority of the state, and one of them more than fifty years ago. The city of Newark has been made a port of entry by an act of Congress, has some little foreign commerce, and some with ports of other states. Being, in fact, but a manufacturing suburb of New York, much the largest portion of its commerce is with that city, and carried on the rail and plank roads connecting them.

That the proposed bridges will, in some measure, cause an obstruction to the navigation of the river, and some inconvenience to vessels passing the draws, is certainly true. Every bridge may be said to be an obstruction on the channel of a river, but it is not necessarily a nuisance. Bridges are highways as necessary to the commerce and intercourse of the public as rivers. That which the public convenience imperatively demands, cannot be called a public nuisance because it causes some inconvenience or affects the private interests of a few individuals.

Now, if every bridge over a navigable river be not necessarily a nuisance, but may be erected for the public benefit, without being considered in law or in fact a nuisance, though certainly an inconvenience affecting the navigation of the river, the question recurs, who is to judge of this necessity? Who shall say what shall be the height of a pier, the width of a draw, and how it shall be erected, managed and controlled? Is this a matter of judicial discretion or legislative enactment? Can that be a nuisance which is authorized by law? Does a state lose the great police power of regulating its own highways and bridges over its own rivers, because the tide may flow therein, or as soon as they become a highway, to a port of entry within its own borders? In the course of seventy years' practical construction of the Constitution, no act of Congress is to be found regulating such erections, or assuming to license a bridge over such a river wholly within the jurisdiction of a state (if we except tne doubtful precedent of the Cumberland road), and during all this time states have assumed and exercised this power. If we now deny it to the states, where do we find any authority in the Constitution or acts of Congress for assuming it ourselves?

These are questions which must be resolved before this court can constitute itself "*arbiter pontium*," and assume the power of deciding where and when public necessity demands a bridge, what is a sufficient draw, or how much inconvenience to navigation will constitute a nuisance.

The complainants, in these several bills, in order to show jurisdiction in the court, have stated themselves to be citizens of the state of New York. Their right to a remedy in the courts of the United States is not asserted on account of the subject-matter of the controversy, nor do they allege any peculiar jurisdiction as given to us by any act of Congress; but rest upon their personal right as citizens of another state to sue in this tribunal. It is very apparent also that the complainants, if not introduced as mere John Does, or nominal parties (while those really contending are used as witnesses), are at least volunteers in the controversy, "*post litem motam*," who have bought the right to an expected injury for the luxury of the litigation.

Without stopping to laud this exhibition of public spirit by citizens of a neighboring state, it is plain, by their own showing, that they can demand no other remedy from this court than would be administered by the tribunals of the state of New Jersey in a suit between its own citizens. A citizen of New York who purchases wharves in Newark or owns a vessel navigating to that port, has no greater right than the citizens of New Jersey. A court of chancery in New Jersey would not interfere with the course of public improvements authorized by that state at the instance of a wharf owner on the suggestion that a change in the location of a bridge would cause a depreciation in the value of his property. This is not a result for which (if the court can give any remedy at all) it will interfere by injunction. The court has no power to arrest the course of public improvements, on account of their effects upon the value of property, appreciating it in one place and depreciating it in another. If special damage occurs to an individual, the law gives him a remedy. But he cannot recover either in a court of law or equity special damage as for a common nuisance, if the erection complained of be not a nuisance. A bridge authorized by the state of New Jersey cannot be treated as a nuisance, under the laws of New Jersey. That the police power of a state includes the regulation of highways and bridges within its boundaries, has never been questioned. If the legislature have declared that bridges erected with draws of certain dimensions will not impede the commerce of the river, as to be injurious or become a public nuisance, where can the courts of New Jersey find any authority for overruling, reversing or nullifying legislative acts on a subject-matter over which it has exclusive jurisdiction? Admitting, for the sake of argument, that Congress, in the exercise of the commercial power, may regulate the height of bridges on a public river in a state below a port of entry, or may forbid their erection altogether, they have never yet assumed the exercise of such a power, nor have they by any legislative act conferred this power on the courts. The bridges will not be nuisances by the law of New Jersey. The United States has no common law offenses, and has passed no statute declaring such an erection a nuisance. If so, a court cannot interfere.

by arbitrary decree, either to restrain the erection of a bridge or to define its form and proportions. It is plain that these are subjects of legislative, not judicial, discretion. It is a power which has always heretofore been exercised by state legislatures over rivers wholly within their jurisdiction, and where the rights of citizens of other states to navigate the river are not injured, for the sake of some special benefit to the citizens of the state exercising the power.

But it has been contended, on the authority of a *dictum* of my own, in *Devoe* v. *The Penrose Ferry Company*, "that the Supreme Court have decided in the case of *Pennsylvania* v. *Wheeling Bridge*, 13 How. 579, that, although the courts of the United States cannot punish by indictment, the erection of a nuisance on our public rivers, erected by authority of a state, yet that as courts of chancery they may interfere at the instance of an individual or corporation who are likely to suffer some special injury, and prohibit by injunction the erection of nuisances to the navigation of the great navigable rivers leading to the ports of entry within a state."

3 Am. Law Reg. p. 83.

It is true that this doctrine was enunciated as a corollary from *The Wheeling Bridge Case*, on a motion for an interlocutory injunction against a bridge over a stream wholly within the territory and jurisdiction of Pennsylvania. On such motions I have always refused to hear and definitively decide the great points of a case. If there be a prima facie or even doubtful case shown, it is the interest of both parties that the interlocutory injunction should issue, and that the defendants should not expend large sums in erections which may possibly be treated hereafter by the courts as nuisances. In the cases now before us the same course was pursued; but after the full argument of this question on final hearing, and a most careful consideration of it, I feel bound to acknowledge that the *dictum* I have just quoted from the report of the case of *The Penrose Ferry Bridge Company* is not supported by the decision of the Supreme Court in *The Wheeling Bridge Case*. It is true that such an inference might be drawn from a hasty or superficial examination of the opinion of the court as delivered in that case. But the point now to be considered, was not in that case, and could not, therefore, have been decided. No judge, in vindicating the judgment of the court, can deliver maxims of universal application, in every sentence, or oracles which may be read in two ways, one applicable to the case before him, and the other not. To sever the arguments of a judge from the facts of the case to which he refers, will often lead to very erroneous conclusions. The fact that Pittsburg has been made a port of entry may have been mentioned as an additional or cumulative reason why Virginia should not be allowed to license a nuisance on the Ohio below that city. But the question whether the power to regulate bridges over navigable rivers wholly within the bounds of a state, could be exercised by it below a port of entry, and whether the establishment of such a port, did, *ipso facto*, devest the state of such a power, was not in the case and, therefore, not decided. This assertion will be fully vindicated by a careful examination of the record in that case.

1st. It must be noted as a circumstance of that case, that although the state of Pennsylvania, in its corporate capacity, was complainant, and "*propter dignitatum*," entitled to sue in the Supreme Court of the United States; yet that when the bill was filed, the same complaint might have been sustained in the circuit court of the United States, or the bridge might have been prostrated as a nuisance by indictment in the proper state court of Virginia. The bill charged that the bridge proposed to be erected was in utter disregard of the license granted by its charter, which carefully forbids the least interference with the navigation of the Ohio. On the facts charged and proved, a court of chancery of Virginia would have been bound to enjoin the erection of so palpable a nuisance to the navigation. The case, therefore, presented every fact necessary to give the court jurisdiction—a party having a right to sue in the court—a nuisance proposed to be erected within the sanction either of Virginia or the United States, and great special damage to the plaintiff.

2d. During the pendency of this suit, the legislature of Virginia saw proper to come to the assistance of its corporation in the unequal contest, and at its suggestion enacted that the bridge proposed to be built contrary to the license granted to the corporation, was according to it, and not, therefore, to be considered as a nuisance by the laws of Virginia—notwithstanding that the bridge was without a draw and for many days in the year would wholly obstruct the passage of steamboats.

3. This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions:

Could Virginia license or authorize a nuisance on a public river, which rose in Pennsylvania and passed along the border of Virginia, and which by compact between the states was declared to be "free and common to all the citizens of the United States?" If Virginia could authorize any obstruction at all to the channel navigation, it could stop it altogether and divert the whole commerce of that great river from the state of Pennsylvania and compel it to seek its outlet by the railroads and other public improvements of Virginia. If it had the sovereign right over this boundary river claimed by it, there could be no measure to its power. It would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States, by compact made before the Constitution, were held at the mercy or caprice of every or any of the states to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defense, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the

apparent hardship of such a decree, if executed unconditionally, the court, in the exercise of a merciful discretion, granted a stay of execution, on condition that the bridge should be raised to a certain height, or have a draw put in it, which would permit boats to pass at all stages of the navigation. From this modification of the decree no inference can be drawn, that the courts of the United States claim authority to regulate bridges below the ports of entry, and treat all state legislation in such cases as unconstitutional and void.

It is abundantly evident from this statement, that the Supreme Court, in denying the right of Virginia to exercise this absolute control over the Ohio river, and in deciding that as a riparian proprietor it was not entitled, either by the compact, or by constitutional law, to obstruct the commerce of a supra-riparian state, had before them questions not involved in these cases, and which cannot affect their decision. The Passaic river, though navigable for a few miles within the state of New Jersey and, therefore, a public river, belongs wholly to that state; it is no highway to other states, no commerce passes thereon from the states below the bridges to states above. Being the property of the state, and no other state having the title to interfere with its absolute dominion, it alone can regulate the harbors, wharves, ferries, or bridges in or over it. Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a state. Canals, turnpikes, bridges, and railroads are as necessary to the commerce between and through the several states as rivers. Yet Congress has never attempted to regulate them. When a city is made a port of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each state over its own public rivers. Congress may establish postoffices and post-roads; but this does not affect or control the absolute power of the state over highways and bridges. If a state does not desire the accommodation of mails at certain places, and will not make roads and bridges, on which to transport them, Congress cannot compel it to do so, or require it to receive favors by compulsion. Constituting a town or city a port of entry, is an act of convenience and benefit, of such place; but for the sake of this benefit the Constitution does not require the state to surrender its control over the harbor, or the highways leading to it, either by land or water, provided all citizens of the United States enjoy the same privileges which are enjoyed by its own.

Whether a bridge over the Passaic will injuriously affect the harbor of Newark, is a question which the people of New Jersey can best determine, and have a right to determine for themselves. If the bridges be an inconvenience to sloops and schooners navigating their port, it is no more so to others than to them. I see no reason why the state of New Jersey, in the exercise of its absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves of Newark at the mouth of the river. It would affect the rights of no other states. It would still be a port of entry if Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A state may, in the exercise of its reserved powers, incidentally affect subjects intrusted to Congress, without any necessary collision. All railroads, canals, harbors, or bridges necessarily affect not only the commerce within a state, but between the states. Congress, by conferring the privilege of a port of entry, upon a town or city does not come in conflict with the police power of a state exercised in bridging its own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals, to land as well as water? Assuming the right (which I neither deny or affirm) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no act of Congress or rule of law which courts could apply to such a case. It is possible that courts might exercise this discretionary power as judiciously as a legislative body, yet the praise of being a "good judge" could hardly be given to one who would endeavor to "enlarge his jurisdiction," by the assumption, or rather usurpation, of such an undefined and discretionary power.

The police power to make bridges over its public rivers is as absolutely vested in a state, as the commercial power is in Congress; and no question can arise as to which is bound to give way, when exercised over the same subject-matter till a case of actual collision occurs. This is all that was decided in the case of *Wilson* v. *The Black Bird Creek, etc.*, 2 Pet. 257. That case has been the subject of much comment and some misconstruction. It was never intended as a retraction or modification of anything decided by *Gibbons* v. *Ogden*, as to the exclusive power of Congress to regulate commerce. Nor does *The Wheeling Bridge Case* at all conflict with either. The case of *Wilson* v. *The Black Bird Creek*, etc., governs this—while it has nothing in common with that of *The Wheeling Bridge*.

The view taken by the court of this point dispenses with the necessity of an expression of opinion on the questions on which so much testimony has been accumulated; what is the proper width of draws on bridges over the Passaic? How far the public necessity requires them? What is the comparative value of the commerce passing over or under them? What the amount of inconvenience such draws may be to the navigation, and whether it is for the public interest that this should be encountered rather than the great one consequent on the want of such bridges. And finally, the comparative merits of curved and straight lines in the construction of railroads. These questions have all been ruled by the legislature of New Jersey, having, as we believe, the sole jurisdiction in the matter. It has used its discretion in a matter properly submitted to it, and this court has neither the power to decide, nor the disposition to say, that it has been injudiciously exercised.

II. The second great question in this case is not affected by the conditions of the first. The court has undoubted jurisdiction to administer

the relief here sought, if the complainants have shown themselves entitled to it.

It is charged that the corporation called the "Proprietors of the bridges over the rivers Passaic and Hackensack," have a right to bridge these rivers, "exclusive of all other persons whatsoever, in such manner as that no other bridge can be erected within said limits, until the expiration of ninety-nine years from the date of said original act (1790), without the consent of said proprietors." It is contended, also that a majority of the stockholders cannot, by law, surrender or release this exclusive privilege or franchise, and that any law assuming to take away or authorizing any invasion of such franchise, impairs the obligation of the original and fundamental contract with and between the stockholders, and is, therefore, unconstitutional and void; and as a consequence, this court, having jurisdiction of the parties, is bound to protect their franchise from invasion, on the complaint of any individual stockholder.

In order to a clear understanding of this point, it will be necessary to give a brief, but nevertheless, a somewhat tedious history of the legislative and other transactions connected with it.

Previous to the year 1790, the Passaic and Hackensack rivers have been crossed by means of ferries only. In that year the legislature of New Jersey passed an act "for building bridges over the Passaic, Hackensack," etc. As this act is somewhat anomalous in its provisions and subject to misconstruction, it will be necessary to notice some of its provisions. The 1st section nominates certain commissioners, "who are authorized to put in execution the several services intended by this act." They are required to view the ground from Newark to Powle's Hook, and fix upon the most suitable and convenient site for a bridge, and are authorized to erect or cause to be erected, a bridge over each of these rivers. The bridges must each have a draw of twenty-four feet, lamps, etc. After having agreed upon the sites of the bridges, they are required to lay out the roads to them. If the bridge be fixed at the ferry, commissioners were to pay for the ferry rights; they were also authorized, at their discretion, to contract and agree with any person or persons who would undertake to build such bridges for the tolls allowed by the act; and for so many years and upon such conditions, as, in the discretion of the commissioners, should seem expedient. This agreement must be reduced to writing, signed and sealed by the parties thereto, and recorded, "and to be binding on the parties contracting, as well as the state of New Jersey, and as effectual as if the same and every part, covenant and condition thereof, had been particularly and expressly set forth and enacted in this law."

The 15th section enacts, "that it shall not be lawful for any person, whatsoever, to erect or cause to be erected, any other bridge, or bridges over or across the said river Passaic, between its mouth and second river, etc."

In February, 1793, these commissioners entered into a contract, by indenture with some thirty-seven gentlemen, reciting their powers under the above act. By this deed, they "demised, granted and to farm, let" the said bridges, to be erected, "as hereinafter declared, over said rivers, together with the tolls appertaining thereto." "To have and to hold the said bridges, with their respective tolls and profits, hereinbefore mentioned, etc.," for a term of ninety-seven years. In 1794, the stockholders in this company are constituted a body politic and corporate, by the name of the "Proprietors of the bridges over the rivers Passaic and Hackensack."

In 1832 "the act to incorporate the New Jersey Railroad Company" was passed.

As the proprietors of the bridges had claimed the sole right to build bridges over the Passaic and Hackensack on the proposed route of the railroad, the legislature, with a laudable regard for private rights, authorized the railroad company to purchase turnpike roads and bridges on the route or any or all the shares of the capital stock of such roads and bridges. The stockholders were to be paid the value of their stock, or have railroad stock to the same amount. The act did not make it compulsory on the stockholders to accept their value of their stock in money, or railroad stock, but left it to the two corporations to arrange the matter between themselves. No difficulty appears to have been apprehended, as the railroad was authorized to purchase the stock, and thereby control the other corporation. The act, while it contemplated that the railroad corporation should have the control of both the turnpikes and bridges, did not permit the smaller corporations to be absorbed or annihilated by the greater, but ordained that the roads and bridges should be preserved and governed by the provisions of their respective charters.

Accordingly, in November, 1832, the railroad corporation entered into an agreement with the "proprietors of the bridges," reciting the authority conferred on the railroad, and that the parties had agreed upon the terms of sale of the stock of the bridge company; and stipulating that the railroad company pay to the stockholders of the bridge company $150 for every share of their stock. It provided that the stockholders electing to receive payment for their stock according to this agreement, should show their assent before the 1st of January, following, and might elect to receive money or railroad stock to the same amount, reserving their "franchise privileges" as before held, and reserving also all grants or privileges theretofore made by way of commutation.

The reservations were made to meet the exigency of the proviso to the 10th section of the act of incorporation of the railroad company. "That nothing herein contained shall be so constructed as to impair any reversionary interest or vested rights which the state or any incorporated company or individual may possess in virtue of an act for building bridges, etc., passed in 1790," by way, etc.

By this agreement the railroad is permitted either to use the old bridge or erect another alongside, but so as not to obstruct, hinder or interrupt the travel over the old bridge.

In pursuance of their act of incorporation and of their agreement, the railroad bought some nine hundred and thirty of the one thousand shares into which the stock of the "proprietors of the bridges," etc., was divided, at the price of $150 for each share of $100. They erected a bridge at the end of Center street,

which has been used for upwards of twenty years. As a new bridge is now found necessary, and as the position of the old one requires sharp curves of the railroad through the streets of the city, which are not only inconvenient but dangerous, a supplement to the act incorporating the railroad was passed on the 3d April, 1855, authorizing the construction of the bridge at Commercial Dock, and the removal of the old one at Center street, and of the railroad track connected therewith. It requires the new bridge to have two draws, each at least sixty-five feet wide, on which a light must be kept at night, and a careful person to open the draws for free passage of vessels, with the same provision as to reversionary interests as is found in the 10th section of the original act. It requires also the consent of the "proprietors of the bridges, etc.," in writing under the corporate seal, and that the giving of such consent shall not, except as to the bridge so consented to, be constructed, held or deemed in any manner to strengthen or impair any rights or privileges which the said "proprietors may possess."

It is not worth while, for the purposes of this case, to inquire whether the "proprietors of the bridges," etc., can claim any franchise of greater extent than that contained and accurately defined in their written agreement with the commissioners. It clearly does not confer on them a right to build any other bridges than the two described and specified, or take tolls therefrom. They cannot be said, therefore, to have a monopoly for building of bridges within the boundaries specified in the act. The instrument called a lease of agreement defines the rights and the extent of the franchise granted to the company; and it may well be doubted whether the provisions of the 15th section, which are wholly omitted from their charter, can be invoked as any portion of their franchise. Nevertheless, as the legislature of New Jersey seems to have treated this section as in the nature of a covenant by the state not to permit other bridges to be erected which might injure the value of the franchise conferred on the "proprietors," by the commissioners without the consent of the corporation, we shall treat it as such—at best it is no more.

If the proprietors had the sole right to build bridges and take tolls, their whole franchise might have been condemned by the legislature under their right of eminent domain. A title to a franchise is of no higher quality than a title to land. Such indiscreet contracts by a legislature cannot paralyze the arm of government and stop the progress of improvement for a century. The legislature, without attempting to define its rights of compelling them to renounce them for a proper consideration, has merely suggested a very easy mode for getting over the difficulty. The railroad is authorized to purchase out the whole stock and franchise of the bridge company by paying the full value thereof. Those stockholders who did not choose to accept such terms, knew well the purpose and object of this transaction was to give to the railroad corporation the control of this claim to a monopoly, whatever might be its validity or extent without a destruction of the other corporate privileges and faculties.

An acquiescence for more than twenty years in the exercise of this right by the railroad will hardly leave room to question it now, even if a majority of the stockholders should be disposed to do so. But the parties now objecting do not seem absolutely to deny the right of the railroad company to have a bridge over the Passaic somewhere, provided it be built so as to suit the private interest of certain wharf owners. Their franchise to receive tolls and pass free on their own bridge, will not be impaired by the change. Nor is there any evidence that the value of the bridge stock will be in any manner affected thereby. When the legislature has decided that the public interests require the change of location of the track of a railroad, or a bridge connected with it, a court cannot be called upon to enjoin such a change, because it will cause a depreciation of property adjoining it, nor can members of the bridge corporation in this case call for the intervention of the court to protect them against the acts of the majority of the corporators, unless for some abuse of power to the injury of the corporate privileges or property of the minority. It is no part of the corporate franchise of the proprietors, etc., that any of its stockholders who may chance to be wharf owners, shall wield their corporate privileges to enhance the value of their wharves.

This change of the position of the railroad bridge is authorized by law. It has the consent of the "proprietors" given in the manner pointed out by the law, under the seal of the corporation. In giving this assent the corporation was acting within the scope of its powers, and in a case where the will of the majority must necessarily govern when lawfully expressed. This is not a case where a majority of the stockholders are employing the common fund for the accomplishment of a purpose not within the scope of the institution. The majority must decide what is proper compensation for any real or supposed injury to their franchise of toll, which may result from the change of position of this railroad bridge.

If it be part of their franchise to license other bridges, such a franchise can only be exercised by the corporation under their common seal, and at the will of a majority. But it is plain that another bridge erected without legislative authority might have been treated as a nuisance, for whatever may have been considered the nature of the supposed monopoly, neither the law nor their own lease, authorized them to build another bridge, or to give a valid license to others. The legislature admits that it is bound by contract not to authorize another bridge; but on the principle of "*volenti non fit injuria*," they have directed the railroad to obtain the consent of the corporation with which this contract was made; whether this covenant was made with them originally as partners or corporators, can make no difference in the case. In neither case can a single individual, by his negative vote, control the majority of the body, or compel it to give or refuse its consent, as may suit the interest of an individual or a minority.

This supposed franchise of forbidding the legislature from licensing a bridge over these rivers, seems to have been a puzzle for the learned lawyers of the state for half a century past; and as it is claimed by a large number of highly respectable, influential and wealthy men,

it has been treated with great reverence by the legislature, and the more so, as the lawyers could not agree in defining what it was. Some have fancied it an incorporeal hereditament in each stockholder, which cannot be affected by the act of another, having the quality of a polypus; and though divided into one thousand parts or pieces, each one became a unit or a distinct whole; others have treated it as a right of common, in which "*quilibet totum habet et nihil habet*," an indivisible unit of which, if the man has not the whole, has nothing—and consequently a majority cannot dispose of it. But we do not think it necessary to search the lumber garret of obsolete law, in order to give a show of profound legal learning to an absurd conclusion. The provisos in the different acts of the legislature, which have been invoked as conferring their power of obstruction on each one of a thousand partners or stockholders, make no new grant of a power or franchise, and clearly refer to other valuable privileges, without being open to such misconstruction.

Having, then, such evidence of the consent of the corporation as is required by law, we cannot say it is insufficient. The allegations in the bill, of irregularity or fraud in the election of the officers of the corporation, and obtaining the act giving such consent, even if sufficiently pleaded, have not yet been proved, and require no further notice.

I am of opinion, therefore, on this point of the case, that the complainants have shown no legal rights as stockholders of the corporation of "proprietors," etc., to interfere and overrule the act of incorporation.

Nor have they alleged or shown such an improper use of the common property of the corporation, or such deviation from its original purpose, or abuse of the trusts confided to it, as will entitle them to the interference of a court of equity.

III. The last and third question for consideration, is, whether the railroad company has, by any valid contract, covenanted or agreed with the complainants, or those under whom they claim as assignees, that the railroad bridge over the Passaic shall be forever fixed at Center street, so that the company cannot, even with the consent of the legislature, and for its own and the public benefit, change the location of the bridge, shorten their road, and avoid difficult and dangerous curves.

As we have already seen, the question of the expediency or necessity for this change of route on the road, is not submitted to the decision or discretion of the court. If the legislature has authorized it, the railroad has a right to protect, unless bound by contract to maintain its bridge where it at present stands.

The answer denies the existence of any such contract.

Assuming that a contract which is to have the effect of forever restraining the improvement of this road at this point, can be proved by parol, those who aver it must be held to clear, consistent and undoubted evidence, as to the parties, the consideration, and the precise terms of such contract. Have we such proof?

Without wishing to make any remarks which may appear offensive to any of the highly respectable witnesses who have given such contradictory accounts of the transaction, it is too plain to be overlooked, that much of this conflict arises from the examination of persons as witnesses who are the real parties in interest.

The transfer made *post litem motam* in order to constitute the complainant a party to the suit, is a veil too transparent to conceal the real parties to the litigation.

But waiving this objection to the testimony of certain witnesses, as also any invidious comparison of the credibility of very respectable men, I must say that there is not such clear evidence of a contract, its consideration, its parties, or its terms, as would justify a court in decreeing its specific execution.

It appears that originally the railroad company had purchased the commercial dock property, with the view of erecting its bridge there. As the town of Newark was then built, the railroad would pass along its lower boundary. At this time railroads were an untried experiment. It was a popular notion that it would be of great advantage to a town or city to have a railroad pass through its most frequented streets—that it would advance the value of property on the streets through which it passed, and increase their commerce; and that curves in a railroad were preferable to straight lines, being much more graceful and no less useful.

From the prevalence of these notions, the popular feeling became much excited; and the more so, that certain individuals of wealth and influence, who owned wharves on the river, had shrewdly discovered that it would add considerably to the value of their property if the railroad, instead of crossing below it, could be bent round behind it, and crossing above, create an obstruction to the navigation of the river above their wharves. Public meetings were held, exhorting, entreating, and advising the railroad directors. Suits were brought by lot owners in the name of the Attorney General, threatening them with injunctions. Some wanted one thing, some another, and the result is, perhaps, best described in the graphic language of one of the witnesses:

"I can only say, that according to my recollection now, there was much confusion and conflict of wishes among all the parties, and I don't know how many parties I could count up. I know there were sharp speeches and feelings exhibited, as much so as upon anything I ever saw in this town, and to my view at the present moment, they were like two dogs that had been quarreling, until they had got tired and left off, and there was a sort of common consent to abandon the conflict, and not to keep the progress of the work from going on, by a general assent of making the bridge where it is now. The location of the bridge was the result, but that there was any contract or agreement that was to be final and conclusive and not to be revoked, I know no such arrangement as that. There was a cessation of the conflict, and the work went on."

The directors, desirous of conciliating the people of Newark, and expediting the completion of their road, yielded to the pressure, and passed the following resolution, which had the effect of allaying the excitement. It is dated on the 24th of September, 1834, and is as follows:

"Whereas, considerable diversity of opinion has prevailed among the citizens of Newark